

**SUMMIT TO
SUCCESS**

2022

PBSA ANNUAL CONFERENCE



In-Person
Gaylord Rockies Resort
Denver, CO
September 11-13



Virtual
September 13-15

#PBSA22

FCRA Compliance Audits

JOSEPH S. MESSER

MESSER STRICKLER BURNETTE, LTD.

September 13, 2022

No audio recording, video recording or photography is allowed without the express written permission of the speaker and PBSA.





OPEN SESSION

This session is open to photos; however, no audio recording or video recording is permitted.

The information and opinions expressed are for educational purposes only and are based on current practice, industry related knowledge and business expertise. The information provided shall not be construed as legal advice, express or implied. The practices may not have been independently vetted and are neither approved nor endorsed by PBSA.



Legal Disclaimer

This information is for the use of attendees only. Any distribution, reproduction, copying or sale of this material or the contents hereof without consent is expressly prohibited.

This information is not to be construed as legal advice. Legal advice must be tailored to the specific circumstances of each case. This information is not intended to be a full and exhaustive explanation of the law in any area. This information is not intended as legal advice and may not be used as legal advice. It should not be used to replace the advice of your own legal counsel.

The opinions expressed are the views of the author alone and should not be attributed to any other individual or entity.

- Internal Fair Credit Reporting Act Compliance Audits can be an effective way for background screeners to identify areas of legal non-compliance which could result in FCRA liability.
- Properly conducted Audits can expose legal compliance deficiencies so you can address them before liability arises.

- However, an improperly conducted FCRA Compliance Audit can worsen the situation by exposing your company to additional liability if litigation occurs.
- I will explain how to conduct a successful FCRA Compliance Audit and how to keep it from backfiring.



Topics Covered

- Areas background screeners can audit to identify and address potential legal compliance problems.
- How to get employees to meaningfully participate in the audit.
- How to protect negative information from the Audit from disclosure if litigation arises.
- This is an interactive presentation so ask questions as we go.



What Should You Audit For?

It's up to you. Where do you think you may have FCRA compliance problems?

A good place to start is by reviewing past FCRA lawsuits against your company.

Review consumer disputes. Have you had to correct reports? Are the same patterns repeating themselves?



Audits Don't Need to be Comprehensive

You can focus on problem areas based on particular compliance concerns.

Deconstruct resolved FCRA lawsuits and consumer disputes to address compliance problems so they won't repeat themselves.

Consider these to be mini FCRA Compliance Audits.



Audit for Permissible Purposes

Your clients must have permissible purpose for the reports they order (e.g., employment or rental decisions).

How are they conveying their permissible purpose to you?

In paperwork each time they request a report? If electronic, by clicking a box when they order a report?



Audit for Permissible Purposes

Conduct an “audit trial” of the forms through which your clients provide permissible purpose.

Match them to the reports you generate. Do you have permissible purpose for each report?

Are there any gaps?



Audit for Accuracy of Information

You must have “reasonable procedures to assure the maximum possible accuracy” of information in your reports.

Pull multiple reports prepared by multiple researchers and double check them for accuracy.

Reports prepared by new researchers can be “peer reviewed” for accuracy by more experienced researchers.



Audit for Accuracy of Information

Limit communications between reviewer and reviewees when conducting peer reviews.

Have a series of “seed reports” prepared from scratch on consumers whose reports contained errors previously corrected in response to consumer disputes.

- Are the same errors occurring? If so, why?

Make sure “seed reports” are not issued to end users.



Audit for Stale Adverse Information

The FCRA prohibits the inclusion of stale adverse information in reports:

- Bankruptcies that predate the report by 10 years or more from the date of entry of the order for relief or date of adjudication.
- Civil suits, civil judgements, and records of arrest that predate the report by more than 7 years, or until the governing statute of limitations has expired, whichever is longer.
- Accounts placed for collection and/or "Charged Off" Accounts which predated the report by more than 7 years.
- Any other adverse information other than records of convictions of crimes which predate the issuance of the report by more than 7 years.



Audit for Stale Adverse Information

Does your software automatically remove stale adverse information?

- Prepare several test reports on consumers with stale records to confirm the software weeds them out.

Do you rely on researchers to exclude stale adverse information?

- Test researchers the same way to confirm they are excluding stale information.



Audit for “Mixed Files”

FCRA liability can occur when records belonging to another person are included in a consumer’s report. “Mixed files” can be avoided if care is taken when preparing reports. Audit by testing to determine:

- The types of personal identifiers used in verifying a consumer’s identity.
- The minimum number of personal identifiers that are acceptable to confirm an identity match, especially for common names.
- The degree of deviation that is acceptable before a criminal record is included in a report.
- The quality and quantity of personal identifying information obtained on consumers by your client.



Audit for “Mixed Files”

Interview researchers to determine how they use personal identifiers to avoid mixed files.

Test researchers by having them prepare reports on consumers with common names to determine if they result in mixed files.

Determine if particular researchers are prone to producing mixed files by reviewing consumer disputes.



Audit for “Mixed Files”

Review application materials received from clients to determine if they are failing to provide sufficient personal identifiers.

Ask researchers what they do when clients fail to provide sufficient personal identifiers.

Pull sample reports on consumers with common names to double check for accuracy.



Audit for Accuracy in Describing Criminal Records in Reports

The level of offense when a consumer is initially charged with an offense often differs from the ultimate outcome.

Offenses are frequently reduced due to plea agreements.

Charged offenses are often dismissed.

Researchers occasionally use the wrong terminology to describe an offense.



Audit for Accuracy in Describing Court Records in Reports

Review files containing criminal records which were corrected as a result of consumer disputes.

What mistakes were corrected?

Do they show patterns of repeated mistakes?

Do they show that certain researchers regularly make mistakes?



Audit for Proper Consumer Disclosures

Consumer “files” and “reports” are separate things.

A “file” on a consumer contains all of the information the CRA has in its database regarding that consumer.

A “report” on a consumer is the report the CRA issued to its client on the consumer.

Employees who field requests must know the difference between files and reports to properly respond to consumer requests.



Audit for Proper Consumer File Documentation

The FCRA gives consumers the right to request that the CRA send them everything in their “file”.

When the CRA receives a request from a consumer for their file the CRA must send the consumer “all of the information on that consumer recorded and retained by [the CRA] regardless of how the information is stored.”*



Audit for Proper Consumer Disclosures

Interview employees who field consumer calls to determine if they understand the difference between files and reports.

Review call recordings; what did consumers request and what was sent?

If no call recordings, review call notes in system.



Audit for Proper Consumer File Documentation

Review several files on consumers to confirm they contain the required documentation.

- Are there missing documents?
- Are documents located elsewhere?

Review several file requests.

- What was sent to the consumers?



Audit for Proper Responses to Consumer Disputes

The FCRA gives consumers the right to dispute the completeness or accuracy of any item of information contained in their report.

Generally CRAs are required to conduct a reinvestigation within 30 days of receiving the dispute and to notify the consumer of the result of the reinvestigation within 5 business days after completing the reinvestigation.*



Audit for Proper Responses to Consumer Disputes

The notice must include:

- A statement that the reinvestigation is complete;
- A copy of a revised consumer report based upon the result of the reinvestigation;
- A notice that, if requested by the consumer the CRA will send the consumer a description of the procedure used to determine the accuracy and completeness of the information disputed by the consumer in their file including the business name and address of any furnisher of information contacted in connection with such information and the telephone number of such furnisher, if reasonably available;
- A notice that the consumer has the right to add a statement to his/her file disputing the accuracy or completeness of the information; and
- A notice that the consumer has the right to request that a revised report be sent to those that received a report in the last two years for employment purpose or in the last six months for any other purpose.



Audit for Proper Responses to Consumer Disputes

Review the records from several consumer disputes to determine if reinvestigations were conducted timely and that the proper notices were issued to the consumers.

Review recordings of consumer dispute calls.

- Did the employee fielding the dispute understand the dispute and properly respond?

Was the reinvestigation conducted properly (i.e., were mistakes caught and corrected or ruled out)?

Were proper notices sent to the consumer?



FCRA Compliance Manuals & Examinations

Prepare & Implement an FCRA Compliance Manual

Have employees whose work responsibilities involve areas governed by the FCRA review the Manual, then take and pass a FCRA Compliance Examination tailored to their work responsibilities.

Examination should confirm employee know how to follow procedures contained in the Manual.

Employees should take and pass FCRA Compliance Examinations on an annual basis.



Obtaining Meaningful Employee Participation

To get employees to meaningfully participate in the audit they need to know it is not a gauge of their performance but an audit of the organization in general.

You may want to inform them that results won't be maintained in their employment files and won't be used in making decisions about their advancement (or lack thereof) in your organization.

OR you may want to consider using this as an opportunity for employees to advance within the organization by helping to improve organizational legal compliance.



Importance of Keeping Audit Results Confidential

The disclosure of negative audit results in litigation could be very harmful.

Negative information could be used by a plaintiff to demonstrate a “willful” noncompliance with the FCRA.

This could result in punitive damages and/or class action liability.



Methods of Keeping Audit Results Confidential

Self-Critical Analysis – Not always available.

Attorney-Client Privilege – The strongest protection.

Work Product Privilege – Available only in connection with litigation and not ironclad.



Self-Critical Analysis

Where recognized, the self-critical analysis privilege is a qualified privilege to protect self-critical, evaluative analyses from discovery.

The privilege seeks to protect the opinions and recommendations of corporate employees engaged in the process of critical self-evaluation of the company's policies.

Jurisdictions that recognize the privilege do so because it encourages thorough and candid self-evaluation and compliance with the law.

Self-Critical Analysis

Generally a 4 part test:

- (1) the information must be the result of self-critical analysis undertaken by the party seeking protection;
- (2) the public must have a strong interest in preserving the free flow of the type of information sought;
- (3) the information must be of the type whose flow would be curtailed if discovery were allowed; and
- (4) the document sought to be protected must have been prepared with the expectation that it would be kept confidential, and it must have remained so.



Self-Critical Analysis

Self-critical analysis privilege is not absolute and can be waived or overcome through a showing of exceptional need by the party seeking discovery.

Courts apply a balance test and consider: (1) the extent to which the information may be available from other sources; (2) the degree of harm that the litigant will suffer from its unavailability; and (3) the possible prejudice to the party's investigation.



Self-Critical Analysis

In 1979 TRW (now Experian) was unsuccessful in invoking the privilege in withholding documents subpoenaed by the Federal Trade Commission as part of an investigation to determine whether TRW's practices violated the FCRA. *FTC v. TRW*, 479 F. Supp. 160, 162 (D.D.C. 1979).

Court found the privilege to be not generally recognized and inapplicable when a law enforcement agency was seeking documents pursuant to its statutory subpoena power.



Self-Critical Analysis

A federal court in Georgia allowed the privilege in the context of an employment discrimination case. *Banks v. Lockheed-Georgia* 53 F.R.D. 283 (N.D. Ga. 1971).

Court held plaintiffs were not entitled to a report prepared by team appointed to study the employer's equal employment opportunity practices – because the report included a candid self-analysis and evaluations of the employer's actions. It would be contrary to public policy to discourage frank self-criticism and evaluation in the development of affirmative action programs.



Attorney-Client Privilege

Best way to protect audit results from disclosure.

If legal counsel conducts or directs the compliance audit the results may be protected by the attorney-client privilege under the US Supreme Court case *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

To be privileged, the audit must be carried out for the purpose of obtaining and providing legal advice.



Attorney-Client Privilege

The privilege will not protect the audit from discovery if no legal advice is sought or provided, or if the attorney is consulted merely for business advice.

The privilege can be lost if the confidential nature of the audit is not conveyed to participants; if the attorney is merely kept informed of the audit rather than tasked with directing it or to provide legal advice as part of the audit.



Attorney-Client Privilege

The predominant purpose of the audit must be to obtain legal advice. Otherwise, the privilege is waived.

Overly broad disclosure within the company can trigger a waiver if the individual to whom disclosure was made did not have a “need to know” the contents of otherwise privileged information



Work Product Privilege

Available only if the audit was carried out in anticipation of litigation.

To be protected, the audit should be conducted at the direction of counsel to assist counsel to plan or strategize for litigation, such as possible legal defenses or affirmative claims.

Work product privilege has limits. Even if documents are prepared in anticipation of litigation, the adverse party may obtain them by showing “substantial need” for disclosure and an inability to obtain their equivalent by other means.



Speaker Information



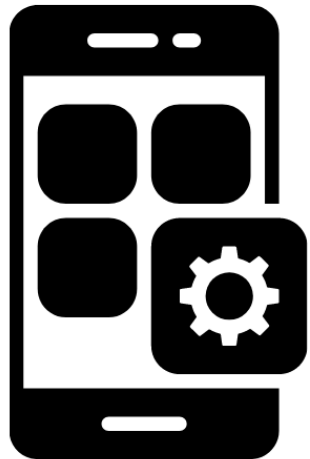
Mr. Messer provides comprehensive legal representation to CRAs and related companies throughout the nation in litigation, compliance and transactional matters. A former Illinois Special Assistant Attorney General, Mr. Messer has extensive trial and appellate experience and is admitted to practice before many federal district courts. He has earned a national reputation for defending lawsuits brought under the FCRA and other consumer protection laws. He has conducted many trials and has substantial class action experience. Mr. Messer is a nationally recognized author and speaker and an active member of the Professional Background Screening Association.

JOSEPH S. MESSER

MESSER STRICKLER BURNETTE, LTD.

JMESSER@MESSERSTRICKLER.COM

We value your feedback!



Please complete the session
survey in the PBSA Mobile
App.