

February/March 2008

Federal

Congressional Priorities & Actions—Banking & Financial Services Committees

Senator Chris Dodd (D-Connecticut) and Representative Barney Frank (D-Massachusetts), the Chairmen, respectively, of the Banking, Housing and Urban Affairs Committee and of the Financial Services Committee, have identified legislative priorities for 2008.

The residential housing market, specifically the subprime foreclosure crisis, are at the top of each of their lists. Senator Dodd, returning full-time to his Senate post from over a year of campaigning for his party's 2008 presidential nomination, in a January 23rd statement, and in a January 22nd letter to Senate Majority Leader Harry Reid (D-Nevada) presented a number of proposals aimed at mitigating the current crisis and also at making structural reforms to help prevent future crises. These include creation of a new entity—the *Federal Homeownership Preservation Corporation* (analogous to the Resolution Trust Corporation formed back in the 1990s during the Savings and Loan crisis) that would purchase outstanding mortgages at a deep discount, “assuring that lenders and investors...are not bailed out” and resell these deeply discounted loans back to the homeowners in the form of lower-interest, lower balance mortgages guaranteed by the FHA or held by one of the federal housing GSEs (Fannie Mae, Freddie Mac, et al.). Other Dodd ideas include block grants to local governments to purchase and refurbish or demolish distressed properties, and raising the conforming loan limits of the federal housing GSEs.

Meanwhile in the House, Chairman Frank outlined his priorities in a January 24th press conference. He acknowledged that he, too, was looking at a temporary increase in the conforming loan level for the GSEs and also at a new federal entity to purchase either the foreclosed mortgage or the property itself, offering homeowners a new mortgage at lowered rates. The House Financial Services Committee recently raised the FHA and GSE's conforming loan limit to \$730K from the current \$417K—a reflection of the influence of various powerful lobbying groups.

However, all of the housing-crisis proposals are taking a back seat at present to the more pressing question of the overall economic stimulus package available to most citizens. On February 7th, the Senate Democrats agreed to strip out their proposed increases in unemployment benefits, heating oil subsidies and business tax rebates, leaving only their increased benefits for seniors and disabled veterans. That compromise was quickly approved by the full Senate and was returned to the House, which passed the Senate's amendments on February 8, sending the measure to the President, who signed it on February 13th.

Consumer credit issues are not far behind among the priorities of either Chairman Dodd or Frank. On February 4, Chairman Frank gave a clear boost to Financial Institutions and Consumer Credit Subcommittee Chair Carolyn Maloney's bill restricting certain credit card billing practices by issuing a joint “Dear Colleague” letter, urging support for the “Maloney-Frank Credit Cardholders Bill of Rights”. The bill's provisions include: 1) restrictions on universal default by prohibiting rate increases on existing balances due to other delinquencies; 2) a requirement that cardholders faced with a rate

increase be allowed to pay off the current balance at the old rate; 3) ending double-cycle billing by banning collection of interest on amounts already paid; and 4) a requirement that payments received prior to 5:00pm on the due date be posted on that date. The bill, HR 5244, entitled "The Credit Cardholders Bill of Rights Act of 2008" was introduced on February 7, with 44 co-sponsors.

In the Senate, Chairman Dodd in his January 23rd statement only noted that credit card marketing and billing practices remained a concern and that "examining this market will continue to be a high priority." Thus, he appears to have opened the door for one or more hearings in 2008, other priorities permitting.

If the Banking Committee does hold hearings, it may serve to re-claim this issue from the Senate's Homeland Security and Government Affairs Subcommittee on Permanent Investigations. Subcommittee Chairman Carl Levin (D-Michigan), following months of staff work and information-gathering (including discussions with TransUnion and several major credit card issuers) held a hearing on December 4th, focusing on credit card billing practices, and in particular on the use of credit scores to evaluate creditworthiness and manage credit risk. Universal default was a major issue.

In that hearing, Chairman Levin made clear his belief that, once an account was opened, subsequent credit scores should have no bearing on either the interest rate charged on the account or on any other risk-mitigation actions the lender might take if the account was current. Chairman Levin also noted that "the credit scoring process is, at times, akin to a black box" and that a consumer should: (i) be informed of the variables used to calculate a credit score; (ii) understand the impact specific behaviors may have on a credit score; and (iii) receive specific information regarding the factors affecting the consumer's credit score (e.g., not just that there are issues involving credit utilization, but specifically what about the credit utilization is affecting the consumer's score). Chairman Levin relied on testimony from several consumers who shared their experiences, which portrayed that individuals in general do not understand the credit scoring process or what causes a credit score to decline.

Chairman Levin's critique of the use of credit scores for risk management and risk-based pricing did prompt Senators Norm Coleman (R-Minnesota) and Tom Carper (D-Delaware) to defend the practice of continually monitoring accounts based on creditworthiness and repricing as necessary. Senator Coleman presented the issue in such a manner that even the consumer witnesses testifying agreed that repricing a credit card account is fair so long as the consumer receives a clear and easily understandable notice, and has the opportunity to close the account and repay any outstanding balance under the existing terms of the account.

Thus it seems clear that if legislation imposing restrictions on credit card billing practices moves it is likely to include some provisions affecting universal default rules. The Levin hearing in particular made the argument for more transparency around the use of credit scores and more actionable score disclosures to individuals. Although Senator Levin's Subcommittee cannot initiate legislation on this issue, his hearing clearly set the table for possible action in Senator Dodd's Banking Committee, or even an amendment to other legislation being considered on the Senate floor.

Congress Makes Opt-Out on Do-Not-Call List Permanent, Removes Sunset Provision for FTC Fee Collection

On February 6, the Senate and House approved each other's complimentary bills, sending both to the President's desk. The House passed the Senate's bill (S 781) which "extends the FTC's authority to collect funds to maintain the Do-Not-Call registry while providing financial certainty to entities that utilize the registry by standardizing yearly fee increases for use of the registry's list." The Senate passed the House bill (HR 3541) which removes the need for consumers currently on the list to re-register, in effect making registration permanent. President Bush signed both bills on February 15th.

FTC Studies File Freeze Issue

On January 10th, the Federal Trade Commission (FTC) published, on its website, a request for comments on file freezing, in preparing to write a report on the subject—a task they took on themselves in the 2007 Report by the President's Identity Theft Task Force, which FTC Chairman Deborah Platt Majoras co-chaired with then-Attorney General Alberto Gonzales. TransUnion is working with our trade association, the CDIA, in preparing a response. As reported in the December 2007 Legislative Update, we have also received inquiries on file freezing from Senator Charles Schumer (D-New York) and Representative Carolyn Maloney (D-New York). Mark Marinko, the TransUnion's President, Consumer Services responded to each, and offered to meet to discuss to file freezing functionality while continuing to keep it secure.

Federal Rulemaking and other FACT Act Activity

Accuracy & Integrity Guidelines, Direct Dispute Rule

On December 13, 2007, the Office of the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the FTC (the Agencies) published a Notice of Proposed Rulemaking on two important data furnisher issues—guidelines for accuracy and integrity of the information provided to consumer reporting agencies and the conditions under which furnishers must act on disputes received directly from their account holders. Congress required this rulemaking under Section 312 of the FACT Act. The comment period closed on February 11, and thus a Final Rule can reasonably be expected in the second quarter of 2008, and a compliance date some months later.

In a June 19, 2007 hearing of the House Financial Services Committee, the Agencies had been severely criticized by Members on both sides of the aisle for the time this rulemaking had taken. (The FACT Act was signed on December 4, 2003.) Chairman Barney Frank threatened legislation which would confer the rulemaking authority on the FTC, reducing the banking agencies to an advisory capacity. A flurry of behind-the-scenes activity ensued, resulting in the December 13th joint publication.

The question of *balance* is key to this rulemaking. Recognizing that the entire credit reporting system is voluntary, any rulemaking aimed at data furnishers should provide helpful guidelines without creating onerous requirements that may discourage "full file reporting". TransUnion consulted closely with our major trade association, the Consumer Data Industry Association and with the Coalition to Implement the FACT Act (the "Coalition"), of which we are also a member. Both of these organizations are filing comments, which will note the importance of balance, and the voluntary nature of the credit reporting system.

Affiliate Sharing Survey

Section 214(e) of the FACT Act requires the Agencies to jointly submit to Congress a series of reports on the information sharing practices of financial institutions, and other users of consumer reports, with their affiliates. On December 10, the Agencies published in *the Federal Register* their second request for comment on their plans for conducting surveys to gather the information needed to write these reports. (The first notice had been published on August 31, 2006.)

The Coalition filed comment letters in response to each of these requests. The response to the current request was filed on January 9, 2008. The burden of both letters was concern over the methods to be used in collecting, compiling, and analyzing the information, and whether, because of these uncertainties, any practical utility could be drawn from the resulting reports. The Coalition also expressed concern in the January 9th letter with the adversarial stance apparently being adopted by the Agencies, as illustrated by the lack of clarity over confidentiality of responses and the FTC's threat to compel responses by private sector entities under its jurisdiction.

States

With a deeply troubled real estate market, the sub-prime lending crisis, record foreclosures, declining tax revenues, and both the Congress and state lawmakers debating what to do about the 47 million Americans with no health insurance and the millions more with too little, it would appear that little room would remain to focus on privacy and credit reporting legislation. However since Congress has proved unable or unwilling to pass national data security, security freeze, or Social Security number legislation, state legislatures across the country continue to be eager to move on these issues in 2008. The issues affecting TransUnion in large part bring Democrats and Republicans together. Privacy bills are often positioned by many legislators and consumer advocates as helping consumers without unduly harming businesses. The reality is that if the bulk of these bills passed they would impose new liability on businesses that hold personal data, change the way identifying information is stored and Social Security numbers are used, and stop consumer reporting agencies from charging reasonable fees for services.

Security Freezing

Security freeze bills are under consideration during the 2008 legislative sessions in most of the 11 states that do not already have such a law on the books, and bills have been introduced in at least three states that already have freeze laws, seeking to amend existing statutes. TransUnion continues to lobby for uniform standards throughout the states, including; reasonable fees for placing, lifting, and removing a freeze, no artificial timelines, exemptions for a variety of business relationships, and only administrative penalties.

In **South Carolina** (SB 453) and **Georgia** (HB 130), states currently without freeze laws and usually not known for passing pro-consumer measures, we are facing showdowns over fees. In Georgia, where we have been working over the past year with Senators to pass a bill that is blessed by all of industry and had reached consensus, a bill passed out of the House that caps freeze fees across the board at \$3. And in South Carolina Representative Kris Crawford, a freshman, has all but hijacked the industry consensus omnibus identity theft bill, forcing the removal of all security freeze fees and increasing penalties for non-compliance. It is receiving favorable reception because in this election year there are many legislators that prefer not to advocate for any perceived increase in fees to consumers, regardless if it is a costly service to operate.

In **Idaho**, another state without a freeze law where we were able to defeat a pretty bad bill in 2007, we worked in the off season with industry and legislators to craft a balanced security freeze bill. On February 7, the industry bill, SB 1380, was introduced. The bill was put in by Sen. Bart David (R), the majority leader, but is officially a Commerce Committee bill. We are expecting a hearing not later than the week of Feb. 18. While it is largely friendly, we did have to compromise on a \$6 fee for placing, lifting, and removing a freeze.

Alaska, Michigan, and Ohio, all without freeze laws, also are considering credit freeze bills carried over to the second year of their biennial legislative sessions. In Alaska we have been successful in negotiating \$10 for placement of a freeze however there is increasing pressure to restrict the fees we may recoup for lifting a freeze. Alaska HB 65 would grant two free lifts to consumers per year, but allow us to charge no more than \$2 for subsequent lifts during a calendar year. Given that we have been successful in defeating freeze bills in Alaska for the past four years, it is unlikely we will be able to kill the idea this year. In both Michigan and Ohio, we are on track for favorable legislation; however it is too early in the legislative session this year to determine an outcome.

While TransUnion has opened security freezing to all consumers in the country, currently **Kansas, Mississippi, and South Dakota** are the only three states out of the 39 with freeze laws that restrict coverage to identity theft victims. A bill introduced in South Dakota (S.B. 81) would extend the freeze

law's scope to allow all state residents rather than just identity theft victims to place a freeze on their credit reports.

In **Tennessee**, a bill (S.B. 3269) was introduced that would allow residents that have received a security breach notice letter to receive free freezes; however we do not expect this to get favorable attention. Rather, we do expect SB 2852, which makes technical changes to the existing freeze law, to pass this year.

A bill introduced in **Nebraska** (L.B. 831) this year would amend the current freeze law so that a security freeze would stay in place until the consumer notified the credit reporting firm to permanently lift the freeze, removing the current requirement that a security freeze remain in place for seven years. But more troublesome because of a lack of fees for lifting a freeze allowed under current law, is a proposed reduction in fees for placing a freeze; from \$15 to \$5.

In **New York**, SB 5543, which carried over from 2007 and is expected to be enacted this year, would add a requirement that victims of domestic violence receive free freezes. However, the abusers would have to reimburse Consumer Reporting Agencies for the costs associated with the freeze.

In **California**, the home of the file freeze concept, AB 372, which would modify credit freeze provisions, passed the Assembly in January and is now in the Senate. When introduced it attempted to strip all away all fees that we could charge for freezing. In a compromise worked out with the author of the bill, we only have to reduce our fees in half to \$5 to place, lift and remove a freeze for consumers 65 years and older.

Data Security and Security Breaches

On the heels of the TJX Companies announcement last year of a breach of 46 million (and growing) payment cards and subsequent class action lawsuits against the company to replace the cards, in 2007, Minnesota was the only state that enacted a law providing that merchants that retain certain credit or debit card data beyond specified time limits can be sued by banks if the data is breached. Banks can sue to recover "the cost of reasonable actions undertaken" to respond to the breach.

The **California** Legislature passed a bill that was similar but not identical to the Minnesota measure. Gov. Arnold Schwarzenegger (R) vetoed it in October 2007. Similar retailer liability bills did not make it out of legislatures last year in Connecticut, Illinois, Massachusetts, New Jersey, and Texas. Unlike security freeze bills, for example, where we take the lead, TransUnion is part of a large coalition of businesses opposing these bills.

However, in 2008 bills introduced in **Michigan and Washington** would hold retailers responsible for reimbursing costs incurred by financial institutions in the wake of a breach of financial and personal data held by a retailer, such as providing notification to affected individuals and replacing compromised credit and debit cards, and require businesses to encrypt personal data they retain.

The **Michigan** bill (SB 1022) would require all companies doing business in the state – not just retailers – to encrypt the personal data they retain in databases. Under the Michigan measure, retained data must be encrypted "in conformity with current industry-standard encryption methods and capabilities." A person who "knowingly or intentionally" fails to encrypt retained personal data would be subject under the proposed law to imprisonment for up to 30 days and a fine of up to \$1,000, or both. The bill would also allow financial institutions to recover costs they incurred as the result of a breach of data retained by a merchant. Under the bill, "If a person maintains a computerized database that includes personal identifying information about a depository institution's customers, and a security breach of the computerized database occurs, the depository institution may bring a civil action against that person for any actual damages to the depository institution." SB 1022 has been referred to the Senate Committee on Banking and Financial Institutions where it is expected to be heavily debated.

The **Washington** bill (HB 2574) would require any person doing business in Washington to “use encryption to secure personal information and would also require such businesses to comply with the Payment Card Industry Data Security Standard, which includes mandatory safeguards for restricting access to data, encrypting sensitive data transmitted over public networks, the use of firewalls, current virus software, and other data security measures. The business community is largely aligned against the bill but Washington has a history of enacting anti-business legislation. In addition to establishing retailer liability for data breaches, Washington companion bills (HB 2838/SB 6425), which were introduced January 16 respectively by bipartisan groups of six representatives and four senators, would require businesses that electronically collect payment card data to expeditiously dispose of authorization information once a transaction is complete.

California SB 364 passed the Senate in January and is now in the Assembly. The bill was amended to remove the requirement that notice of security breaches be posted on a website maintained by the Office of Information Security and Privacy Protection. The amendments also delete the office’s obligation to provide a report to the legislature on the submitted notices. These amendments address our concerns with the bill but we will continue to monitor its movement.

Three of the few states without breach notice laws on the books but are considering them this year include **Missouri** (HB 1635), **Virginia** (HB 385 et al.) and **West Virginia** (HB 2175). They all are considering require businesses to notify individuals if their personal data is involved in a data breach incident. In addition, Alaska carried over to 2008 a data security bill (HB 65) that contains breach notice requirements.

Social Security Numbers

Measures to restrict the use of Social Security numbers have been introduced nearly in all of the state legislatures in session during 2008.

The vast majority of such measures are aimed at protecting SSNs from public disclosure and from exploitation by identity thieves. Many of the bills would, for example, ban the use of SSNs on state employee identification badges and gift cards, and information posted on government Web sites. Three bills introduced for consideration by state legislatures in 2008, would go further, and seek a more comprehensive approach to limiting the use of SSNs.

A **Maryland** bill (HB 259) introduced January 22 would provide that a person "may not require an individual to disclose the individual's Social Security number unless required by State or federal law." AB 9712, introduced January 22 in **New York**, would make it a crime to sell a person's Social Security number. Also, a SSN use limitation bill in Virginia (H.B. 633), which was introduced Jan. 9, would prohibit "the dissemination of another person's social security number, regardless of whether such number is obtained from a public or private record."

In **Minnesota** we continue to work to amend a bill that will restrict the sale of SSNs and that will go into effect in July 2008. We have been working closely with Minnesota businesses and legislators to reach compromise language that would continue to allow the sale of SSNs as permitted or authorized under the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act, but would restrict bad actors from selling SSNs outside of already strong federal laws. The outcome of this may not be known until mid-May, when the legislature is scheduled to adjourn.

Insurance Scoring

In 2003 the National Conference of Insurance Legislators (NCOIL) recommended its Model Act on Insurance Scoring and since then we have seen virtually every state enact or regulate some sort of restriction on insurer’s use of credit. Legislators and regulators continue to feel pressure from consumer advocates to ban insurance scoring, despite all of the national and state research which

supports the use of credit as a show a strong correlation between credit history and insurance risk and thus a predictive and useful underwriting and rating too, but also estimate that as many as 60-70 percent of consumers are paying less for their home or auto insurance because of insurers' use of credit scores in setting rates.

Despite having the lowest rates in the country, **Wisconsin** as it has done each year since 2002, continues to explore how to restrict further or ban insurance scoring altogether. In January SB 259, a ban bill was rushed through committee and passed the Wisconsin Senate despite furious industry opposition. It now resides in the Republican-controlled Assembly, which is not expected to consider the bill. This dynamic may change next year due to the moving electoral tides; many expect a significant challenge for the Republicans to keep their control of the Assembly.

In **Washington**, HB 2802, a bill prohibiting the use of personal credit histories and credit scores in insurance decisions, was laid to rest by the Washington state Legislature. The House Committee on Insurance, Financial Services & Consumer Protection put a hold on the bill on January 30. Insurance Commissioner Mike Kreidler has been a vocal opponent of insurance scoring for many years, and like Wisconsin, with different legislative chambers under different party control, these bills have not seen much traction, but this could change depending on the outcome of the 2008 elections.

The **Colorado** House of Representatives in January also voted down in a division vote (counted by how many stand in support or opposition of the bill) on second reading on the House Floor a proposed credit-based insurance scoring ban bill, HB 1143. In a procedural move, the sponsor tried to resurrect her bill by motioning for an electronic vote by the Committee of the Whole, but her attempt to pass it was soundly defeated on a 39-26 vote, including a no-vote by House Speaker Andrew Romanoff. The insurance companies pulled out all stops to defeat the bill. Companies initiated grassroots calls and emails through their agents and employees. Farmers Insurance even had agents arriving in waves at the Capitol to speak personally with their representatives.

Nebraska, the only state with a unicameral legislature, on February 12 heard testimony in the Senate Banking and Insurance Committee on LB900, a bill that would ban insurance scoring. Besides hearing from the sponsor of the bill, Speaker of the Senate Mike Flood, no other party spoke in favor of the bill but numerous representatives from insurers and their trade associations spoke against the bill. After hearing all testimony the committee elected not to vote on the bill and it is unlikely to advance in 2008.

Legislative Updates are written and distributed by the Government Relations department and appear bi-monthly on TransUnion.com.

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