Protecting Credit Since 1916
American Financial Services Association

Aug 26, 2019

Commissioner Rickisha L. Hightower
Office of the Commissioner
Financial Institutions Division
Department of Business and Industry
3300 W. Sahara Ave., Suite 250
Las Vegas, Nevada 89102

**Re: Senate 311/Chapter 280**

Dear Commissioner Hightower:

Thank you and Ms. Young for meeting with me and others from the American Financial Services Association (AFSA)[1] and the Nevada Financial Services Association to discuss our concerns about Senate Bill 311 / Chapter 280 ("SB 311") last week. I repeat the points we made to you at that meeting in this letter and reiterate our position that SB 311's provisions are impossible to comply with and immediate action is required from your office if creditors are to avoid being non-compliant when the law goes into effect on October 1, 2019.

The provisions of the law require creditors to deem an applicant with no credit history to have identical credit history to a spouse's or former spouse's credit, established during a marriage. This requires creditors to consider credit bureau information relating to third-parties, something we believe is legally impossible under the Fair Credit Reporting Act ("FCRA") and the Equal Credit Opportunity Act ("ECOA"), both of which preempt SB 311. Even if this law were not independently preempted by both the FCRA and the ECOA, the information necessary for compliance with the law is not held by credit bureaus.

Our detailed comments on the challenges with this law are listed below, followed by our recommendations for action which are urgently required if creditors are not to be forced into non-compliance when the law goes into effect.

## I. SB 311 Forces Creditors to Violate the Permissible Purpose Provisions of the FCRA

FCRA Section 1681b outlines permissible purposes of consumer reports. It states that credit bureaus "may furnish a consumer report under the following circumstances ***and no other***."[2] The list of permissible purposes for which a credit report may be used does not include the actions required for compliance with SB 311.

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[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

[2] 15 U.S.C. § 1681b (emphasis added).

Furthermore, the only way a creditor could conceivably access this information (albeit in limited form)—both in the cases of a *current* spouse or *former* spouse—is with written authorization from the non-applicant subject of the consumer report. Creditors could not otherwise obtain that report without the non-applicant spouse's written authorization, as no other applicable permissible purpose would apply.

## II. SB 311 Violates ECOA Proscription on Inquiries Relating to Marital Status

Creditors in non-community property states generally cannot request information relating to marital status unless the applicant is relying on property in a community property state as the basis for repayment of the requested credit or is acting as the agent of the non-applicant spouse.

Because Nevada is a community property state, a creditor may inquire about marital status. However, upon determining the applicant is not married, such that the community property laws are inapplicable to the particular credit for which the application was submitted, the collection of additional information regarding a former spouse would be prohibited under ECOA and its implementing regulation, Regulation B.[3]

Regulation B provides that, except as otherwise provided, a creditor "may not request any information concerning the spouse or former spouse of an applicant."[4]

> *A creditor is specifically prohibited from considering, in its evaluation of creditworthiness, information it is prohibited from obtaining or from using that information for any purpose except permitted self-testing.*[5]

## III. Credit Bureaus are Unable to Provide the Reports SB 311 Envisages

SB 311 does not impose any requirements on credit bureaus, yet the type of information that credit bureaus—and only credit bureaus—hold, is central to the law. Even so, the precise nature of the information that would allow SB 311 to function as it was presumably intended to, is not available to credit bureaus.[6]

Even if a permissible purpose to access consumer reports *could* be established—and it cannot—credit bureaus do not have the information necessary for compliance with the law. SB 311 requires creditors deem the credit history of an applicant to be identical to the credit history of the applicant's spouse *established during the marriage*.[7] Yet credit bureaus report only on the

[3] Reg. B allows a creditor to inquire about an applicant's former spouse if the "applicant is relying on alimony, child support, or separate maintenance payments from a spouse or former spouse as a basis for repayment of the credit requested." See 12 CFR 1002.5(c)(2)(v). Relying on the former spouse's credit history is not included in the list provided in 12 CFR 1002.5(c)(2)(v).

[4] 12 C.F.R. § 1002.5(c)(1).

[5] Commentary to 12 CFR 1002.6(a)(1) at ¶ 1.

[6] Though AFSA does not represent the credit bureau industry, this is our understanding after numerous conversations with credit bureaus and credit bureau counsel.

[7] NV SB 311 8oth session (2019) § 3(c) / Ch. 280. *Emphasis added.*

most up to date status of an account.[8] The accuracy requirement of FCRA compels them to ensure "maximum possible accuracy" of the information they report, and it would be inaccurate to report an historical status.[9] In fact, credit bureaus generally are prohibited by law from providing any negative information older than seven years (and bankruptcies after 10 years). Because they cannot supply a complete picture of an account older than seven years, even positive information is dropped due to the "reasonable procedures to assure maximum possible accuracy" requirement under FCRA.[10]

There are also potential unintended consequences for non-applicant spouses whose consumer reports are used in the way required by SB 311.[11] Obtaining a credit report on a non-applicant spouse or former spouse would likely create a "hard inquiry," potentially affecting the creditworthiness of the non-applicant former spouse and remaining on the report as a factor for up to two years.[12] This risks inundating creditors with inquiry disputes from non-applicants.[13] Even if an attempt to remove the inquiry could be coordinated with the non-applicant, there is no guarantee the inquiry would be removed and any negative effect on the non-applicant's credit score would potentially have to be endured.[14]

In any case, the FCRA states that a creditor may not procure a credit report of a non-applicant unless the individual has given authorization in writing to procure it.[15] In the case of a former spouse, there is no mechanism in SB 311 to procure the written authorization, which the former (non-deceased) spouse could quite easily withhold.[16]

## IV. Other Considerations

Though AFSA's primary concern with SB 311 is its impossibility—both in terms of preemption and practical availability of the required information—a number of secondary issues also speak to the compliance challenges with the new law.

### A. Privacy

[8] The challenge with SB 311 is amplified by the fact that credit scores and reports may fluctuate on a weekly basis, depending on credit utilization in a revolving credit line or payment dates or reporting dates, so credit history "during the course of the marriage," is not knowable.

[9] Credit bureaus must use "reasonable procedures to assure maximum possible accuracy" under the FCRA. 15 U.S.C. § 1681e (b)

[10] 15 U.S.C. § 1681e (b)

[11] Using the spouse's credit history may result in imputing debts to an applicant that results in them being reviewed as not having an ability to repay and also do not reflect the debts and obligations of the actual borrower which is required under 12 C.F.R. 1026.43(c) and 1026.51(a).

[12] If an applicant were to apply for many different types of credit, this may create the false impression that the non-applicant former spouse is suddenly desperately looking for credit, which could have a significant adverse effect on his or her creditworthiness.

[13] In AFSA members' experience, both the creditor and the person whose credit was pulled must send in a nearly identical letter requesting removal of the inquiry and a valid reason why the credit reporting agency should do so.

[14] This also raises the question that if the applicant is turned down due to information used in the non-applicant's credit report, would the creditor required to provide an adverse action notice to the non-applicant, per 15 U.S.C. § 1681m (a)?

[15] 15 U.S.C. § 1681b (b)(2)(A)

[16] In fact, credit bureaus have told AFSA that there has been an increase in the number of complaints on joint credit applications, where a current spouse alleges that his or her consent was not given for joint credit.

At a time when privacy and data security are daily concerns and top of mind for policymakers, regulators and businesses, SB 311 raises significant questions about data sharing and an individual's right to privacy, with no clear options for resolution. SB 311 would expose creditors to potential litigation for invasion of privacy, opening them up to accusations of intrusion into private affairs, disclosures of private information, or appropriation of an identity for personal gain (assuming no consent).

Privacy concerns also have a special importance in cases of divorce where former spouses seek to cut all ties. In cases where, for example, a restraining order exists between the parties, or where domestic abuse or criminal activity may have been a factor in the divorce, SB 311 may inadvertently violate a person's privacy and put her or him at risk.

Simply put, sharing credit information outside of the traditional borrower-lender-credit bureau model (or other permissible uses) for the use by a third-party whose credit decisions are presumably unknown to the subject of the information, is at odds with wider efforts to limit the sharing of personal data for security reasons. Even deceased individuals maintain certain privacy rights, which is why access to a deceased individual's credit report is only granted to an executor of an estate authorized to act on the deceased's behalf.[17]

### B. "No Credit History"

Significantly, the new law fails to define what constitutes "no credit history" for an applicant and creates potential regulatory, enforcement, and litigation risk for creditors. What if a consumer has a credit history, but has disputed and ultimately deleted all credit information in their report? That would show up as having "no" credit history when accessed by a creditor, even though the consumer did in fact have a history.

### C. Office of Foreign Assets Control (OFAC) Considerations

Under OFAC, the primary responsibility of lenders is to ensure that they do not do business with individuals on the Specially Designated Nationals and Blocked Persons List (SDN). Any discrepancies must be cleared before proceeding with the extension of credit. Reconciling this with accessing a third-party credit report as a means to make credit decisions presents a number of challenges, particularly when one considers that the creditor's relationship is with the applicant, not the subject of the credit report, who may (in the case of a non-deceased former spouse) be unaware that the credit is being sought. Checking "red flags" relating to places of residence, name changes and other factors becomes exponentially more difficult.

In addition, it is unclear as to what would happen if an applicant's spouse or ex-spouse did appear on the SDN list. Even in cases where the applicant's spouse or ex-spouse had good credit, would the lender be required to deny the credit extension to the applicant and report the applicant's spouse or former spouse to OFAC? There is also the risk that traffickers or, indeed, other criminal elements, subvert the system by using former spouses to secure credit using their

[17] *For more information, see* https://www.experian.com/blogs/ask-experian/executor-of-estate-can-obtain-deceaseds-credit-report.

history.

## V. Requested Action

NRS 598B.090 empowers the Commissioner to administer the law and requires the Commissioner cooperate and assist all public and private agencies in their efforts to eliminate discrimination. On that basis, we request your assistance in ensuring that creditors who have no way to comply with the law, as demonstrated above, are not deemed to be non-compliant when it goes into effect. We believe the following actions are urgently required.

### A. Notice of Non-Enforcement

The Financial Institutions Division should issue a Notice of Non-Enforcement based on federal preemption and the unworkability of SB 311.By undertaking not to enforce the provisions of SB 311, FID will protect entities who have no way of complying with the law from the potential consequences of non-compliance. This would create the necessary breathing space for a legislative solution to be sought.

### B. Attorney General Requests from FID

The Financial Institutions Division should request an opinion from the Attorney General on the preemption issues raised by SB 311, if FID has doubt about the preemption issues herein.

The Attorney General can also play a critical role in alleviating the negative effects of SB 311. We additionally respectfully request that the Division:

- Request that the Attorney General states the provisions of the law relating to spouse / former spouse credit records are unenforceable;
- Request that the Attorney General approves a stay of provisions of the law relating to spouse / former spouse credit records in court.

Thank you for your attention and assistance in this matter. If you have any questions or would like to discuss this further, please do not hesitate to contact me at 952-922-6500 or dfagre@afsamail.org.

Sincerely,

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