

Date of Hearing: April 29, 2013

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

AB 1220 (Skinner) – As Amended: April 22, 2013

SUBJECT: Consumer credit reporting: files: inspections.

SUMMARY: Requires that if a consumer requests a written copy of his or her consumer credit report then the consumer must receive the same information that is provided to the user (entity that grants credit) of the consumer credit report. Specifically, this bill:

- 1) Requires a contract between a consumer reporting agency (CRA) and a user of a consumer credit report shall include a statement that federal law prohibits a consumer CRA from prohibiting a user of a consumer credit report from disclosing the contents of the report to a user who has had an adverse credit action.
- 2) Specifies that a contract that violates the prohibition in #1 is void and contrary to public policy and that the Attorney General or the district attorney of the county in which the violation occurred may bring a civil action to enjoin a contract in violation.
- 3) Provides that if a consumer has authorized a CRA to furnish a consumer credit report for an extension of credit or other lawful purpose, the user of the consumer credit report shall notify the consumer orally and in writing of the following:

"You have authorized us to obtain a copy of your credit report as part of an application for credit or for some other lawful purpose. If we take adverse action on your application and our decision is based in whole or in part upon your credit report, you have a right to obtain a copy of the report from us that we receive from the consumer credit reporting agency.

Neither state nor federal law prevents you from obtaining a copy of your credit report from us under those circumstances."

EXISTING STATE LAW

- 1) Regulates consumer CRAs via the Consumer Credit Reporting Agencies Act. [Civil Code, Section 1785.1 et seq. All further references are to the Civil Code].
- 2) Defines consumer credit report as any written, oral, or other communication of any information by a consumer CRA bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for: (1) credit to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) hiring of a dwelling unit, as defined in subdivision (c) of Section 1940, or (4) other purposes authorized in Section 1785.11. [Section 1785.3].
- 3) Requires that every CRA shall, upon request and proper identification of any consumer, allow the consumer to visually inspect all files maintained regarding that consumer at the time of the request. [Section 1785.10]

- 4) Specifies the circumstances under which a CRA shall furnish a consumer credit report.  
[Section 1785.11]
- 5) Requires a user of a consumer credit report to provide written notice of an adverse action to the consumer. [Section 1785.20].

EXISTING FEDERAL LAW provides for the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* The FCRA provides for the following:

- 1) Defines "consumer report" as an written, oral or other communications of information by a CRA bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for person, family, or household purposes; (2) employment purposes; or (3) other purposes.
- 2) Defines the term "CRA" as any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regulatory engages in whole or in part in the practice of assembly or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.
- 3) Defines "adverse action" as the following:
  - a) A denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance; or
  - b) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee; or
  - c) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and
  - d) an action taken or determination that is -- made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account; and adverse to the interest of the consumer.
- 4) Provides that a consumer report may be furnished for use in connection with a credit transaction involving the consumer, primarily for personal, family or household purposes, and involving the extension of credit to, or review or collection of, a consumer's account.
- 5) Provides for the following duties of CRAs:
  - a) Must have permissible purposes to furnish consumer reports;
  - b) Must avoid furnishing obsolete adverse information in certain consumer reports;

- c) Required to adopt reasonable procedures to assure privacy and accuracy of consumer reports;
  - d) Must provide only limited disclosures to governmental agencies;
  - e) Required to provide consumers certain disclosures upon request at no cost or for a reasonable charge;
  - f) Mandated to follow certain procedures if a consumer disputes the completeness or accuracy of any item of information contained in his file; and
  - g) Required to follow certain procedures in reporting public record information for employment purposes or when reporting adverse information other than public record information in investigative consumer reports.
- 6) Gives consumers the right to one free credit report per year.
- 7) Requires CRAs to conduct an investigation concerning disputes arising from credit reports.
- 8) Provides that no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to the requirements of the FCRA, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.
- 9) Specifies that no requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under—
- a) subsection (c) or (e) of section 1681b , relating to the prescreening of consumer reports;
  - b) section 1681i , relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;
  - c) subsections (a) and (b) of section 1681m , relating to the duties of a person who takes any adverse action with respect to a consumer;
  - d) section 1681m (d) , relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;
  - e) section 1681c , relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

- f) section 1681s-2 , relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply—with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
  - g) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996);
  - h) section 1681g (e) , relating to information available to victims under section 1681g (e) of this title;
  - i) section 1681s-3 , relating to the exchange and use of information to make a solicitation for marketing purposes; or
  - j) section 1681m (h) , relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;
  - k) with respect to the disclosures required to be made under subsection (c), (d), (e), or (g) of section 1681g , or subsection (f) of section 1681g relating to the disclosure of credit scores for credit granting purposes, except that this paragraph—
- 10) Specifies that the items in #9 shall not apply with respect to sections 1785.10, 1785.16, and 1785.20.2 of the California Civil Code (as in effect on December 4, 2003) and section 1785.15 through section 1785.15.2 of such Code (as in effect on such date);

FISCAL EFFECT: Unknown

COMMENTS:

Need for the bill.

According to information supplied by the author's office the following is the need for the bill,

*Credit reports play an increasingly important role in the lives of American consumers. Most decisions to grant credit – including mortgage loans, auto loans, credit cards, and private student loans – include information contained in credit reports as part of the lending decision. These reports are also used in crucial decisions that affect the personal and financial well-being of consumers, including eligibility for rental housing, setting premiums for auto and homeowners insurance in some states, or determining whether to hire an applicant for a job.*

*Because of the increased relevance of credit reports, the need to ensure the accuracy of such reports has become more important. All parties to the credit reporting system have a vital interest in ensuring that credit reports are accurate. Consumers and users alike rely upon the accuracy of the information they receive in consumer credit reports and may be hurt by errors and inaccuracies therein.*

*A December 2012 study by the Federal Trade Commission (FTC) found widespread problems with the accuracy of credit reports. According to the FTC report, the three*

*national credit reporting agencies (NCRAs) received approximately eight million contacts from consumers in 2011 to initiate disputes about the accuracy of one or more items on their credit files. According to the FTC, one in four consumers identified errors on their credit reports that might affect their credit scores; one in five consumers had an error that was corrected by a credit reporting agency (CRA) after it was disputed, on at least one of their three credit reports; four out of five consumers who filed disputes experienced some modification to their credit report; Slightly more than one in 10 consumers saw a change in their credit score after the CRAs modified errors on their credit report; and approximately one in 20 consumers had a maximum score change of more than 25 points and only one in 250 consumers had a maximum score change of more than 100 points. <http://www.ftc.gov/opa/2013/02/creditreport.shtm>*

*Inaccuracies can enter into credit reports in a number of ways. Inaccuracies can occur if consumers provide inaccurate data when applying for a loan or if the creditor who furnishes data to the credit bureau inputs consumer information to its systems inaccurately. Inaccuracies can occur when the bureaus match information about a consumer from a particular data furnisher to the wrong individual consumer's file. Inaccuracies can also come from errors or the lack of identifying information in government records. Finally and importantly, inaccuracies occur when consumers are victims of identity fraud or identity theft.*

*One way to improve the accuracy of reports is for consumers to have more information about the contents of their credit reports is to provide them with the same reports that users of credit reports receive. Federal law allows consumers to obtain an exact copy of his or her consumer credit report from a user who makes an adverse decision about the consumer that is based in whole or in part upon information in the report.*

*AB 1220 will give consumers an important tool to ensure the accuracy of the information in their credit reports. By giving consumers the ability to review the same reports that users receive, AB 1220 gives consumers a more complete and accurate picture of the information users of credit reports see about his or her credit history. As a result, consumers will be able to correct inaccuracies in their credit history, improving the quality of credit reports for consumers and users alike.*

#### Information contained in consumer reports

AB 1220 requires that in addition to the current law requirement that a consumer can receive a written copy of their file maintained by the CRA, that the consumer shall also receive the same information that is provided to a user of a consumer credit. This provision is designed to address a concern that the user of a report, such as a lender, may have information in the consumer report that is used to make a credit decision that is not provided to the consumer. Over the last two years several media reports and a report by the FTC have highlighted the difficulty consumers face in attempting to correct errors contained in their credit report. Furthermore, the FTC study found that 25% of consumers had errors in their credit reports. Other surveys have found this rate to be as high as 37% (Zogby Interactive, *Most Americans Fear Identify Theft*, Zogby's *American Consumer*, April 2007). On February 10<sup>th</sup>, 2013 CBS' 60 Minutes program, 40 Million Mistakes, covered the issue of errors in credit reports and the difficulties of correcting those errors. This report highlighted a number of consumer issues relating to credit reports, including the off-shoring of dispute investigations. A key issue raised in the 60 Minutes story involved a

consumer that was denied credit on numerous occasions yet all the credit reports the consumer received from the CRAs were clean of any blemishes. The consumer would then go the user of the report (a bank) and was told that in fact her credit report reflected debt that was not shown on the copies that she received.

This goes to the issue of mixed credit files in which the credit information for one consumer is placed in the file of another consumer. This can occur when two or more consumers have similar names, social security numbers, or other identifiers. The purpose of AB 1220 is to allow a consumer to see the information contained in the report furnished to the user as that report may include different information that would have an impact on the decision on whether to extend credit to the consumer. Committee staff is unable to determine if the issue highlighted by the one consumer in the *60 Minutes* program is part of a large scale problem, or an anomaly. The same program also highlighted cases of mixed credit files that were discovered by consumers when they requested their credit report.

If users of credit reports are receiving information that the consumer is not able to request or view when they exercise their legal rights to review such information, this is a troubling practice. However, state and federal law provide that consumers shall be able to review the information in their files and receive notice of an adverse action. Section 1785.15 of the civil code provides that CRAs shall supply, upon requests, to a consumer a written copy of his or file. Section 1681 of FCRA and civil code section 1785.20 both provide that when a user of a credit report takes and adverse action, the consumer must be supplied with notice of the adverse action and their respective rights under law, as well as, the reason for the adverse action. If a consumer credit report obtained by a user that is then used to deny credit to a consumer contains information that the consumer is not able to access via existing law then wouldn't the existence of undisclosed information violate existing law if that information impacted the credit decision?

#### Disclosure.

AB 1220 provides for a new disclosure provided by the user of the credit report both orally and in writing of the consumer's right to obtain a copy of their report from the user of the report used in taking action. Current law already gives consumers the right to request their report from a user when an adverse action has taken place. AB 1220 would also provide that when a consumer authorizes a CRA to furnish a consumer credit report to a user that the user must provide the required disclosure. Oral disclosure requirements are fraught with liability and enforcement issues, and may be unnecessary in those cases where the borrower receives a written disclosure. This committee has previously voted against oral disclosure requirements for a host reasons. For this reason, staff suggests deleting the provision that requires oral disclosure. Furthermore, if it is necessary to provide the restatement of existing law that is provided in the disclosure, then staff recommends that the disclosure occur with an adverse action notice, not every time a customer seeks credit. In providing for an adverse action disclosure staff suggest that the statement be moved to the existing law requirements (Civil Code, Section 1785.20) that provide for the requirements of users when an adverse action has taken place.

#### Contracts.

Existing law specifies that a contract between a user of consumer credit reports and CRAs may not prohibit a user of a consumer credit report from providing a copy of the report to the consumer. AB 1220 would require that a contract between a user and provider of a consumer

credit report include a statement that federal law prohibits a consumer credit reporting agency from prohibiting the user of consumer credit reports from disclosing the contents of the report to the user if adverse action has been taken by the user based on the report. Additionally, AB 1220 provides that any such contract in violation is void.

This provision came about due to information provided to the author's office that provisions in contracts between users and the CRAs, in spite of the FCRA prohibition, contain restrictive language on what the user can reveal about the report to the consumer. This requires that the contracts between these parties include a disclosure that such prohibitions are not allowed. For example, committee staff was provided with a contract between a CRA and a user of consumer reports that contains the following:

"Neither Client nor client Affiliates will provide a copy of the consumer report to the consumer, except as may be required or permitted by law..."

#### Federal Preemption.

As this committee has noted previously, the actual preemption of state law is left to the courts to decide. However, when faced with issues that approach the scope of issues covered by federal preemption due consideration of those issues must be given. The potential of federal preemption often weighs upon the issues facing the Banking and Finance committee as the committee has jurisdiction of multiple issues that overlap with federal law and regulations.

The FCRA contains several areas of preemption. First, FCRA section 1681t contains explicit references to provisions of the FCRA of which states may not regulate. These areas include,

- 1) Sharing of information with affiliates;
- 2) Prescreen activities;
- 3) Duties placed on furnishers of credit information;
- 4) Duties of a person taking adverse action;
- 5) CRA action concerning resolution of disputed report data;
- 6) Requirements concerning a consumer report; and
- 7) The summary of rights and notice to be provided to consumers.

Additionally, FCRA section 625(a) contains a general preemption statement relating to inconsistent or conflicting state laws, specifically,

*Except as provided in subsections (b) and (c), this title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency.*

The main question for debate is to what extent is AB 1220 inconsistent with the FCRA? The proposed amendments, discussed later, may mitigate preemption concerns as they attempt to codify in state law concepts that are already present in the FCRA.

### Amendments.

Should the committee desire to move AB 1220 forward committee staff suggests the following amendments:

- 1) If, as the premise of AB 1220 assumes, that decisions are made with information in a consumer report that a consumer does not currently have access to, then this is serious issue that may already violate state and federal law. Additionally, it is unclear how extensive this issue could be. Currently, the language provides "the consumer shall receive the same information that that is provided to a user of a consumer credit report..." This language does not specify any point in time. For example, when was the information provided to the user? How far back can the consumer request information? What if the user receives information in a credit file that is specific to the user but does not involve the consumer? Based on these concerns and that the problem has not be adequately outlined, staff recommends that this requirement be stricken from the bill.
- 2) The FCRA already prohibits a CRA from preventing a user of consumer credit report from disclosing the information in that report to the consumer if an adverse action has taken place. This bill further requires that contracts between CRAs and users must include a statement to that the contract cannot include prohibitions against the user sharing the consumer credit report with the consumer. Additionally such a contract would be void and the Attorney General or District attorney could bring an action for a violation. In order to avoid implementation issues with existing contracts staff recommends that the voidability language be stricken and that additional clarifying language be added as follows:

1785.10.1. (a) It is unlawful for a consumer credit reporting agency to prohibit in any manner, including, but not limited to, in the terms of a contract enforceable in the state, or to dissuade or attempt to dissuade, a user of a consumer credit report furnished by the credit reporting agency from providing a copy of the consumer's credit report to the consumer, upon the consumer's request, if the user has taken adverse action against the consumer based in whole or in part upon information in the report. A contract between a credit reporting agency and a user of a consumer credit report for the provision of consumer credit reports shall include a statement that federal law prohibits a consumer credit reporting agency from prohibiting a user of consumer credit reports from disclosing the contents of the report to the user if adverse action has been taken by the user based in whole or in part on the report: **and allows a user of consumer credit reports to disclose the contents of the report under those circumstances.**

(b) ~~A contract in violation of this section is void as contrary to public policy.~~ The Attorney General or the district attorney of the county in which a violation of this section occurs may bring a civil action, or intervene in any civil action, to enjoin the enforcement of a contract that violates this section.

- 3) State law and the FCRA already require that a consumer can get access to their report after an adverse action. This bill requires an oral and written disclosure upon any inquiry that requires use of a consumer credit report. Due to the liability of oral disclosures, and their potential ineffectiveness in consumer protection, staff recommends that the disclosure should only be made in writing.

Additionally, the statement that the consumer can get from the user a copy of their report conflicts the language in the FCRA and state law. Section 607 (c) of FCRA provides that a CRA may not prohibit a user from disclosing the contents of the report to the consumer if an adverse action has taken place. The proposed disclosure statement includes a statement that the consumer can obtain a copy of the actual report from the user. These are different concepts. An actual "report" may not be the same as "contents of the report." On the other hand, a user could disclose the contents by providing the actual report. Either way this terminology presents potential confusion for consumers and users of reports. As a conflict between FCRA and this bill could lead to preemption challenges, staff recommends striking the current proposed Section 3 of the bill and instead provide for an alternative to the current version of the written notice in the bill. Additionally, this section should be moved to the existing civil code section addressing adverse actions.

**Section 1785.20 of the civil code is amended to read:**

(a) If any person takes any adverse action with respect to any consumer, and the adverse action is based, in whole or in part, on any information contained in a consumer credit report, that person shall do all of the following:

(1) Provide written notice of the adverse action to the consumer-, **that includes the following statement:**

**"We have taken adverse action on your application and our decision is based in whole or in part upon your credit report. You have a right to request from us the contents of the report that we receive from the consumer credit reporting agency. Neither state nor federal law prevents you from obtaining the contents of your credit report from us under those circumstances."**

(2) Provide the consumer with the name, address, and telephone number of the consumer credit reporting agency which furnished the report to the person.

(3) Provide a statement that the credit grantor's decision to take adverse action was based in whole or in part upon information contained in a consumer credit report.

(4) Provide the consumer with a written notice of the following rights of the consumer:

(A) The right of the consumer to obtain within 60 days a free copy of the consumer's consumer credit report from the consumer credit reporting agency identified pursuant to paragraph (2) and from any other consumer credit reporting agency which compiles and maintains files on consumers on a nationwide basis.

(B) The right of the consumer under Section 1785.16 to dispute the accuracy or completeness of any information in a consumer credit report furnished by the consumer credit reporting agency.

(b) Whenever credit or insurance for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or in part

because of information obtained from a person other than a consumer credit reporting agency bearing upon consumer's credit worthiness or credit standing, the user of that information shall, within a reasonable period of time, and upon the consumer's written request for the reasons for that adverse action received within 60 days after learning of the adverse action, disclose the nature and substance of the information to the consumer. The user of the information shall clearly and accurately disclose to the consumer his or her right to make such a written request at the time the adverse action is communicated to the consumer.

(c) No person shall be held liable for any violation of this section if he or she shows by a preponderance of the evidence that at the time of the alleged violation he or she maintained reasonable procedures to assure compliance with this section.

(d) Nothing in this chapter shall excuse compliance with the requirements of Section 1787.2.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Interest Research Group (CALPIRG)  
Consumer Federation of California  
Privacy Rights Clearinghouse  
TURN

Opposition

Equifax

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