

Congress Considers Changes to FCRA to Expand Consumer Credit Files and Limit Use of Credit Reports for Employment Decisions

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Two bills amending the Fair Credit Reporting Act (FCRA) intended to benefit consumers are making their way through Congress. H.R. 4172, "The Credit Access and Inclusion Act of 2015," has bipartisan support, although it is opposed by certain consumer groups. H.R. 3524, the "Equal Employment for All Act of 2015," is a Democratic-supported bill with far less chance of becoming law.

H.R. 4172 - "The Credit Access and Inclusion Act of 2015"

H.R. 4172,¹ introduced by Representative Keith Ellison (D-MN) along with 20 bipartisan cosponsors, has the stated purpose of amending the FCRA "to clarify Federal law with respect to reporting certain positive consumer credit information to consumer reporting agencies (CRAs), and for other purposes."² According to the sponsors, H.R. 4172 "would allow utility and telecom companies and landlords to report on-time payment data to [CRAs] – helping those with little to no credit build their credit scores based on a full picture of their payment history."³

Supporters argue consumers will benefit from increased reporting of credit information.

Furnishing all payment data, both positive and negative, to CRAs is known as "full-file reporting."⁴ While utility and telecom companies are major consumers of credit reports, most either report to CRAs "only negative information (delinquencies, defaults, and collections,) or do not report at all."⁵ Regulatory uncertainty on the legality of furnishing data to CRAs was identified as "the primary policy barrier to sharing energy utility and telecommunications data with CRAs."⁶ H.R. 4172 addresses that uncertainty by affirmatively allowing full-file reporting.

Supporters of full-file reporting for telecom and utility providers, or whose research supports the expanded use of "alternative" or "nontraditional" data like recurring payments for rent, utilities, and telecom service,⁷ as would be allowed under H.R. 4172, believe furnishing positive and negative payment history will increase the amount of credit history reported for millions of Americans, allowing for more affordable access to credit.⁸ The CFPB estimated that as of 2010, roughly 26 million Americans are without a credit history, and roughly 18 million more have credit history that is too thin or too old to be scored.⁹ Players in the credit reporting industry, whose support is highlighted on one of the bill sponsor's website, believe H.R. 4172 will improve the credit history of those Americans who have been termed "credit invisibles."¹⁰

Increased reporting from utility and telecom companies could help expand consumer credit histories, as these

industries' concentration makes widespread data collection by CRAs feasible, and the vast majority of Americans, including those without much credit history, have utility and telecom services.¹¹ Supporters claim full-file reporting from utilities and telecom services can increase access to credit for, as of 2011, the "as many as 75 million Americans who are excluded from the mainstream credit system not because of bad credit history, but rather due to a lack of information."¹² H.R. 4172's sponsors believe "nearly 100 million Americans would be able to establish a credit score, or raise their existing score" if H.R. 4172 was implemented.¹³

H.R. 4172 states in relevant part:

"(f) Full-File Credit Reporting. –

(1) IN GENERAL. – . . . notwithstanding any other provision of law, a person or the Secretary of Housing and Urban Development may furnish to a consumer reporting agency information relating to the performance of a consumer in making payments –

(A) under a lease agreement with respect to a dwelling, including such a lease in which [HUD] provides subsidized payments for occupancy in a dwelling; or

(B) pursuant to a contract for a utility or telecommunications service."

...

"(3) PAYMENT PLAN – An energy utility firm may not report payment information to a [CRA] with respect to an outstanding balance of a consumer as late if –

(A) the energy utility firm and the consumer have entered into a payment plan . . . with respect to such outstanding balance; and

(B) the consumer is meeting the obligations of the payment plan, as determined by the energy utility firm."

Opponents argue consumers will be harmed by increased reporting of credit information.

The bill's opponents, including consumer groups like the National Consumer Law Center (NCLC), believe this increased reporting will actually harm consumers instead of helping them.¹⁴ Currently, at least three states prohibit utility or telecom providers from sharing a customer's payment history or financial information to CRAs without the customer's consent.¹⁵ The bill will preempt those laws by permitting utility and telecom providers to furnish such information to CRAs.

The NCLC outlined its concerns with H.R. 4172 in a letter of opposition written to Congress on September 8, 2015. It is noteworthy that the NCLC does "not oppose permitting consumers to voluntarily opt-in to utility credit reporting or efforts to include certain other types of 'alternative data,' such as rental data if reported appropriately."¹⁶

The NCLC's first concern is that H.R. 4172 will preempt state privacy laws prohibiting the furnishing of payment information from utility customers, as well as set a "dangerous precedent by encroaching on long-standing state jurisdictional authority over gas and electric utilities."

Next, the NCLC believes the data that proponents cite to show how few consumers have late utility payments, and therefore how few consumers will see their credit score lowered by H.R. 4172, is inaccurate. Moreover, the NCLC disagrees with proponents' assertions that a low credit score is better than no score, as a negative credit report can hurt employment chances and a low credit score makes consumers vulnerable to predatory lending.

Lastly, the NCLC is concerned that full-file utility credit reporting will harm the credit scores of consumers "retaining service and paying late under terms of state-sanctioned protections." Reporting "threatens consumers with black marks on their credit reports even when state law provides for protection against disconnection of service." Moreover,

although H.R. 4172 prevents utilities from reporting late payments when a consumer is making payments according to a payment plan, the utility is given full discretion over whether the consumer is meeting the obligations of the payment plan. NCLC opposes what it considers "broad utility discretion," and notes a "lack of consumer[] ability to dispute a utility's determination."

Concluding thoughts on H.R. 4172 and its effects on CRAs and financial institutions.

H.R. 4172 stands to help consumers with little credit history but a record of paying their utility, telecom, and rental payments on time. Consumer groups like the NCLC highlight the negative effects of a low credit score or poor credit report, whereas proponents cite the benefits of a more complete credit history, including increased access to affordable credit markets. In addition, a Brookings Institute study showed how lenders can benefit from a more complete credit history available due to full-filing reporting, which in turn has a positive effect on the whole economy.¹⁷ The study concluded that incorporating full-file utility and telecom payments in traditional consumer credit reports would significantly lower a lender's default rate. Finally, CRAs will have more data to sell, and their reports will be even more predictive, as the Brookings Institute study showed. As various industries clamor to use Big Data to better serve their clients, be it through underwriting by insurers or lending by financial services companies, CRAs will find opportunities to generate value by receiving full-file reporting under H.R. 4172.

H.R. 3524 – "Equal Employment for All Act of 2015"

H.R. 3524, introduced by Representative Steve Cohen (D-TN) with only Democratic support, would "amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions."¹⁹ H.R. 3524 will, with limited exceptions, prohibit CRAs from furnishing a consumer report to an employer "if the employer seeks to use such information in a denial of employment or any other decision made for employment purposes."²⁰ Supporters argue credit reports are "often inaccurate and bear little to no correlation to job performance or ability to succeed in the workplace."²¹ Opponents argue the use of credit reports is limited, and is especially important for employees who are in charge of financial assets. At least one study showed living beyond one's means and experiencing financial difficulties are the two biggest indicators of employee fraud,²² and companies lose a median of 5 percent of their annual revenue due to employee fraud.²³

Currently, employers may request and use a credit report from a CRA "for employment purposes," which is a statutorily "permissible purpose" under the FCRA.²⁴ "Employment purposes" include using a consumer report to evaluate a consumer for employment, promotion, reassignment or retention as an employee.²⁵ Employers and CRAs must follow detailed procedures under the FCRA to use credit reports in such a manner.²⁶ Even when all procedures are followed, the EEOC has filed suit under Title VII of the Civil Rights Act of 1964 when adverse employment decisions based on consumer reports have a disparate impact on minorities.²⁷

While this bill has little chance of passing in the current Congress, and similar legislation stalled in Congress in 2010,²⁸ states are increasingly limiting employers' ability to use credit reports for employment purposes.²⁹ Because of the minefield of technical FCRA procedures and new state legislation, it is prudent for employers to consult a well-versed attorney to develop a systematic approach to requesting consumer reports and making employment decisions based on them.

[1] H.R. 4172, 114th Cong. (2015).

[2] A nearly identical bill, H.R. 3035, 114th Cong. (2015), was introduced by Rep. Ellison on July 14, 2015. On December 3, 2015, the bill was reintroduced as H.R. 4172, and referred to the House Committee on Financial Services. Its Senate companion, S 2355, was introduced by Sen. Mark Kirk (R-IL) and is cosponsored by Sen. Joe Manchin (D-WV), and was referred to the Committee on Banking, Housing, and Urban Affairs. In 2013 a similar bill, H.R. 2538, 111th Cong. (2013), was introduced in the House, but failed to make it out of the House Committee on Financial Services. <https://www.congress.gov/bill/113th-congress/house-bill/2538/all-actions>

[3] *Reps. Ellison, Fitzpatrick introduce bipartisan Credit Access and Inclusion Act*. July 14, 2015. <https://ellison.house.gov/media-center/press-releases/rep-ellison-fitzpatrick-introduce-bipartisan-credit-access-and>

[4] See Katherine Lucas McKay, *Policy Update: Full-file Credit Reporting*, Corporation for Enterprise Development. July 13, 2011. http://cfed.org/blog/inclusiveeconomy/policy_update_full-file_credit_reporting/#; Terry W.

Clemans, *Pending Credit Legislation Shows Congressional Extremes with Regard to Credit Knowledge*. December 22, 2015. <http://nationalmortgageprofessional.com/news/56977/pending-credit-legislation-shows-congressional-extremes-regard-credit-knowledge>.

[5] The Brookings Institute, *Give Credit Where Credit is Due – Increasing Access to Affordable Credit Using Alternative Data*, at 37. December 18, 2006.

http://www.brookings.edu/~media/research/files/reports/2006/12/communitydevelopment-turner/20061218_givecredit.pdf. See also Katherine Lucas McKay, *Policy Update: Full-file Credit Reporting*; Terry W. Clemans, *Pending Credit Legislation Shows Congressional Extremes with Regard to Credit Knowledge*.

[6] The Brookings Institute, *Give Credit Where Credit is Due* at 37.

[7] *Id.* at 2.

[8] *Id.* at 3; *Reps. Ellison, Fitzpatrick introduce bipartisan Credit Access and Inclusion Act*; Katherine Lucas McKay, *Policy Update: Full-file Credit Reporting*; Terry W. Clemans, *Pending Credit Legislation Shows Congressional Extremes with Regard to Credit Knowledge*.

[9] The CFPB Office of Research, *Data Point: Credit Invisibles*, May 2015, at 6. http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf

[10] *Senators Kirk, Manchin, and Representatives Ellison, Fitzpatrick introduce Bipartisan, Bicameral Bill to Expand Access to Credit*, December 8, 2015. http://www.kirk.senate.gov/?p=press_release&id=1583#.

[11] The Brookings Institute, *Give Credit Where Credit is Due* at 9.

[12] Katherine Lucas McKay, *Policy Update: Full-file Credit Reporting*. In its 2006 publication, The Brookings Institute reported 35 million to 54 million Americans were outside the mainstream national credit system due to little or no credit information in their credit files. The Brookings Institute, *Give Credit Where Credit is Due* at 6.

[13] *Reps. Ellison, Fitzpatrick introduce bipartisan Credit Access and Inclusion Act*.

[14] See National Consumer Law Center, Re: H.R. 3035, Credit Access and Inclusion Act (oppose), September 8, 2015. <http://www.consumer-action.org/downloads/coalition/OpposeHR3035HFSCletter.pdf>.

[15] Cal. Pub Util. Code § 2891 (prohibiting telephone company from making available its customer's credit or other personal financial information without customer's consent); N.J. Stat. Ann. § 48:3-85(b)(1) (prohibiting electric or gas utility disclosure, sale or transfer of customer's proprietary information, including, but not limited to, customer's name, address, telephone number, energy usage, and electric power payment history, to a third party without the consent of the customer); Wis. Stat. § 196.137 (prohibiting municipal utilities from releasing "customer information" without the customer's consent except in specific situations).

[16] National Consumer Law Center, Re: H.R. 3035, Credit Access and Inclusion Act (oppose).

[17] The Brookings Institute, *Give Credit Where Credit is Due* at 3.

[18] H.R. 3524, 114th Cong. (2015).

[19] *Id.*

[20] *Id.*

[21] *Cohen-Warren Bill to Protect Job Seekers from Credit-Based Discrimination Introduced in the House*, September 16, 2015. <http://cohen.house.gov/press-release/cohen-warren-bill-protect-job-seekers-credit-based-discrimination-introduced-house>. See also Remarks of Sarah Crawford, Lawyers Committee for Civil Rights Under Law, and Statement of Chi Chi Wu, National Consumer Law Center. U.S. E.E.O.C. Meeting of October 20, 2010 – Employer Use of Credit History as a Screening Tool. <http://www.eeoc.gov/eeoc/meetings/10-20-10/>.

[22] Association of Certified Fraud Examiners, 2008 Report to the Nation on Occupational Fraud and Abuse, at 5. http://www.acfe.com/uploadedfiles/acfe_website/content/documents/2008-rttn.pdf.

[23] Lester Rosen and Thomas Ahearn, *Credit Reports: Is it Discriminatory for Employers to Use Credit Reports for Employment Screening?*, Employment Screening Resources (ESR), November 7, 2013. <http://www.esrcheck.com/Articles/States-with-Laws-Regulating-Credit-Reports-for-Employment/186/>.

[24] 15 U.S.C. § 1681b(a)(3)(B).

[25] § 1681a(h).

[26] Statement of Maneesha Mithal, FTC Bureau of Consumer Protection, U.S. EEOC Meeting of October 20, 2010 – Employer Use of Credit History as a Screening Tool. <http://www.eeoc.gov/eeoc/meetings/10-20-10/>.

[27] See *E.E.O.C. v. Freeman*, 778 F.3d 463 (4th Cir. 2015).

[28] See S.A. 3795, 111th Cong. (2010). <https://www.congress.gov/amendment/111th-congress/senate-amendment/3795/text>. See *Federal Bill Seeks to Ban Credit Report Checks for Most Employment Screening, Employment Screening Resources (ESR), May 12, 2010*. <http://www.esrcheck.com/wordpress/2010/05/12/federal-bill-seeks-to-ban-credit-report-checks-for-most-employment-screening/>.

[29] Representative Cohen's office reported that eleven states and the City of New York already have laws similar to H.R. 3524. September 16, 2015. <http://cohen.house.gov/press-release/cohen-warren-bill-protect-job-seekers-credit-based-discrimination-introduced-house>. See also *Credit Reports: States with Laws Regulating Credit Reports for Employment*, Employment Screening Resources (ESR), December 1, 2015. <http://www.esrcheck.com/Articles/States-with-Laws-Regulating-Credit-Reports-for-Employment/186/>.

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