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Fair Credit Reporting Act: Preemption of State Law

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Summary

Generally, the Fair Credit Reporting Act (FCRA) only preempts state laws that are inconsistent with the federal law. However, there are a number of specific provisions of the Fair Credit Reporting Act under which states may not enact laws that impose additional requirements or prohibitions. The specific preemption provisions are set to expire at the end of 2003. After January 1, 2004, states would be able to enact laws relating to the areas currently addressed only under federal law.

This report provides an overview of the Fair Credit Reporting Act's preemption provisions and discusses the implications of allowing those provisions to expire.¹ Recently introduced legislation (S. 660, H.R. 1766, H.R. 2622) will also be discussed. This report will be updated as events warrant.

Preemption Provisions

Generally, the FCRA “does not annul, alter, affect, or exempt any person subject to the provisions of [the Act] from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of [the Act], and then only to the extent of the inconsistency.”² Despite the general nonpreemption of similar laws, the Act sets forth a number of specific provisions under which states may not enact similar laws. Each specific preemption will be discussed below.

Under the specific preemptions, states may not enact laws related to certain provisions of the Fair Credit Reporting Act regarding the prescreening of consumer

¹ For general information on the Fair Credit Reporting Act see CRS Report RL30889, *The Consumer Credit Protection Act: An Overview of Its Major Components* and CRS Report RL31666, *Fair Credit Reporting Act: Rights and Responsibilities*.

² 15 U.S.C. 1681t(a).

reports.³ The FCRA provides that a credit report may be furnished through a prescreening process so long as the consumer has authorized the reporting agency to provide such a report, and has not elected to be excluded from lists provided to creditor or insurers through the prescreening process.⁴ The FCRA also places limitations on the type of information that can be released through the prescreening process and establishes procedures that consumer reporting agencies must follow with respect to excluding consumers from prescreening lists upon request. States are not allowed to impose additional requirements or prohibitions with respect to these procedures.

States are also prohibited from imposing requirements regarding the time by which a consumer reporting agency must take action with respect to the procedures required in cases of the disputed accuracy of any information in a consumer's report.⁵ Under the FCRA, a consumer reporting agency must reinvestigate and update or delete the information in a consumer's file within 30 days of receiving notice of the dispute from the consumer.⁶ The reinvestigation period may be extended for up to 15 additional days if the consumer reporting agency receives additional information from the consumer during the initial 30-day period.⁷ Consumer reporting agencies are also required to notify the furnisher of the disputed information of the dispute within 5 days of receiving notice of the dispute from the consumer.⁸

Federal law also preempts any state requirements with respect to certain duties imposed on persons who take any adverse action with respect to a consumer based upon information in the consumer's credit report.⁹ The FCRA requires persons who take adverse action with respect to a consumer to provide the consumer with notice of the action and information about the consumer reporting agency that furnished the report upon which the adverse action was based, as well as information about the consumer's right to obtain a free copy of his or her credit report and to dispute the accuracy of the information contained in his or her report.¹⁰ The Act places additional requirements on

³ 15 U.S.C. 1681t(b)(1)(A). Prescreening is the process "whereby a consumer reporting agency compiles or edits a list of consumers who meet specific criteria and provides this list to the client or third party on behalf of the client for use in soliciting these consumers for the client's products or services." This process is permissible under the Fair Credit Reporting Act if the client agrees in advance that each consumer on the list will receive an offer of credit. CCH Consumer Credit Guide, ¶ 25,050.

⁴ 15 U.S.C. 1681b(c) and (e).

⁵ The preemption of these provisions in state law does not apply to any state law in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996. 15 U.S.C. 1681t(b)(1)(B).

⁶ 15 U.S.C. 1681i(a)(1)(A).

⁷ 15 U.S.C. 1681i(a)(1)(B).

⁸ 15 U.S.C. 1681i(a)(2)(A).

⁹ 15 U.S.C. 1681t(b)(1)(C)

¹⁰ 15 U.S.C. 1681m(a).

persons who take adverse action based upon information obtained from third parties or affiliates.¹¹

Provisions of the Fair Credit Reporting Act regarding the duties of persons who use a consumer report in connection with a credit or insurance transaction that is not initiated by the consumer also preempt state law.¹² Under the FCRA, persons who use reports in connection with a transaction not initiated by the consumer must provide the consumer with certain information, including a statement that information from the consumer's credit report was used in connection with the transaction, and that the consumer received the offer of credit or insurance because he or she satisfied the institution's specified criteria for creditworthiness or insurability.¹³ The statement must also include a notice that the consumer may not be extended credit pursuant to the offer if, after responding, the consumer fails to meet the criteria specified. The consumer must also be notified of his or her right to prohibit the release of credit information in connection with transactions not initiated by the consumer.

The Fair Credit Reporting Act sets forth specific requirements regarding information to be included in a consumer's credit report, including the length of time that certain information may be reported.¹⁴ States are prohibited from enacting laws related to the requirements imposed under the FCRA.¹⁵

In addition to the duties imposed on the users of consumer reports, the Fair Credit Reporting Act imposes certain duties on persons who furnish information to consumer reporting agencies. These include a duty to report accurate information, a duty to correct and update information, a duty to provide notice of the disputed accuracy of information reported, a duty to provide notice of accounts closed by the consumer, and a duty to provide notice of delinquency of accounts.¹⁶ State law is preempted with respect to these requirements.¹⁷

State laws relating to the exchange of information among persons affiliated by common ownership or common corporate control are also preempted,¹⁸ as are those

¹¹ 15 U.S.C. 1681m(b).

¹² 15 U.S.C. 1681t(b)(1)(D).

¹³ 15 U.S.C. 1681m(d).

¹⁴ 15 U.S.C. 1681c.

¹⁵ The preemption of these provisions in state law do not apply to any state law in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996. 15 U.S.C. 1681t(b)(1)(E).

¹⁶ 15 U.S.C. 1681s-2.

¹⁷ The preemption does not apply with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996); or with respect to section 1785.25(a) of the California Civil Code (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996). 15 U.S.C. 1681t(b)(1)(F).

¹⁸ The preemption does not apply with respect to subsection (a) or (c)(1) of section 2480e of title
(continued...)

relating to the form and content of the disclosure of a consumer's rights under the FCRA.¹⁹

Expiration of Preemption Provisions

The specific preemption provisions of the Fair Credit Reporting Act discussed above are set to expire at the end of 2003. If unchanged, the preemptions will not apply to any provision of state law that is enacted after January 1, 2004, so long as the new law states explicitly that it is intended to supplement the federal law, and it gives greater protection to consumers than is provided by the Fair Credit Reporting Act.²⁰ Congress may allow the preemption provisions to expire, or act to extend the preemption beyond the current date.

Should the preemption provisions be allowed to expire, states would be able to enact laws providing greater protection to consumers. The effects of the expiration of the preemption would not be immediately known because the Act requires states to enact laws after January 1, 2004. Even after the enactment of new state laws, the Fair Credit Reporting Act would still be in effect and enforceable, but states would be allowed to impose additional requirements or prohibitions on consumer reporting agencies and those who furnish information to the agencies or use consumer reports. Consumer groups argue that additional protections are necessary to protect consumer privacy and prevent crimes such as identity theft. Industry groups counter that a single national standard is necessary to ensure that consumer reporting agencies can operate on a nation-wide basis.

Extending the preemption provisions set forth in the Fair Credit Reporting Act – either indefinitely or for a specified period of time – would mean that the federal law would continue to preempt state laws, and states would continue to be prohibited from enacting laws with respect to the areas specified above.

Legislative Response

To date, three bills have been introduced during the 108th Congress to address the expiration of the Fair Credit Reporting Act's preemption provisions.

S. 660, the Economic Opportunity Protection Act of 2003, would amend the Fair Credit Reporting Act's preemption provisions to exclude the exception pertaining to state laws enacted after January 1, 2004, effectively making the preemptions – originally set

¹⁸ (...continued)

9, Vermont Statutes Annotated (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996). 15 U.S.C. 1681t(b)(2). The provisions of the recently enacted California financial privacy law relating to the sharing of information among affiliates would presumably be preempted pursuant to this provision. For more information on the sharing of information among affiliates see CRS Report RS21427, *State Financial Privacy Laws Affecting Sharing of Customer Information Among Affiliated Financial Institutions*.

¹⁹ 15 U.S.C. 1681t(b)(3). Requirements regarding the form and content of the disclosure of a consumer's rights under the FCRA are codified at 15 U.S.C. 1681g(c).

²⁰ 15 U.S.C. 1681t(d)(2).

to expire at the end of the year – permanent. Specifically, the bill would amend section 624(d) of the Fair Credit Reporting Act to read as follows:

Limitation – Subsections (b) and (c) do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996.

S. 660 was introduced on March 19, 2003, and referred to the Committee on Banking, Housing, and Urban Affairs. No additional action has been taken.

H.R. 1766, the National Uniform Privacy Standards Act of 2003, was introduced on April 11, 2003. Similar to S. 660 discussed above, H.R. 1766 would amend the Fair Credit Reporting Act's preemption provisions to exclude the section providing for an exception for state laws enacted after January 1, 2004, thus making the preemption provisions permanent. The amended section 624(d) would read the same as the section quoted above from S. 660.

In addition to the Fair Credit Reporting Act amendments, H.R. 1766 would also amend the Gramm-Leach-Bliley Act to prohibit the enactment of state laws regarding subjects addressed under the Act. As amended, Section 507 of the Act would read as follows:

No requirement or prohibition may be imposed under the law of any State, or any political subdivision of any State, with respect to any subject matter regulated under or addressed by any provision of this subtitle.

H.R. 1766 was referred to the House Committee on Financial Services. No additional action has been taken.

H.R. 2622, the Fair and Accurate Credit Transactions Act of 2003, was introduced on June 26, 2003. Among other things, the Act would amend the Fair Credit Reporting Act's preemption provisions to make the current expiring preemptions permanent. As amended, section 624(d) of the FCRA would read the same as under S. 660, discussed above.

H.R. 2622 was reported out of the House Committee on Financial Services on July 24, 2003, with a number of substantive amendments not specifically related to preemption. The bill, as reported, retains the language making permanent the FCRA's current preemptions.