DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB−2410/P2dn
ARG:cjs:rs

July 5, 2007

ATTN: Eric Knight

Please review the attached draft carefully to ensure that it is consistent with your intent.

In our meeting on May 31, we discussed two approaches for this redraft, depending on whether a trigger lead is, or is not, a consumer report under the Fair Credit Reporting Act (FCRA). It occurred to me that these two approaches are not mutually inconsistent, so the attached draft incorporates both approaches.

Created s. 100.55 (2) contains provisions that apply if a trigger lead is not a "consumer report" under the FCRA. In these circumstances, the federal preemption provisions of the FCRA would not apply and the state would be free to restrict the dissemination or use of trigger leads. The provisions of s. 100.55 (2) would also cover data assemblers that are not consumer reporting agencies.

Created s. 100.55 (3) contains provisions that apply if a trigger lead is a "consumer report" under the FCRA. The provisions of created s. 100.55 (3) are modeled in part on the Connecticut legislation provided to me. If trigger leads are considered "consumer reports" under the FCRA, this state is limited in its ability to devise and enforce legislation related to these trigger leads. If s. 100.55 (3) of the attached bill were challenged on federal preemption grounds, I believe it would be difficult to predict how a court would rule on the challenge. The FCRA covers not just the distribution of consumer reports but also use of consumer reports by those who receive them from consumer reporting agencies. While the FCRA recognizes a general authority of states to enact and enforce legislation relating to the collection, distribution, and use of consumer information if this legislation is not inconsistent with the FCRA, there are certain subject areas within the FCRA in which the intent of the FCRA is to "occupy the field" and preempt all state legislation related to that subject area. Prescreened consumer reports is one such area. The FCRA states, "No requirement or prohibition may be imposed under the laws of any State − (1) with respect to any subject matter regulated under − (A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports; ... (D) section 1681m (d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit ... transaction that is not initiated by the consumer and that consists of a firm offer of credit ...." 15 USC 1681t (b). Accordingly, under this provision of the FCRA,

the entire subject area of *use* of prescreened consumer reports is preempted, suggesting that created s. 100.55 (3) in the attached draft may be found to be preempted if challenged in court. (As discussed previously, federal law also specifically limits states from attempting to modify the "firm offer of credit" definition. 15 USC 1681t (c).) However, the FCRA also specifically provides that 15 USC 1681m, relating to use of prescreened consumer reports, "is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit ... transaction that is not initiated by the consumer." 15 USC 1681m (d) (4). It is difficult to predict how a court would assess created s. 100.55 (3) in the attached draft in light of 15 USC 1681m (d) (4) and 1681t (b) (1) (D).

The provisions of the attached draft relating to investigative and enforcement authority should be found consistent with the general scope and purpose of the FCRA. See, e.g., 15 USC 1681s (c). Also, federal law already prohibits a person from using or obtaining a consumer report for any purpose other than an authorized purpose and requires that the purpose be certified to the consumer reporting agency by the prospective user. 15 USC 1681b (f). The state is authorized to investigate and enforce violations of this provision of the FCRA. See 15 USC 1681s (c).

If any portion of the attached bill is found to be preempted and unenforceable, that portion would be severable from the remainder of the bill. See s. 990.001 (11).

The most challenging part of this draft was creating the various definitions. Please review these carefully.

After I completed this draft, I spoke with Sandra McCarthy at the Federal Trade Commission regarding my letter dated June 7, 2007. The FTC considers trigger leads to be permissible prescreened consumer reports and, while the FTC is concerned with unfair or deceptive practices by those who obtain trigger leads and also with do–not–call violations by those using trigger leads, the FTC is taking no broad enforcement action related to providing trigger leads. My understanding of the FTC's position is that the FCRA allows a consumer reporting agency to provide inquiry information, loan application numbers, loan amount information, and other loan–related information so long as the information does not identify the relationship of the consumer with a *particular creditor*. The FTC's position is also that the FCRA allows telephone numbers to be released in prescreened consumer reports. Ms. McCarthy suggested that the factual scenario described in my letter was not entirely accurate, but I am still unclear as to the exact process under which the trigger lead information is assembled and furnished to other lenders (who then solicit the original loan applicant). Based upon my conversation with Ms. McCarthy, created s. 100.55 (2) in the attached draft may have little or no practical application. Also, to the extent the FTC's position on trigger leads may be inconsistent with the FCRA, state enforcement action is possible under the FCRA, although I imagine it would be very difficult to enforce the FCRA without the support of the FTC.

Please let me know if you would like any changes made to the attached draft or if you have any questions. If the attached draft meets with your approval, let me know and I will convert it to an introducible "/1" draft.

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