

TO: Honorable Barbara Lee
Attention: Julie Little

FROM: Angie A. Welborn
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American Law Division

SUBJECT: Effect of H.R. 2622 on Current California Law and the Proposed Financial Privacy Ballot Initiative

As per your request, this memorandum provides an analysis of the effect of H.R. 2622 on California law.¹ Specifically you asked which state laws enacted since 1996 would be preempted under H.R. 2622 and the impact of H.R. 2622 on the proposed California financial privacy ballot initiative.

Preemption of Current State Law

H.R. 2622 would make permanent the Fair Credit Reporting Act's preemption provisions which are set to expire as of January 1, 2004.² Under these provisions, seven specific sections of the FCRA preempt state laws which attempt to impose other requirements or prohibitions related to the subject matter addressed in the applicable section.³ State laws which impose requirements or prohibitions with respect to the exchange of information among affiliates are also preempted under the FCRA.⁴

While H.R. 2622 does not change the enumerated sections of the Act which preempt state laws, it does make a number of changes to the underlying sections of the FCRA referenced in the preemption section.⁵ H.R. 2622 appears to make substantive changes to two sections of the FCRA which could lead to the preemption of certain state laws which are not preempted under the current FCRA. The changes made to each section, and the corresponding state laws which could be subject to preemption, are discussed below.

Section 605

¹ All references to H.R. 2622 are to the Amendment in the Nature of a Substitute to the Committee Print of July 18, 2003, offered by Mr. Oxley, and approved by the House Committee on Financial Services on July 24, 2003.

² For more information on the FCRA's preemption provisions, see CRS Report RS21449, *Fair Credit Reporting Act: Preemption of State Law*.

³ 15 U.S.C. 1681t(b)(1) and (3).

⁴ 15 U.S.C. 1681t(b)(2). This section is discussed below with respect to the California financial privacy ballot initiative.

⁵ The specific sections of the FCRA which preempt state laws are subsections (c) and (e) of section 604 (related to prescreening); section 611 (related to the time by which consumer reporting agencies must take certain actions); subsections (a) and (b) of section 615 (relating to the duties of persons who take adverse actions with respect to a consumer); section 615(d) (relating to the duties of persons who use consumer reports in connection with transactions not initiated by the consumer); section 605 (relating to the information contained in consumer reports); section 623 (relating to the responsibilities of furnishers of information); and section 609(c) (related to certain disclosures that must be made to consumers). 15 U.S.C. 1681t(b).

Under H.R. 2622, several amendments would be made to section 605 of the FCRA which currently relates to the information contained in a consumer report.⁶ Section 605 would be expanded to include additional requirements related to identity theft prevention,⁷ and, pursuant to the preemption provisions in the FCRA, which would be made permanent by H.R. 2622, would preempt any related state laws which were not in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996.⁸ The new section 605 would include provisions related to the placement of fraud alerts in consumer credit reports,⁹ the truncation of credit card account numbers on printed receipts,¹⁰ the blocking of certain information in a consumer's report resulting from identity theft,¹¹ and the reconciliation of addresses where there is a discrepancy between the address furnished by the requester and the address on file with the consumer reporting agency.¹²

Several California laws enacted after 1996 could be preempted under the amended section 605. The California law was recently amended to include several provisions aimed at assisting victims of identity theft. Among other things, the amendments allow consumers to place security alerts or security freezes in their credit reports and place certain responsibilities on credit agencies with respect to doing so.¹³ The California law related to security alerts appears to be similar to the new provision that would be added to section 605 regarding fraud alerts, and would thus likely be preempted. It is not clear, however, whether the provisions of California law related to security freezes would be preempted as security freezes would not be addressed in the amended section 605. California statutes related to the verification of addresses when the address on a credit application does not match the address on file with the consumer reporting agency¹⁴ and the truncation of credit card account numbers on receipts could also be preempted.¹⁵

Section 623

H.R. 2622 would also amend section 623 of the FCRA which relates to the duties of furnishers of information. Pursuant to the FCRA's preemption provisions, section 623 preempts state laws that impose requirements or prohibitions with respect to persons who furnish information to consumer reporting agencies.¹⁶ Two state statutes are explicitly excluded from preemption. They are section 54A(a) of chapter 93 of the Massachusetts Annotated Laws and section 1785.25(a) of the California Civil Code.¹⁷

Under the amended section 623, if a financial institution that furnishes information to a consumer reporting agency furnishes negative information regarding credit extended to a customer, the institution would also be required to provide a notice of such furnishing of

⁶ Section 605 is codified at 15 U.S.C. 1681c.

⁷ See H.R. 2622, Title II.

⁸ 15 U.S.C. 1681t(b)(1)(E).

⁹ H.R. 2622, Sec. 202.

¹⁰ H.R. 2622, Sec. 203.

¹¹ H.R. 2622, Sec. 205.

¹² H.R. 2622, Sec. 401.

¹³ Cal. Civ. Code § 1785.11.1; Cal. Civ. Code 1785.11.2. These provisions were enacted in 2001, and became effective July 1, 2002.

¹⁴ Cal. Civ. Code § 1785.20.3(a). This provision was enacted in 2001.

¹⁵ Cal. Civ. Code § 1747.9. This provision was enacted in 1999 and became effective January 1, 2001.

¹⁶ 15 U.S.C. 1681t(b)(1)(F).

¹⁷ *Id.*

negative information, in writing, to the consumer.¹⁸ California has a similar law, which requires creditors who submit negative information to a consumer reporting agency to notify the consumer affected.¹⁹ While section 1785.25(a) of the California Civil Code is excluded from preemption, the section containing the notification requirement is not excluded and would thus likely be subject to preemption.

Effect on Proposed Financial Privacy Ballot Initiative

As noted above, H.R. 2622, if enacted, would make permanent the FCRA's preemption provisions which are set to expire at the end of the year. These provisions provide that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control."²⁰ Reportedly, if approved, the California financial privacy ballot initiative would "bar 'affiliate sharing,'" absent a consumer's explicit consent.²¹ The initiative would reportedly require financial institutions to first obtain a consumer's explicit consent before selling or sharing the consumer's personal or financial information with affiliates for any purpose other than to complete a transaction initiated by the consumer.²² As it seeks to restrict the sharing of information among affiliates, the law resulting from the initiative would likely be preempted pursuant to the FCRA's preemption provisions should those preemptions be made permanent as in H.R. 2622.

¹⁸ H.R. 2622, Sec. 504.

¹⁹ See Cal. Civ. Code 1785.26(b).

²⁰ 15 U.S.C. 1681t(b)(2). Subsections (a) and (c)(1) of section 2480e of title 9 of the Vermont Statutes Annotated are excluded from preemption.

²¹ Carolyn Said, *Privacy bill backers ready to go to ballot, Pass law or face initiative, they tell Legislature*, San Francisco Chronicle, July 21, 2003. <www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/07/31/MN61145.DTL>. Complete text of the actual initiative has not been made available.

²² <www.californiaprivacy.org/framework.shtml>.