Legislative Update

October 2010

Federal

Toward the new Consumer Financial Protection Bureau (CFPB)

Some observers expected President Obama to announce his choice for the Director of the new CFPB at the July 21st signing of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the new agency. When that did not occur, the uncertainty about whether the new Director would take up his or her duties via regular order (i.e., through Senate hearings and confirmation) or through a recess appointment was answered by the President's appointment of Harvard Professor Elizabeth Warren on September 20 to be an "assistant to the President". Although not the official "Director" of the new agency, her duties would be focused on establishing the new agency.

The CFPB will have full examination and enforcement authority over TransUnion. Professor Warren originally framed the concept of a CFPB and is seen by many as the only acceptable person for the Director's job. However others, including Senate Banking Committee Chairman Christopher Dodd, viewed her as being too difficult to confirm, given her unwavering vocal criticism of many financial institutions.

In the days since her appointment, Ms. Warren's actions (e.g., announcing and acting on a top priority—mortgage disclosures; meeting with senior financial services executives) clearly indicate that she will be acting as an interim Director, and not merely making staffing and internal organizational decisions. Meanwhile, Treasury Secretary Timothy Geithner on September 22nd established July 21, 2011 as the "designated transfer date"—the date on which actual responsibilities are transferred from existing federal agencies to the new CFPB. As we learn more on who will be staffing this new agency TransUnion intends to proactively reach out to educate these new regulators about our business and our processes.

Scores, Accuracy, and Permissible Purpose

The related credit-reporting issues of credit scoring, information accuracy, and permissible purpose continued to receive attention in the House of Representatives

after enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act. On September 23, the Financial Institutions and Consumer Credit (FICC) Subcommittee of the Financial Services Committee held a hearing on a bill to ban use of credit reports by employers: HR 3149—The Equal Employment for All Act. Representatives of employer groups and the US Chamber of Commerce argued that the practice is limited to appropriate jobs, that the consumer protections in existing law and regulation are strong, and that employers have a legitimate need for this information. Supporters of the ban argued that there is no correlation between credit report and job performance, that credit reports are inaccurate, and that many employers routinely ignore the protections in current law. The prospects for further action on this bill after the November 2nd midterm elections are unknown.

On September 29, the House passed the Medical Debt Relief Act of 2010 on a vote of 336-82, requiring deletion of paid medical collections from consumer reports. The trade association representing the major national consumer reporting agencies, Consumer Data Industry Association, was essentially the only source of opposition—arguing against arbitrary rules deleting valid and predictive information from credit reports. The principal sponsor, Ohio Representative Mary Jo Kilroy, argued that the data were not predictive, that its deletion would in fact improve the accuracy of credit reports, and that the measure was supported by many business groups, including the National Homebuilders Association and the National Credit Reporting Association. The strong vote (with all but one Democrat and about half of the Republicans supporting the bill) suggests that the measure could continue its momentum if the Senate decides to fold it into other legislation during the lame duck session.

States

Employer Use of Credit Information

For the third year in a row, **California** Governor Arnold Schwarzenegger vetoed a bill restricting the use of credit information by employers. The governor stressed that he vetoed the bill, AB 482, “on the basis that California’s employers and businesses have inherent needs to obtain information about applicants for employment and existing law already provides protections for employees from improper use of credit reports. As with the last two bills, this measure would also significantly increase the exposure for potential litigation over the use of credit checks.”

In August, **Illinois** Governor Pat Quinn signed into law HB 4658, which limits employers’ ability to inquire about and use credit reports in employment situations. The effective date is January 1, 2011. Illinois is now the fourth state to enact this type of law, after Washington, Hawaii and Oregon.

In New Jersey, a fifth bill banning employer’s use of credit was recently introduced, this one by Ruben J. Ramos Jr. (D-Hoboken). This bill is identical to SB 1922, and states that “[no employer or employer’s agent…shall seek to obtain or require a

©2010 TransUnion LLC All rights reserved 555 West Adams Street, Chicago, IL 60661

current or prospective employee to provide or consent to the creation of a credit report that contains information about the current or prospective employee's credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers as a condition of employment, unless the employer is required by law to obtain a credit report, or the employer reasonably believes that the employee has engaged in a specific activity that is financial in nature and constitutes a violation of law."

The bill then goes on to allow credit checks if "an established bona fide occupational requirement of a particular position or employment classification" exists, including in a managerial position which involves setting the financial direction or control of the business; involving access to customers', employees', or employers' personal or financial information, other than information customarily provided in a retail transaction; involving a fiduciary responsibility to the employer, including, but not limited to, the authority to issue payments, transfer money or enter into contracts; or providing an expense account for travel.

As noted in the previous *Legislative Update*, the three bills, besides AB 3238 and SB 1922 noted above are: AB 3199, SB 1791 AB 2561. While none of these bills have been scheduled for a hearing, TransUnion will be engaged with them if they see any progress.

A new bill, HB 586, has been introduced in **Ohio** that would amend the Labor & Industry Title so that: (A) No employer shall discharge, refuse to hire, or otherwise discriminate against any person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment based upon a consumer report or investigative consumer report if the report contains information concerning the person's consumer creditworthiness, credit standing, or credit capacity, however it does not apply to an employer's use of a consumer report or investigative consumer report if the position of employment is a supervisory, managerial, professional, or executive position at a financial institution. As is typical in the early stages of similar bills in other states, the bill limits the use of consumer reports, thus reaching deep in to criminal histories. The bill has not yet been referred to a committee and the legislature is out until after the election, so we do not yet know if it will receive consideration.

In **Pennsylvania**, we have another bill to regulate the use of credit for employment screening. This one, SB 420, has several co-sponsors, but only one is on the committee of referral, Labor & Industry. The bill amends the Human Relations Law by making it an unlawful discriminatory practice for any employer or potential employer to procure a consumer report for employment purposes where any information contained in the report bears on the consumer's credit worthiness, credit standing or credit capacity, unless the information is either: (1) substantially job-related and the employer's or potential employer's reasons for the use of the information are

©2010 TransUnion LLC All rights reserved 555 West Adams Street, Chicago, IL 60661

disclosed to the consumer in writing, in which case, the burden of proof shall be on the employer or potential employer to demonstrate that the employee or potential employee's credit worthiness, credit standing or credit capacity is substantially job-related; or (2) required by law. Exceptions are provided for a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania. Although SB 420 was scheduled to be heard this fall, due to a full agenda it has now been removed from the hearing calendar. We expect it to be considered in 2011.

Foster Youth and Identity Theft
In **California**, Governor Schwarzengger vetoed AB 2698, which would have made further corrections to the state foster youth and identity theft law. The governors veto message was similar to last year's veto, which stated that "this measure does not address any of the concerns I outlined in last year's veto message about counties attempting to shift workload to the state."

Security Breaches
California Governor Schwarzenegger, showing his consistency, also vetoed SB 1166, marking another attempt by Senator Joe Simitian to amend the law, and the second veto of this topic. In addition to requiring notice to the State's Attorney General for certain breaches, his current effort would have required notices stating: general description of the breach incident; the type of information breached; the date and time of the breach; whether the notification was delayed because of a law enforcement investigation; and a toll-free number of major credit reporting agencies if the breach exposed Social Security numbers, driver's license numbers, or state identification card numbers. Similar to his veto of SB 20 last year, the Governor explained in his veto message that the additional restrictions of SB 1166 were "unnecessary" because "there is no evidence that there is a problem with the information provided to consumers" under California's existing data breach laws. He further noted that "there is no additional consumer benefit gained by requiring the Attorney General to become a repository of breach notices when this measure does not require the Attorney General to do anything with the notices."

Insurance Scoring
The issue of insurers' use of credit reports and credit-based insurance scores continued to receive national, if not Congressional, attention, as the National Association of Insurance Commissioners (NAIC) appeared set to modify the data call aimed at evaluating this practice. In testimony on May 12 before the FICC Subcommittee, Illinois Insurance Commissioner Michael McGraith described the NAIC's plans for a voluntary data call to property and casualty insurers. Insurance trade groups expressed concern over confidentiality as well as the burden of the project, given the existence of 19 separate studies of this matter in the states. On

©2010 TransUnion LLC All rights reserved 555 West Adams Street, Chicago, IL 60661

September 28, the National Conference of Insurance State Legislators (NCOIL) urged the NAIC to instead support NCOIL's *Model Act Regarding Use of Credit Information in Personal Insurance*, which has been enacted in 27 states.

On September 30, at an all-day hearing at NAIC offices in Kansas City, after the trade representatives, including representatives from PCIAA, NAMIC, and AIA made opening remarks, Chairman McRaith and other members of the Property Casualty Committee seemed to back away from the current form of the data call almost without a fight. Whether the reason was because the members of the committee took to heart industry testimony regarding the significant complications inherent in the data call as currently drafted or because they felt it was far more expansive than it needed to be in order to obtain the information they are seeking, the committee ultimately decided to make substantial changes to the structure of the data call.

The data call will now consist of 10-15 hypothetical consumer profiles that companies, most likely just the top 10 writers nationally and/or in a particular state, will then rate. Insurers would provide premium quotes for particular profiles and then provide premium calculation for those with, for example, the best and worst insurance scores (as well as possibly up to four other rating factors). The data call will also include narrative questions similar to those included in a survey conducted last year by the New Jersey Department of Banking and Insurance (DOBI) that was primarily intended to measure the impact of current economic conditions on insurance scores. It will also incorporate the Arkansas survey measurement of what percentages of the population either pay more for their insurance due to the use of credit information, what percentage pays less and what percentage is otherwise unaffected. While the devil is in the details with this new data call, it certainly seems as if many of our concerns with the data call will be eliminated with this new format.

Legislative Updates are written and distributed by the Government Relations Department and are available on TransUnion InSite or at http://www.transunion.com/corporate/business/clientSupport/resources/legislativeUpdate.page

Bob Ryan
Vice President of Government Relations
(312) 466-7799
rryan@transunion.com

Eric Rosenberg
Director of State Government Relations
(312) 466-6323
erosenb@transunion.com

To view a PDF file, you must have Adobe Acrobat Reader Version 5.0 or higher installed on your computer. To download a free copy of Adobe Acrobat Reader, follow the instructions on this Web site: http://www.adobe.com/products/acrobat/readstep2.html

© 2010 TransUnion LLC. All Rights Reserved.

©2010 TransUnion LLC All rights reserved 555 West Adams Street, Chicago, IL 60661