



Legislative Update

June 2009

Federal

Enactments on mortgages and credit card billing

Congress devoted a considerable amount of time in April and May to financial and information services issues, sending three bills which we note here to the President. On May 20, President Obama signed two bills: S 896—the Helping Families Save their Homes Act of 2009; and S 386—the Fraud Enforcement and Recovery Act of 2009. On May 22, he signed HR 627—the Credit CARD Act of 2009.

S 386 was introduced by Judiciary Chairman Patrick Leahy (D-VT). The bill broadens existing laws against financial crimes, and authorizes an expenditure of \$490 million over 2010-2011 for the Department of Justice and other federal agencies to investigate financial crimes leading to the current economic downturn. This new law also creates the Financial Crisis Inquiry Commission, comprised of ten members appointed by congressional leadership. The Commission has subpoena powers and the power to conduct hearings to investigate the causes of the current economic crisis in the United States, to investigate the causes of the collapse of major financial institutions, to submit a report to Congress by December 15, 2010, and to refer to the Attorney General any person that the Commission finds may have violated the laws of the United States in relation to such crisis. Financial institutions (including TransUnion) in general can reasonably expect this investigative activity to require their attention and participation.

S 896 and HR 627 were the work products of Senator Christopher Dodd (D-CT), the Chairman of the Committee on Banking, Housing and Urban Affairs. The provisions of S 896 include an amendment to the National Housing Act authorizing the Secretary of Housing and Urban Development to encourage loan modifications and reduce foreclosures, in part through the use of funds from the Emergency Economic Stabilization Act of 2008, and an amendment to the Federal Deposit Insurance Act and the Federal Credit Union Act to extend the increase of the guaranteed deposit limit to \$250,000 through 2013. There were no provisions of S 896 which directly impacted TransUnion's current businesses.

In contrast, HR 627 contained at least one provision directly affecting TransUnion and, potentially, many indirect ones. Section 302 of the Credit CARD Act amends the Fair Credit Reporting Act ("FCRA") limiting prescreening to consumers if the user of the prescreened consumer report knows the consumers are under 21 years of age.

As its title suggests, HR 627 is generally directed toward credit card issuers. Although the number of the legislation (HR 627) is the same as the bill described in the *March 2009 Legislative Update*, the bill itself consists of language drafted primarily in the Senate, in a compromise reached between Banking Committee Chairman Dodd and the Ranking Republican Member, Richard Shelby (R-AL). Like the original House bill, the final legislation generally addressed the same issues raised in the recent Uniform Deceptive Act Practices (“UDAP”) rulemaking (e.g., increasing APRs, banning two-cycle billing, etc.) which were summarized in the *January 2009 Legislative Update*. The Senate compromise version went significantly further than the UDAP rules, generally preserving or increasing the number of restrictions contained in the House bill. For example, both bills require 45 days notice before raising interest rates or other provisions of the account. However, the Senate bill requires that an account be delinquent for at least 60 days before interest rates can be increased on existing balances, and further, that if the account is then paid on time for six months, the lower interest rate must be restored. The House version required only 30 days of delinquency before allowing a rate increase and contained no rate-restoration provision. Another contrast is marketing to young people. The House version had significant restrictions relating to issuing credit cards to college students. The final version restricts prescreening to persons under 21, imposes a three-part test (parental consent/cosigning, proof of independent means to repay, or financial literacy course completion) for any extension of a credit card or open-ended credit to persons under 21 (regardless of whether they are college students), and also imposes new duties and reporting burdens on any card issuer engaging in marketing to college students.

Finally, the Senate’s bill adds new consumer disclosures and requires several studies. New disclosures include a requirement for card issuers to post their card agreements on an Internet website, as well as to provide these to the Board of Governors of the Federal Reserve (“FRB”) who will maintain a website with all such information provided by all card issuers. Another new disclosure requirement is placed on any advertisement for a free credit report, which must contain a notice that a free report is available at annualcreditreport.com. The studies include two on financial literacy—one of these looking at fluency in English as a component. There are other studies on use of emergency PIN technology in ATMs, on the marketing of products with credit offers, on small business credit plans, on reductions of credit limits, on consumer credit plans and regulations, and on interchange fees. The studies thus help to assure a continuously full plate from which Members of Congress may select new batches of issues to tackle.

Other Congressional Activity

Data Brokers

On May 5th, the House Energy & Commerce (“E&C”) Committee’s Subcommittee for Commerce, Trade and Consumer Protection held a hearing on HR 2221, the Data Accountability and Trust Act of 2009 (“DATA Act”). CDIA President and CEO, Stuart Pratt, was among those testifying. In general, HR 2221 aims to establish FCRA-level duties concerning accuracy and completeness, access, disputes, corrections, data security, etc. over “data brokers” not already covered under FCRA. It would accomplish much of this with expanded rulemaking authority for the FTC. It would also grant unprecedented and broad rulemaking authority to the FTC with respect to the “collection, use, sale, other dissemination and maintenance” of personal information.

CDIA's (and TransUnion's) concerns with the bill in its current form include the less-than-clear exclusion for consumer reporting agencies ("CRAs") and financial institutions whose databases and information practices are already regulated under the FCRA and the Gramm-Leach-Bliley Act of 1999 ("GLBA"). The concern from the CRAs' perspective is one of overlapping and redundant regulatory regimes (FCRA/GLBA vs. DATA Act) and therefore of oversight by multiple Congressional Committees. Earlier versions of this bill have passed the E&C Committee on bipartisan votes. While we welcome an extension of federal control over unregulated "data brokers" currently running amok on the Internet, it is important for the operation of the credit reporting system, and of fraud prevention and identity confirmation services operating within FCRA and GLBA, to not be comingled with the bad guys as the new federal marshal rides into town.

We expect HR 2221 to be reported out of the E&C Committee, and our efforts to obtain the necessary correcting language will continue.

Financial Product Safety Commission

That consumer protection should be a key element of the federal regulatory restructuring of financial services seems clear. However, recent reports have indicated that the Obama Administration has begun looking at legislation introduced last March which may have the effect of accelerating consumer protection, potentially separating it from regulatory restructuring. We provided a summary in the *March 2009 Legislative Update*. The bills (S 566 and HR 1705) would create a new federal agency with an exclusive—and many would add, "overlapping"—focus on consumer protection. To date, neither bill has received any Committee attention. Both Committee Chairmen (Senator Dodd and Representative Barney Frank (D-MA)) have each offered some indications of an inclination to tie this question to the larger regulatory restructuring. However, given the Administration's recent interest, it now appears possible that this proposal may gain its own momentum apart from the larger regulatory restructuring. Such a development seems sure to generate significant opposition—not only among the financial institutions who would see themselves as being subjected to redundant, duplicative regulatory authority, but also among the existing federal regulatory agencies who would perceive their consumer protection authority as being diluted.

Mortgage Reform

On May 7th, just 41 days after its introduction on March 26th, the Mortgage Reform and Anti-Predatory Lending Act (HR 1728) passed the House of Representatives on a vote of 300-114. (60 Republicans voted for the bill, 111 voted against.) The bill was referred to the Senate's Committee on Banking, Housing and Urban Affairs on May 12, where Committee Chairman Dodd indicated that the bill would probably not be put on such a fast track, noting that there were higher priorities and also that not much predatory lending was occurring at present. With this assessment, the bill may meet the same fate as its predecessor in the 110th Congress, HR 3915, which was sent to the Senate on a similar vote but received no action in the Banking Committee.

Among the more noteworthy provisions of HR 1728:

- Banking agencies directed to prohibit mortgage loan terms that are abusive, unfair, deceptive, predatory, inconsistent with usual underwriting standards, or not in the interest of the borrower.

- Prescribes minimum standards for residential mortgage loans, including a mandatory net tangible benefit requirement for refinancing
- Prohibits specified practices including mandatory arbitration, loan provisions that waive a statutory cause of action by the consumer, and mortgages with negative amortization
- Requires a creditor that makes a mortgage loan that is not a qualified mortgage to retain an economic interest in a material portion of the loan if the creditor transfers, sells or conveys such a loan to a third party

There is much more. Thus far, nothing in this legislation would have a direct impact on TransUnion. We will of course continue to monitor.

Credit Scores

Representative Luis Gutierrez (D-IL), Chairman of the Subcommittee for Financial Institutions and Consumer Credit (Financial Services Committee) has a long-established interest in the issue of credit scores in general and the potential for disparate impact in particular. In the last Congress, he joined with other Committee Members in a hearing on the use credit scores by property and casualty insurers. Back in 2003, during the legislative work on the FACT Act, Rep. Gutierrez was influential in having Section 215 added to the bill, requiring a study by the FRB and FTC on the use of credit scores and its effect on the availability and affordability of credit and insurance to groups protected under the Equal Credit Opportunity Act. (Separate reports issued in 2007 by the FRB and FTC concluded that the credit scores evaluated were predictive of risk across all demographic groups and that the scores had little effect as a proxy for race, ethnicity or gender), and that “The relationship between scores and claims risk remains strong when controls for race, ethnicity, and neighborhood income are included in statistical models of risk.” (FTC Report to Congress, July 2007)

However, the issue is still very active, and of continued interest to Chairman Gutierrez and at least some other Members. The FTC is expected to release later this year a follow up study to its 2007 report. In the new study, the FTC is using information produced by compulsory process rather than information voluntarily provided by the insurance companies—a criticism leveled at the 2007 report. We expect to continue our conversation on this topic with Chairman Gutierrez’ subcommittee staff.

Rulemaking on Accuracy & Integrity Guidelines, Direct Disputes

On May 21, the National Credit Union Administration became the first of the federal banking agencies to make public the interagency Final Rule promulgated under Section 312 of the FACT Act. This rulemaking provides guidelines to be used by furnishers of information to consumer reporting agencies regarding the accuracy and integrity of information they provide to consumer reporting agencies; and also the circumstances under which the furnisher must investigate disputes of information it provides to a consumer reporting agency when that dispute is conveyed directly to the furnisher in a request by its customer.

The Final Rule will become effective on the first day of the first calendar quarter beginning one year after publication in the *Federal Register*. Thus, for example, if the Final Rule were published on June 15, 2009, the effective date would be July 1, 2010.

In general, the Final Rule varied little from the Proposed Rule published December 13, 2007. It provides that a furnisher must undertake a reasonable investigation of a direct dispute it receives if the dispute relates to consumer liability, the terms of the account, the consumer's performance or other conduct on the account, or any other information on the account related to the consumer's creditworthiness or other characteristics. The direct dispute investigation requirement does not apply if the direct dispute relates the consumer's identifying information, including address information, the identity of past or present employers, inquiries on the credit report, information from public records (unless it relates to information from the furnisher), information about fraud or active duty alerts, or information provided by another furnisher.

The Final Rule requires a furnisher to establish reasonable written policies and procedures regarding the accuracy and integrity of the information it provides to a consumer reporting agency. In developing its policies, the furnisher should consider the types of business activities in which it engages, the nature and frequency of the information which it reports to the consumer reporting agency, and the technology which it uses to report. The policies and procedures should promote the objectives of accuracy, integrity, reasonable investigations, and regular updating of information.

States

Insurance Scoring

Indiana House Bill 1246 was signed into law on May 5. Effective July 1, it forbids scoring with late payments with a medical code.

In **Michigan**, the legal battle over the state Insurance Commissioner's attempt to ban insurer use of credit scoring is now headed to the State Supreme Court after a judge's recent ruling in favor of carriers that oppose the prohibition. Barry County Circuit Court Judge James Fisher on April 10 issued a new order precluding the Michigan Office of Financial and Insurance Regulation from challenging or denying rate filings based on credit based insurance scoring. The order also indicates that the rate filing rejections already issued are void and rescinded. OFIR first promulgated administrative rules banning the use of credit scoring in 2005, and the judge originally ruled in 2005 that the use of consumer credit records in setting insurance rates was justified and did not discriminate. April's decision expanded the 2005 injunction by preventing OFIR from challenging insurance credit scoring by enforcing the insurance code on a case-by-case basis.

While the commissioner had been disapproving auto insurance rate filings that used credit scoring to set premiums, arguing that studies by consumer groups had found mistakes in credit reports for many consumers, he has allowed existing rate plans to stay in force. He relied in part on an executive order issued by Michigan Gov. Jennifer Granholm last month, directing OFIR to utilize every administrative tool at the agency's disposal to assure the auto insurance company provides insurance at fair and equitable rates--including but not limited to disapproval of rate increases or rejection of rate filings.

On April 30 the **National Association of Insurance Commissioners** Property and Casualty Insurance and the Market Regulation and Consumer Affairs Committees held a hearing

exploring credit-based insurance scoring, specifically how does the insurance industry uses credit-based insurance scores for pricing and underwriting, and what is the impact on policyholder premium from credit-based insurance scores in light of the current economic conditions.

There were about 17 state insurance commissioners or their staff in attendance. Also attending were staff representatives of U.S. House Financial Services Committee, and various insurance and credit industry representatives, and many consumer advocates.

Illinois Insurance Director McRaith noted that the hearing was to gather data and not discuss solutions, yet during the hearing the tone turned into more of an examination with several commissioners taking a very litigious approach to their inquiries to panelists. There was little or no commissioner discussion/questions about accuracy. There was a bit more discussion/questions on score differential.

The first panel of the day addressed how credit scores are developed and used, and leading off was Chet Wiermanski, Group Vice President of TransUnion's Analytical Services Division. Chet and others on the panel discussed what goes in to an insurance score and that such scores are stable in the current economic crisis. The consumer advocate Birny Birnbaum questioned this claim, saying that many loans are not included in credit reports, including payday loans and small lenders who cannot meet consumer reporting agency minimum reporting requirements and also missing were utility payments, and residential rentals. With regard to insurers, there were accusations that adverse action notices are incomplete, and that insurers want to reduce the number of notices they send. Finally, the state laws on thin file/no hits do not protect consumers. This panel did a very effective job at countering a number of these attacks, especially on "missing" data, and thin files/no hits.

The second panel included insurance actuaries and economists, and they addressed quality in credit reports and actuarial standards. The consumer advocate Bob Hunter made accusations that scoring is actuarially unsound, unfairly discriminatory, lacks logical relationship, and violates objective standards, and stated that a study of 500,000 scores shows wide variance in scores and insurance scores do not take in to account unexpected life events. However the actuaries and economists did an excellent job at providing hard evidence, through their and other research that scores do not greatly vary, that they are indeed objective, highly predictive of loss ratio, and thus actuarially sound.

The third panel was a discussion with insurer representatives and producers. They largely reinforced that for the carriers using insurance scoring, it provides better pricing, which equals deeper market penetration and in turn offers more opportunities for more people. They explained the difference between disparate impact and disproportionate impact, which is frequently confused.

The fourth panel included consumer representatives, including a representative of the National Organization of Women (NOW). In large part, they retread the same old tired arguments we have been hearing for years, and for the previous five hours, and they were very ineffective. Surprisingly there was little or no discussion or questions about credit report accuracy but there was more discussion and questions on score differential. The advocates complained that there aren't any standards, there are multiple scores, and scores vary too much in range and input and thus are confusing.

The fifth and last panel was an open discussion on scoring issues, and selected panelists were invited to participate in the discussion. The consumer advocates took opportunity to push the Insurance Commissioners to learn more about scoring, to carefully monitor what's going on in the market, to more sharply question how volatile scores really are, to collect application and policy data, and to demand greater transparency. The insurance representatives reinforced that credit based insurance scores have not been adversely affected by the economy, and TransUnion studies show this to be true. They also reinforced that insurance scores are highly correlated, robust and objective across all states and that the auto and homeowners insurance markets are doing well, pricing is stable and there are a number of substantial companies providing business. The insurance representatives challenged the commissioners to go back to each of their states and find out what the complaints really are, knowing that there are not many complaints and to not emulate the approach of California, which does not allow insurer's to use credit and is perceived as highly competitive market but in all actuality has the greatest amount of subsidization in the country.

It is expected that the NAIC will continue to explore in the future how insurers use credit, and to push model legislation that addresses greater transparency in model development, expanded adverse action reasons, and how insurers treat individuals with extraordinary life circumstances such as divorce, medical catastrophe, and fraud.

Security Freezing

Currently there forty-eight states and Washington DC have security freeze laws. **Michigan** and **Alabama** are the only exceptions. So far this spring TransUnion has seen thirty-two security freeze bills in thirteen states attempting to either reduce allowable fees, decrease timeframes for freezing, lifting, or removing the freeze, or increasing penalties for noncompliance.

Kansas House Bill 2292 was signed into law on April 20. It amends the previous law which limited freezes to victims of identity theft and set broad timeframes by now opening a freeze to all and allowing requests to be made via regular mail, secure website, or by phone. It also changes the time for lifting a freeze to three business days for postal mail, and fifteen minutes, with exemptions, if it's an electronic method chosen by CRA. The bill allows \$5 to place, lift, and remove a freeze, and allows administrative enforcement only for 15-minute lift violations. It is effective July 1.

In **Nebraska**, LB 177 was enacted on April 8, and is effective on July 8. The bill defines a minor as less than 19 years old, removes the seven-year expiration of the security freeze, and lowers the fees to place, lift or remove a freeze from \$15 to \$3.

North Carolina SB 1017 passed through the Senate and is sitting in the House. It would drastically alter the current security freeze regime, most importantly by requiring nationwide consumer reporting agencies to create and operate a shared website and toll free number to request freezes and also requiring CRAs to share this information among each other. Creating such a system would be extremely expensive, challenge interstate commerce, and would conflict with CRA requirements under the FCRA to obtain proper identification for consumers who request disclosures and seek to alter the content of the file. The bill would also lower from \$10 to \$0 the amount we could charge consumers for placing a freeze

electronically or via the telephone, require 15 minutes for both placement and lifting of the freeze, and require certain disclosures when providing credit monitoring services. While we are not opposed to making certain changes to the current North Carolina freeze law that would be consistent with what other states have enacted, are working with the bill sponsor to correct these mentioned provisions.

North Dakota House Bill 1308 was enacted on April 24. This amends the previous law by decreasing from three days to two days the time allowed for handling mail requests for placing, lifting and removing a freeze, and also implementing a 15-minute requirement, subject to exemptions, for temporarily lifting a freeze. Containing an emergency clause, the law was effective immediately.

Employment Screening

The lingering continuing impact of the financial crisis continues to be used as a wedge issue by many consumer advocates against employers who use reports for screening employees. Many bills that would ban or severely curtail employment screening with credit reports that in previous years were not given serious consideration have now become active because of the economy.

Hawaii House Bill 31, which has been sent to the governor for her signature, if enacted would create a new restriction on Hawaii employers – preventing them from hiring, employing, “or changing the terms, conditions, or privileges of employment of any individual because of [that] individual's credit history or credit report, unless the information in the individual's credit history or credit report directly relates to a bona fide occupational qualification under section 378-3(2).” We are part of a large coalition seeking a veto, based on the concern that curtailing employers in using credit reports jeopardizes businesses health, safety and financial security. We have been attempting to overcome misconceptions that credit scores are used in employment screening and that there are lack of sufficient laws and remedies for consumers.

California AB 943 has passed out of Assembly committees and is on third reading. We expect it to be reported favorably and to be more extensively debated in the Senate. AB 943 would require that once every six months, starting in 2011, every employer shall submit to the Department of Fair Employment and Housing (DFEH), a list of each applicant for employment in the preceding six months; their race and gender; whether a consumer credit report was obtained; and a list of all applicants offered employment in the preceding period. It also would require that starting in 2012, the DFEH shall report to the legislature “regarding the use of consumer credit reports by employers and provide an analysis of whether the use of consumer credit reports has a disparate impact on employment with respect to race and gender.” And it would, unless based upon a bona fide occupational qualification, forbid an employer from refusing to hire or employ a person because the person does not authorize the employer to obtain a consumer credit report regarding the person.

Connecticut House Bill 5521, which would ban employers from using credit reports in hiring decisions, has passed out of the House as is being debated in the Senate. Although the governor is opposed to the measure, we are guardedly optimistic about its defeat prior to legislature adjourning on June 3.

Utilities and Scoring

Texas House Bill 2306, which we reported in *March Update* and would eliminate the right of utilities to use any type of utility payment data as a basis for denial of service, has not received favorable attention. **Illinois** House Bill 418, originally just an insurance scoring bill, has now been amended to include a section that would prohibit a public utility (non-telecom) from denying, cancelling, or nonrenewing utility service solely on the basis of credit information of prospective or existing customers. If a public utility denies, cancels, or does not renew service based on credit information, it must provide the affected party with an explanation for the public utility's action and an opportunity for the affected party to explain its credit information. It recently passed both legislative chambers and we expect the governor to sign it into law.

Along the same lines as the Illinois bill, but going a step further are **New York** companions Senate Bill 2532 and Assembly Bill 1537. They provide that no utility service provider shall rely solely upon the consumer credit report of any potential customer or customer when making any determination to provide or continue the provision of service to such potential customer or customer and that credit reports cannot be used by potential customer or customer for the purpose of requiring the potential customer or customer to pay a deposit, additional fee or higher rate for the provision or continuance of the provision of service. We expect much opposition to the bill and are thus optimistic we can amend or defeat it.

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

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