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104TH CONGRESS *1st Session*	SENATE	REPORT 104–185

ECONOMIC GROWTH AND REGULATORY PAPERWORK REDUCTION ACT OF 1995

R E P O R T

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 650

TOGETHER WITH

ADDITIONAL VIEWS

DECEMBER 14, 1995.—Ordered to be printed

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ECONOMIC GROWTH AND REGULATORY PAPERWORK REDUCTION ACT OF 1995

DECEMBER 14, 1995.—Ordered to be printed

Mr. D'AMATO, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 650]

INTRODUCTION

On September 27, 1995 the Senate Committee on Banking, Housing, and Urban Affairs ordered reported a bill, the "Economic Growth and Regulatory Paperwork Reduction Act of 1995," to enhance access to capital for both consumers and business, and thereby increase economic growth by reducing the regulatory burden imposed upon financial institutions and financial service providers consistent with safety and soundness, consumer protection and other public policy goals. The Committee voted to report the bill to the Senate by voice vote.

PURPOSE AND SUMMARY OF NEED FOR LEGISLATION

The purpose of the legislation is to strengthen our nation's financial institutions and to increase their competitiveness. This legislation is intended to allow financial institutions to devote additional resources to productive activities, such as making loans, rather than to compliance with unnecessary regulations.

While no one regulation can be singled out as being the most burdensome, and most have meritorious goals, the aggregate burden of banking regulation ultimately affects a bank's operations, its profitability and the cost of credit to customers.

29–010

Senators Shelby and Mack recognized this mounting problem and have been trying to roll back unnecessary regulations since the 102nd Congress, when they introduced S. 1129, the Regulatory Efficiency for Depository Institutions Act. While this bill was not enacted into law, some of its provisions were included in other legislation. In the 103rd Congress, Senators Shelby and Mack introduced S. 265, the Economic Growth and Regulatory Paperwork Reduction Act of 1993. Portions of S. 265 were included in Title III of the Riegle Community Development and Regulatory Improvement Act of 1994. S. 650 is a continuation of this effort to streamline and rationalize current laws and regulations that effect our nation's financial institutions.

HISTORY OF THE LEGISLATION

On March 30, 1995, Senators Shelby and Mack introduced S. 650, the "Economic Growth and Regulatory Paperwork Reduction Act of 1995." The bill was cosponsored by Senator D'Amato, the Chairman of the Committee on Banking, Housing, and Urban Affairs, Senators Bryan, Bennett, Faircloth, Bond, Gramm and Senate Majority Leader Dole.

As introduced, the bill amended a variety of different banking laws in a number of ways, including streamlining disclosure requirements, eliminating duplicative regulation, unnecessary filing and recordkeeping requirements, and removing outdated barriers on the provision of financial services.

The Subcommittee on Financial Institutions and Regulatory Relief (the "Subcommittee") held hearings on S. 650 on May 2 and May 3, 1995. Testifying before the Subcommittee on May 2 were: Federal Reserve Governor Susan Phillips, Federal Deposit Insurance Corporation Chairman Ricki Tigert Helfer, Treasury Assistant Secretary for Financial Institutions Richard S. Carnell, Comptroller of the Currency Eugene A. Ludwig, and Office of Thrift Supervision Acting Director Jonathon Fiechter.

On May 3rd, the Subcommittee heard testimony from three panels representing the views of the Department of Housing and Urban Development; the financial services industry; and community and consumer groups. Testifying before the Subcommittee on the first panel was the Secretary of the Department of Housing and Urban Development Henry G. Cisneros.

The Secretary was followed by a second panel consisting of: James M. Culberson, Jr., Chairman of the Board of First National Bank and Trust, Asheboro, North Carolina on behalf of the American Bankers Association; Richard Mount, President and CEO of Saratoga National Bank, Saratoga, California on behalf of the Independent Bankers Association of America; Billy Don Anderson, President and CEO of Valley Federal Savings Bank, Sheffield, Alabama on behalf of America's Community Bankers; Ralph Rohner, Dean of Catholic University School of Law, Washington, D.C. on behalf of the Consumer Banker's Association; Warren R. Lyons, President of AVCO Financial Services, Irvine, California on behalf of the American Financial Services Association; and John Davey, Senior Vice President of Draper & Kramer, Inc, Chicago, Illinois on behalf of the Mortgage Bankers Association.

Testifying before the Subcommittee on the third panel were the following representatives of consumer and community groups: Michelle Meier, Counsel for the Consumer's Union on behalf of the Consumers Union and Consumers Federation of America, Washington, D.C.; Frances Smith, Director of Consumer Alert, Washington, D.C.; Tess Canja, Member of the Board of Directors of the American Association of Retired Persons, Port Charlotte, Florida; George Butts, Executive Board Member of ACORN, Philadelphia, Pennsylvania; Gale Cincotta, Chairman of National People's Action, Chicago, Illinois; Irvin Henderson, Chairman of the National Community Reinvestment Coalition, Washington, D.C.; Allen Fishbein, Chairman of the Center for Community Change, Washington, D.C. Also testifying on the third panel were Catherine Bessant, Senior Vice President of NationsBank, Washington, D.C. and Benson F. Roberts, Vice President for Policy of Local Initiatives Support Coalition, Washington, D.C.

On September 27, 1995 the Senate Committee on Banking, Housing and Urban Affairs (the "Committee") considered and ordered reported S. 650. The Committee accepted, by voice vote, a Committee Print in the form of a substitute offered by Chairman D'Amato. During the Committee's consideration of this bill, an amendment offered by Senator Shelby was adopted by voice vote. Most of these new provisions can be found in Titles IV, V and VI of the bill.

The Committee also adopted amendments, by voice vote, that: substantially amend the Fair Credit Reporting Act ("FCRA"); increase the systemwide cap on Federal Home Loan Bank advances to members that are not "Qualified Thrift Lenders" from 30 to 40 per cent of total advances; permit credit card banks to take deposits of less than $100,000 for the purpose of securing a depositor's credit card; exempt certain stored value devices from the Electronic Fund Transfer Act; provide the Federal Home Loan Bank System with greater flexibility to accept certain federally-guaranteed secondary mortgages as collateral for Federal Home Loan Bank advances; provide for a study of credit union regulation; and clarify existing FDIC and RTC policy regarding payment of damages for breach of contracts.

PURPOSE AND SCOPE OF THE LEGISLATION

The bill as ordered reported by the Committee contains six Titles that substantially amend a number of statutes. While the bill is amendatory in nature, it does have a unifying goal and basic purpose: to minimize unnecessary regulatory impediments for lenders, in a manner consistent with safety and soundness, consumer protection, and other public policy goals, so as to produce greater operational efficiency. The Committee hopes that the removal of unnecessary regulatory compliance requirements will permit financial institutions to focus more of their resources on their core business—lending—and thereby enhance access to capital for both consumers and businesses (particularly smaller businesses that are more dependent on credit for growth and operating funds). Following is a title-by-title summary of the certain salient issues in S. 650 as ordered reported by the Committee.

Title I: Streamlining the home mortgage lending process

Title I substantially amends the two Federal laws that directly implicate the home mortgage lending process: The Truth in Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA"). These laws require disclosures related to the terms of the loan agreement. Some of those disclosures need to be modernized to reflect the current marketplace and to eliminate unnecessary burdens, particularly on small lenders.

Lenders do not bear the compliance cost of implementing TILA and RESPA alone; these costs are passed on in the form of higher credit costs, so indirectly borrowers ultimately pay these costs. The Subcommittee heard testimony regarding the effect of compliance costs on consumers,[1] the potential for "information overload" that results from the enormous amount of detail required to be disclosed under the law,[2] and the significant amount of time required to complete the paperwork.[3] In addition, the Subcommittee heard testimony about the need to ensure that consumers continue to receive necessary and adequate disclosure.[4]

While the Committee believes that both these laws were passed for commendable purposes and do provide certain necessary consumer protections, the disclosure requirements of TILA and RESPA could be improved by streamlining and integration. Rather than attempting a wholesale revision and integration of these two laws, the Committee decided to provide greater flexibility at the regulatory level to accomplish the same goals.

The bill as ordered reported from Committee centralizes much of the rulewriting authority for TILA and RESPA disclosures in the Federal Reserve Board. Currently, the Federal Reserve Board writes the implementing regulations for TILA and the Department of Housing and Urban Development is responsible for rulemaking under RESPA. The bill as reported consolidates much of the rulemaking authority for both laws in the Federal Reserve Board, and

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[1] "The consumer resents me taking the time to explain all these forms. Also, because of the additional costs in terms of time and paper imposed by these regulations, we have had to implement a processing fee for our real estate loans of $100 which we did not previously charge." Testimony of James M. Culberson, Jr. on behalf of the American Bankers Association, Hearing on S.650 before the Financial Institutions and Regulatory Relief Subcommittee ("S.650 Hearing"), May 3, 1995. (hereinafter, "ABA testimony".)

[2] "The lengthy and complex disclosures required under both the Real Estate Settlement Procedures Act and the Truth in Lending Act mean that the average consumer is at a loss. He or she will find it almost impossible to discriminate among essential information, useful information, and useless information. When every possible term and contingency and relationship have to be disclosed, and disclosed at different times using different forms, consumers suffer "information overload." Without a clear idea of what's critical and what's peripheral, they may "blank out" and fail to assimilate the essential. * * *" Testimony of Francis B. Smith, representing Consumer Alert, S.650 Hearing, May 3, 1995 (hereinafter, "Consumer Alert Testimony".)

[3] "More time is spent filling out RESPA disclosures for real estate application than is spent addressing the customer's real needs. By the time all the paperwork is completed, applicants are so overwhelmed that they sign the documents without reading them." ABA Testimony, supra note 2.

[4] "I found two pieces of paper that were related to the consumer protection laws that S. 650 will seriously eviscerate—the Truth in Lending statement and the HUD–1 settlement statement that was used to walk the parties through the mortgage transaction, two documents in a mound of over 107 pieces of paper that have been criticized today. The other documents protect the private parties, including the lender and the settlement attorneys by requiring the borrower to sign documents immunizing them from future liability. I think that this problem, the mountains of paperwork, is a problem that this Committee should look at, not by eviscerating the modest consumer protection laws that just begin to address the problem but by moving forward on true reform legislation * * *" Testimony of Michelle Meier, on behalf of Consumer's Union and Consumer Federation of America, S. 650 Hearings, May 3, 1995. (Hereinafter, "Consumer's Union Testimony".)

provides the Fed with the authority to eliminate, simplify, modify and improve the disclosure requirements of TILA and RESPA where greater uniformity in disclosures can be obtained, in furtherance of the purposes of these two laws. This integration of rulemaking to obtain uniformity in the disclosure requirements was supported by a number of witnesses that testified before the Subcommittee. Chairman Helfer of the Federal Deposit Insurance Corporation said in her testimony that:

> (w)e believe that granting the Federal Reserve Board the authority to conform TILA with RESPA, where possible, will reduce regulatory burden for financial institutions and avoid confusion and complexity for consumers.[5]

The OCC generally supported "the overall goal of simplifying and coordinating Truth-in-Lending and Real Estate Settlement Procedures Act disclosures,"[6] but did not support the approach taken in the legislation. The Department of Treasury also did not support the approach that S. 650 adopted, but supported the goal, stating that:

> Action to harmonize the workings of the Truth in Lending Act and RESPA is clearly appropriate. Eliminating duplicative and needlessly burdensome disclosures and unworkable requirements in the home mortgage lending process would reduce the cost of loan originations and relieve consumers from information overload * * * Indeed, we believe that simplifying, consolidating, and coordinating all the disclosures required in the home purchase and finance process and eliminating needless requirements would best serve the interests of consumers and the industry.[7]

Another witness voiced strong support for:

> Coordinating the disclosures and reducing the complexity of disclosures required under the Real Estate Settlement Procedures Act and TILA. It is important that Congress give the bank regulatory agencies statutory guidance to limit the extent of disclosures required under TILA and RESPA and to coordinate them with one another. As the immense TILA compliance commentary demonstrates, absent clear language from Congress to limit the scope of compliance documentation, the rule and related examiner guidance can easily become an overwhelmingly technical document.[8]

The bill as ordered reported by the Committee provides the Federal Reserve Board with the discretion to exempt certain classes of loans from the requirements of TILA. The Committee believes that there may be instances where the protections afforded under TILA do not provide a meaningful benefit to consumers.

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[5] Testimony of Ricki Helfer, Chairman, FDIC Board, S. 650 Hearings, May 2, 1995. (Hereinafter "Helfer Testimony".)

[6] Testimony of Eugene A. Ludwig, Comptroller of the Currency, S. 650 Hearings, May 2, 1995.

[7] Testimony of Richard S. Carnell, Assistant Secretary of the Treasury, S. 650 Hearings, May 2, 1995.

[8] Testimony of Billy Don Anderson, on behalf of America's Community Bankers, S. 650 Hearings, May 3, 1995.

Another concern with respect to RESPA is the effect that Section 8 of that law has had on mortgage delivery services. Section 8 was intended to prohibit the payment of kickbacks for referrals of settlement service business. This practice, which occurred in certain limited circumstances, ultimately inflated the settlement costs of borrowers. The "purposes" section of RESPA indicates that it was Congress' intent to protect consumers from "unnecessarily high settlement charges caused by abusive practices that have developed in some areas of the country(,)" and to eliminate "kickback or referral fees that tend to increase unnecessarily the costs of certain settlement services."

Clearly, under-the-table payments for referrals from ostensibly unrelated parties are not acceptable. RESPA, however, provides limited guidance for determining what constitutes a prohibited payment, and has been broadly construed by HUD. As a result, some believe that Section 8 has impeded the modernization of mortgage marketing in a number of ways. It has been suggested that Section 8 has discouraged vertical integration of the mortgage market, and impeded co-branding and affinity group marketing arrangements. The Committee is aware that consumers often are members or customers of groups based on shared affinity, interest or hobby, or due to educational, vocational, professional, mercantile, or other common interests. Examples of common interests can include university alumni, professionals, buyers' clubs, and the like. Such affinity groups can use their endorsements and the right to feature, or co-brand, their name or other trademarks to negotiate lower costs or other benefits for financial and other products for their members.

The Committee heard testimony from witnesses who raised concerns about the impact that RESPA has had on attempts to modernize delivery systems for financial products.[9]

One specific concern that has been raised is the effect that Section 8 has had on equity loan marketing. Section 8 was enacted before the growth of the home equity and mortgage refinancing markets. Home equity loans and refinancings are typically marketed differently from home purchase loans—for instance, equity lending does not rely on real estate agents as an integral part of the marketing process. As one witness at the Subcommittee's hearings noted:

> The lack of a real estate agent's involvement in the home equity and refinancing situations has led to the development of other distribution and promotional channels by lenders in these businesses. The application of RESPA to these loans has severely hampered the development of these alternative loan distribution channels—much to the detriment of both the industry and consumers.[10]

In light of these concerns, the bill as reported by the Committee incorporates provisions designed to permit co-branding and affinity group marketing, and exclude subordinate lien mortgages from Section 8 of RESPA. These provisions were included in order to allow

[9] "(t)here are serious questions to be considered, including, for example, the suggestion by some parties to real estate transactions that RESPA may be stifling innovation and technological advancement from which the public might benefit." Testimony of Federal Reserve Board Governor Susan Phillips, S. 650 Hearings, May 2, 1995. (Hereinafter, "Phillips Testimony".)

[10] Statement of the American Financial Services Association, S. 650 Hearing, May 3, 1995.

greater flexibility in marketing mortgage-related products, while preserving the meaningful consumer disclosures that RESPA provides. It is worth noting that a driving concern that lead to the expansion of RESPA to subordinate lien financings was the concern over certain abusive high-cost mortgage lending practices.[11] This consumer protection issue was again recognized as a concern and addressed in the "high cost mortgage" provisions that were enacted as part of the Riegle Community Development and Regulatory Improvement Act of 1994.

Section 115 amends Section 108 of TILA. Section 108 prescribes the rules for account adjustments in situations where there is inadequate disclosure of finance charges or the annual percentage rate. TILA currently requires the federal financial supervisory agencies to order restitution to consumers of amounts charged but not adequately disclosed. For loans consummated before April 1, 1980, if the full reimbursement of underdisclosed finance charges would have a significantly adverse impact on the safety and soundness of the creditor, an agency could order partial reimbursement not having such an impact. For loans consummated on or after April 1, 1980, the agency is required to order full reimbursement, but may permit payments over time in order to minimize the impact on the institution.

In some cases where finance charges are inadequately disclosed by a small lending institution, the supervisory agency could be required to order restitution in an amount far in excess of the institution's capital. The Committee believes the relevant regulatory agency should not be required to impose automatically a restitution that would result in the failure of the institution.

Section 115 provides greater flexibility needed to reconcile consumer protection and safety and soundness concerns. This section will allow an agency to order partial restitution if the agency made a factual determination that full restitution would cause the creditor to become undercapitalized.

The Committee recognizes, however, that GAAP rules as they are applied to regulatory reporting (i.e., call reporting) may also play a role in the regulator's determination of whether to order full or partial restitution. The total amount of restitution, whether full or partial and whether paid immediately or over time, must be booked by the institution in accordance with GAAP. Therefore, while payment over time may benefit liquidity, an institution would, however, still be required to follow GAAP. This change to TILA does not affect the GAAP rules.

Title II: Streamlining government regulation

This Title contains provisions intended to eliminate or revise various application, notice and recordkeeping requirements that are currently required of insured depository institutions or holding companies that control such institutions. In developing these provisions the Committee consulted extensively with the relevant regulatory agencies. The provisions contained in this Title will provide significant regulatory relief, consistent with safety and soundness

[11] H. Rep 102–760, 102d Cong., 2 Sess., p. 159 (1992).

oversight. This Title will eliminate costly and time consuming paperwork requirements.

Subtitle A: Eliminating unnecessary regulatory requirements and procedures

This subtitle addresses regulatory filing requirements that may hamper the business operations of the affected institutions. These requirements may slow the implementation of such ordinary business decisions as executive hirings, product line expansion, business expansion, office premises purchase, or branch moves within a given neighborhood.

Some current regulatory notice and application requirements govern activities that do not have any significant public policy implications. As a result, regulators tend to approve these applications in the ordinary course. Nevertheless, there are delays and costs associated with preparation of the necessary paperwork and mandated review or notice periods. For instance, the bill as reported will eliminate, for ATMs and in certain other cases, the notice requirements for branch closure. The bill also eliminates the branch application requirement for ATM's. Federal Reserve Governor Phillips described this latter requirement as "an anachronism," [12] and FDIC Chair Helfer testified that "(w)e do not see a compelling reason for an agency to approve these facilities in advance or even to have prior notice of their establishment." [13]

Consistent with this approach, the Committee also incorporated several provisions that would eliminate certain application and approval requirements that the Federal Reserve Board believes are unnecessary and impose undue burdens on both federal banking agencies and financial institutions. For example, the bill includes a provision that eliminates the approval requirement for routine entry into nonbanking activities that the Fed has already determined to be permissible under the Bank Holding Company Act. Governor Phillips testified that this provision would eliminate the filing of notices to engage in nonbanking activities by sixty percent or more.[14]

The bill also would allow bank holding companies that have already met the requirements of the Bank Holding Company Act to merge or consolidate their subsidiaries without seeking approval under the Bank Merger Act (BMA). The Committee agrees with the Board that eliminating this requirement will reduce unnecessary duplicative burden on institutions that have already received regulatory approval to become affiliates. Because these depository institutions are already affiliates, the competitive effects of a merger of these institutions are de minimis. The appropriate Federal banking agencies already have adequate authority to take appropriate supervisory action to address supervisory, financial and other concerns. Moreover, the amendment made by this section permits the appropriate Federal banking agency to require an application under the BMA in any case in which the agency believes, (based, for example, on concerns about financial condition, managerial, or CRA performance of the institutions involved in the proposal), that

[12] Phillips Testimony, supra, note 9.
[13] Helfer Testimony, supra, note 5.
[14] Phillips Testimony, supra, note 9.

an application under the BMA is appropriate. Finally, the application requirement is only eliminated for a merger that is permissible under the interstate banking and branching provisions enacted by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.

Many regulatory mandates are redundant and the product of statutory accumulation. For instance, Section 202 clarifies that Oakar transactions do not require a duplicative application—the application required under the Bank Merger Act provides the same information that the appropriate regulatory agency needs to analyze the transaction. Section 203 eliminates duplicative oversight of holding companies that control both banks and savings associations (and is a provision that both relevant agencies—the Federal Reserve Board and the Office of Thrift Supervision—endorsed).

The bill amends Section 32 of the Federal Deposit Insurance Act to limit the circumstances in which regulators must receive 30 days advance notice of appointments of new directors or senior executive officers. The advance notice is retained for institutions that are undercapitalized or otherwise in troubled condition. The notice requirement is eliminated for newly-chartered institutions and recent change-in-control situations. Thus, this advance notice is focused on circumstances that may raise capitalization concerns, while at the same time, the provision reduces the burden of a requirement that the FDIC described as "an unnecessary impediment to the routine management of depository institutions." [15]

Section 211 eliminates certain recordkeeping requirements under Section 22 of the Federal Reserve Act that apply to extensions of credit to executive officers and directors of depository institutions or their affiliates. As currently implemented in the Federal Reserve Board's Regulation O, the law generally requires an annual survey of loans to top personnel. Nevertheless, many institutions have felt compelled to conduct these surveys with greater frequency to avoid an inadvertent violation due to new hirings or promotions. Some institutions' compliance programs include monthly Regulation O surveys. Section 211 of the bill as reported contains two provisions that should yield significant relief. The Federal Reserve Board, which is responsible for promulgating and implementing Regulation O, supported both of these provisions in its testimony before the Subcommittee.

This section removes the restriction on officers, directors and principal shareholders of member banks participating in non-preferential benefit or compensation plans. This provision allows officers, directors and principal shareholders to receive extensions of credit pursuant to a benefit or compensation program so long as the benefit or compensation program is widely available to employees of the member bank and does not give preference to any officer, director, or principal shareholder of the member bank, or to any related interest of such person, over other employees of the member bank. Restricted access plans would continue to violate Section 22(h) of the Federal Reserve Act. Participation in such plans does not raise the safety-and-soundness concerns that underlie many of

[15] Helfer Testimony, supra, note 5.

the restrictions and reporting requirements that apply to bank officers and directors.

Section 211 also amends Section 22(h) of the Federal Reserve Act to provide the Federal Reserve Board with regulatory discretion to exempt certain directors and officers of subsidiaries of companies that control member banks from the loan-tracking requirements of Regulation O. The Committee believes that maintaining updated records of the identities of all these persons, and their related interests, represents a substantial recordkeeping burden. For large banks, this would mean tracking hundreds of directors and executive officers on a national and international basis. In those situations where the executive officer or director of a subsidiary of a company that controls a member bank does not have authority to participate, and does not participate, in major policymaking functions of the member bank and the assets of such subsidiary do not exceed 10 percent of the consolidated assets of a company that controls the member bank and such subsidiary (and is not controlled by any other company), the Committee believes that the costs of complying with these recordkeeping requirements outweigh the benefits of Regulation O's application.

The bill as ordered reported by the Committee strikes a balance between these legitimate regulatory burden problems and the safety and soundness concerns that arise in connection with any proposed modification of Section 22 of the Federal Reserve Act or Regulation O. The Federal Reserve Board's exemptive discretion is therefore limited by two conditions: the officer and director in question must not have a policymaking role in the member bank; and the assets of the affiliate must not exceed 10% of the consolidated assets of the holding company. In providing this discretion, the Committee's intent is to provide significant recordkeeping and loan-tracking relief, in a manner consistent with safety-and-soundness protections.

The bill makes certain improvements to the International Banking Act of 1978 as amended by the Foreign Bank Supervision Enhancement Act of 1991 (FBSEA). FBSEA was enacted in response to certain criminal scandals involving foreign banks in the 1980's, most notably the BCCI scandal. FBSEA strengthened federal regulation of foreign banks' operations in the United States by, for the first time, requiring the Federal Reserve Board to review all foreign bank applications for branches and agencies. FBSEA set forth standards to guide the Board's review, the most significant of which was to determine whether the foreign bank applicant is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country. If a foreign bank is not subject to such supervision, the Fed could not approve its application to operate branches and agencies in the United States.

While the FBSEA's intent (to improve supervision of foreign banks operating in this country) clearly remains a public policy priority, the implementation of the law has made it impossible for foreign banks from many countries to enter the United States through branches and agencies. Concern over this and the prolonged approval process prompted some Members of the Banking Committee in September 1994 to request a report by the FRB on its implementation of the FBSEA. The FRB responded to this request on January 20, 1995 with a report on foreign bank applications under FBSEA including information regarding the processing of applications by the FRB and steps it had taken to streamline the process and make it more transparent.

In its report the FRB noted that the provisions of FBSEA require the FRB to make a positive determination that a particular foreign bank currently is subject to comprehensive consolidated supervision before the FRB can approve an application for branches or agencies in the United States. The U.S. standard, it noted, was stricter than the minimum standards for the supervision of international banks proposed by the Basle Committee on Banking Supervision. The FRB noted it might be appropriate to amend FBSEA so as to provide itself with some flexibility on the comprehensive consolidated supervision or regulation standard as embodied in the Basle standards if the foreign bank's home country was actively working toward meeting those standards. This legislation was drafted with the help and approval of the Board's staff to give the Board discretion on this standard without sacrificing the safety of the U.S. banking system. Other amendments to the International Banking Act in this bill are intended to streamline and improve the coordination of exams consistent with diligent and efficient oversight of foreign bank activities, and to ensure that foreign banks continue to receive parity of treatment with domestic banks with regard to the cost and frequency of examinations.

Subtitle B: Eliminating unnecessary regulatory burdens

This subtitle is intended to provide relief from many of the data collection and data production requirements that impose significant burdens on depository institutions, particularly smaller institutions. Again, the Committee's paramount concern in considering the provisions of this subtitle was regulatory relief, consistent with safety and soundness. The bill as reported reflects the safety-and-soundness concerns that the Treasury, OCC, the Federal Reserve Board and the OTS voiced regarding the expansion of the examination cycle for small banks to 24 months.

Section 223 of the bill as ordered reported eliminates a 1992 law (31 U.S.C. 5327) mandating that the Treasury Department issue regulations requiring each depository institution to identify all nonbank financial institution customers (such as broker-dealers, investment bankers and currency exchangers).

While the Treasury grappled with implementing the 1992 law, Congress enacted the Money Laundering Suppression Act of 1994. The 1994 law requires the registration of non-banks that are money transmitters with the Treasury Department. The Conference Report accompanying the 1994 law expresses the Conferees' opinion that "money transmitters" (which provide, among other activities, check cashing, currency exchanges, money transmitting or remittance services, or issue or redeem money orders) are "particularly vulnerable to money laundering schemes because their level of compliance with the Bank Secrecy Act is generally lower" than depository institutions'.[16] Treasury is currently developing the money transmitter registration form and the identification, by depository institutions, of non-bank financial institution customers is no longer necessary.

If Treasury, acting through FinCEN, attempts to implement the 1992 law requiring depository institutions to report non-bank customers to the government, the Treasury rapidly will be overloaded by unnecessary new reports. Also, since the existing definition "Financial Institutions" is extremely broad, the government will again be faced with many reports on legitimate entities that are not useful to law enforcement. The elimination of the requirement that depository institutions provide another layer of routine reports has broad support. In fact, the Director of FinCEN has indicated that his Agency is proceeding toward completion of the money transmitter registration requirement and believes that the 1992 law is no longer necessary. Therefore, the Committee has approved elimination of this potentially burdensome mandate and remains opposed to any modification of the "identification" law short of complete repeal for the reasons expressed above.

S. 650 as introduced eliminated the $3000 monetary instrument identification requirement of Section 5325 of the Bank Secrecy Act. In 1988, Congress passed a law requiring banks to retain information on individuals that purchase certain monetary instruments with over $3000 in cash. In 1990, the Treasury Department finalized a regulation requiring banks to record information on these purchases and retain them in a centralized log for five years. All of the information was to be made available to law enforcement upon request. In the four years of the regulations' existence, there is little evidence that banks were ever asked to provide these logs to law enforcement. Therefore, in 1994 Treasury's FinCEN eliminated the log requirement. FinCEN undertook this action because it believed that "almost all of the information required . . . is kept in the normal course of business." It also pointed out that the elimination of the log requirement reflected "a judgment that records already kept by the industry effectively meet law enforcement needs (to monitor and check for possible money laundering)."

The Committee fully supports the efforts made by FinCEN in 1994, to substantially reduce the bank requirement that all cash purchases of travelers checks, bank checks and cashiers checks over $3000 be recorded in a centralized log for five years. However, concern over the law's mandate that a purchaser's identification be verified forced many institutions to continue to use these logs. Section 234 of S. 650 as introduced eliminated the statutory mandate that gave rise to the monetary log requirement. This provision was included due to concerns that the elimination of the monetary log regulation (while a major regulatory reduction) might not obviate the need to maintain the information that the statute mandated in some form.

Since S. 650's introduction, FinCEN has expressed its belief that this confusion can be addressed by clarifying ambiguities as to whether verification information can be recorded directly on the purchased instrument. If an institution can verify and record the

[16] H. Rep. 103–652, 103rd Cong., 2d Sess. (1994).

identification offered by the purchaser without recording that information on a separate database or document, ambiguity would be resolved. The Committee concurs with that regulator's assessment and has therefore eliminated the provision that would have repealed Section 5325. The Committee urges FinCEN to fully address the uncertainties that remained after the repeal of the monetary instrument log.

The bill as reported provides significant relief for small depository institutions from the data collection and reporting requirements of the Home Mortgage Disclosure Act ("HMDA"). During the Subcommittee hearings on S. 650, a number of industry witnesses and regulators testified to the burden that HMDA compliance imposes on small institutions. The disproportionate burden that HMDA places on small institutions was acknowledged by the Congress that enacted this law when it included a small bank exemption. The $10 million asset-size threshold has not been increased since the law's enactment over twenty years ago, despite the effect of inflation and a general upward trend in asset size within the industry over that time.

The $50 million threshold contained in this bill will only slightly diminish the volume of loan data reported. As FDIC Chair Helfer testified, raising the threshold would exempt 33% of FDIC-regulated institutions, but only 6% of the loan data; she testified that "the resulting cost savings to smaller institutions, however, would be material." [17] The increase of the HMDA threshold to $50 million was supported by both the FDIC and the Federal Reserve Board, the two primary federal regulators of small banks, but was opposed by Treasury and HUD. The change in the threshold applies to depository institutions only and is in no way meant to change the current threshold that is used for non-depository lending institutions.

Both the FDIC and the Federal Reserve Board also supported the repeal of Section 477 of FDICIA which requires an annual report on small business and small farm loans. The Committee believes the costs of producing this report are unnecessary in light of other existing requirements that mandate the reporting of similar data. Eliminating section 477, therefore, does not affect the public availability of this kind of lending data. Section 477 replicates, in large part, the requirements of Section 122 of FDICIA which mandates the collection of call report data on credit availability for small businesses and small farms.

Subtitle C: Regulatory micromanagement

Title II of the bill also includes a provision that requires at least one of the two appointed members of the FDIC Board have State bank supervisory experience. This provision originally required that one of the appointed members be a state bank supervisor. This requirement could be problematic in that the laws of many states preclude state office holders from serving in federal office. In addition, the original provision raised succession questions with respect to supervisors who lost or left their state position, and concerns were voiced that the significant responsibilities of state supervisor

[17] Helfer Testimony, supra, note 5.

would limit the state supervisor's ability to focus on their FDIC responsibilities. The Committee wanted to address these concerns while still ensuring that the FDIC Board include a member with state bank regulatory expertise and sensitivity to the issues confronting the dual banking system. The Committee believes that the current Section 243 strikes a proper balance between these concerns.

Title III: Regulatory impact on cost of credit and credit availability

This Title contains a series of amendments to various laws and regulations that impose limitations on the manner in which depository institutions, and other financial intermediaries, conduct their business. Certain regulations are necessary for safety-and-soundness, anti-discrimination, or other public policy purposes. This Title seeks to preserve these vital safeguards. In considering the provisions of this Title, the Committee sought the advice and comments of the regulatory and enforcement agencies in order to assure that the amendments would not weaken their ability to pursue necessary public policy goals.

Section 301 amends certain provisions governing the scope and mechanics of the independent audit function for insured depository institutions. This provision eliminates the independent auditor attestation requirement for safety and soundness compliance, and allows the agencies the discretion to waive the requirement that all members (but not less than a majority) of the independent audit committee be outside directors in the case of hardship.

The accountant's attestation for compliance with safety and soundness requirements imposes significant costs on banks. The attestation review process duplicates the regulatory examination procedures. The Treasury Department, the Federal Reserve Board, the OCC and the FDIC support this provision. The provision leaves intact the independent auditor attestation requirement for internal controls, as that second review is seen as ensuring the integrity of the safety and soundness exams conducted by regulators.

Many smaller institutions in less populated areas have difficulty recruiting and retaining competent outside directors to sit on their independent audit committees. This provision allows the appropriate Federal banking agency to waive the requirement that the committee be comprised entirely of "outside directors" (but no fewer than a majority of outside directors) if the agency determines that the institution has encountered hardships in retaining and recruiting a sufficient number of competent outside directors to serve on the internal audit committee of the institution. In determining hardship, the agency must consider such factors as the size of the institution, and whether the institution has made a good faith effort to elect or name additional competent outside directors to the board of directors of the institution who may serve on the internal audit committee. The Treasury Department, the Federal Reserve Board, OCC, OTS and FDIC all support the general intent of this provision.

This section also authorizes regulators to designate certain information included in the annual management report privileged and confidential. The granting of such a designation does not alter or provide an exemption from any requirement under the federal securities laws, or any rules and regulations promulgated thereunder, to file audited financial statements and the complete reports of independent auditors.

Section 302 creates a civil and administrative enforcement privilege for "self-tests" conducted by a financial institution to determine fair lending compliance under the Fair Housing Act and the Equal Credit Opportunity Act. The purpose of this provision is to encourage institutions to undertake candid and complete self-tests for possible fair lending violations and to act decisively to correct any discovered problems. The privilege ensures that such self-test efforts will not be used against an institution if that institution has undertaken remedial action. This provision does not change the mandatory referral requirement for "pattern or practice" violations of ECOA or FHA. This privilege augments, and does not supplant, other evidentiary privileges that may attach to the results of a self-test, such as the attorney-client privilege. Waiver of the self-testing privilege does not constitute a waiver of any other privilege that may be available. A report or result of a self-test is considered privileged if a creditor conducts or authorizes an independent third party to conduct a self-test of any aspect of a credit transaction by a creditor, in order to determine the level or effectiveness of compliance; and has identified any possible violations of this title and has taken, or is taking, appropriate corrective action to address the possible violations.

The privilege can be lost or waived where a person with lawful access to the results voluntarily releases them. This refers to officers, employees or contractors of financial institution who are authorized to review and handle the self-test results; the privilege is not waived by inadvertent or unauthorized release of the results, such as by someone breaking into the lender's paper or electronic files. The privilege can also be waived if a person with lawful access cites or uses the results to counter charges that the lender is not in compliance with the law. Moreover, self-test results may be obtained in the narrow context of assessing an appropriate sanction for violations already (or concurrently) adjudicated or admitted; this should not be construed as authorizing expansive "fishing expedition" discovery demands at the outset of litigation or administrative enforcement actions.

A department, agency or civil litigant may challenge a privilege asserted under this section in a judicial or administrative law forum of competent jurisdiction (including procedures to handle the privilege challenge confidentially).

Substantially similar regulations from the Board and HUD are essential for this privilege to operate consistently under both statutes, but broad consultation among affected departments and agencies is to be part of the regulation writing process. Creditors and other lenders may invoke this privilege for self-tests that were undertaken prior to this section's enactment, but not if a formal complaint has been filed involving matters covered by the self tests, or the privilege has been waived under the rules of this section.

Section 304 contains amendments to various statutory provisions that unduly restrict the portfolio holdings of thrifts, including the "Qualified Thrift Lender" test. The mortgage market has changed dramatically in recent years, and there is a diminished need for institutions focused almost entirely on home lending; currently, thrifts only originate about 25% of home mortgages. These new provisions are intended to give thrifts the ability to diversify their portfolios, in a manner consistent with their established lines of business. Greater portfolio diversity will promote healthier and more profitable portfolios. Chairman Greenspan and OTS Director Fiechter support providing thrifts with greater flexibility to invest in other products. The Treasury Department is also supportive of greater flexibility for certain thrifts.

Title III contains a number of provisions intended to streamline and improve the business operations of the Federal Home Loan Banks and the FHLB system. Section 305 would require that the FHLBs receive the same treatment for daylight overdrafts incurred through their use of the Fedwire as all other users of the Fedwire. The Federal Reserve established daylight overdraft rules in order to diminish concerns about the potential for a systematic crisis due to the default on an overdraft position. Because short-term intraday overdrafts are inevitable, the Federal Reserve Board has established "net debit caps," which allow Fedwire users a certain level of overdraft activity prior to the imposition of overdraft fees. These caps are based on the capital and credit quality of the user. The current daylight overdraft rules require the FHLB system to pay fees for daylight overdrafts without the benefit of net debit caps. Thus, the FHLBs are treated as if they pose more risk than other Fedwire users, and ignores the AAA-rated credit quality that the FHLB system and the individual banks enjoy.

Section 306 explicates the FHLBs' authority to approve applications for membership. Prior to approving applications of CAMEL 3, 4, or 5-rated institutions, however, the FHLB must notify the Federal Housing Finance Board (FHFB). This provision was included in recognition of the significant role that the individual banks currently play in the membership screening process (currently the FHFB authorizes the FHLBs to carry out this responsibility for most CAMEL 1 and 2-rated institutions). Each FHLB has extensive credit policies and procedures in place to protect itself and the FHLB system from risk. The provision does not alter existing membership requirements regarding financial condition.

Section 307 will allow the FHLBs to jointly select external auditors rather than the FHFB. The provision does not alter the FHFB's ability to examine the banks or establish independent audit contract requirements to ensure consistency in financial reporting.

Section 309 will provide the Federal Home Loan Banks with greater flexibility in accepting appropriate collateral for advances. With respect to collateral requirements for advances the primary concern has been, and continues to be, assuring that System advances are secured with collateral that will provide sufficient protection against a possible default. The Committee believes that subordinate mortgages on improved residential property that have a secure form of credit enhancement do provide a sufficiently secure collateral source. Section 310 increases the Systemwide cap on advances to members that are not Qualified Thrift Lenders from 30% to 40%. This amendment was adopted in recognition of the changing nature of the System's membership (the System may reach this 30% limit sometime during the 1996 calendar year), and to allow the system to continue to fulfill its role as a source of liquidity for home financing while proposals for modernizing the System are considered. Currently, 16 percent of the total advances of the Federal Home Loan Bank system go to non-qualified thrift lenders (i.e., banks). However, the Federal Home Loan Bank system currently has more members that are banks than savings associations. Once the 30 percent limit is exceeded, non-qualified thrift lenders who are members of the Federal Home Loan Bank system will not be able to get advances from the system to permit them to originate mortgages. The Committee believes that the System continues to play an important policy role in providing community-based lenders with economical wholesale credit and related assistance.

Section 308 eliminates the 7 percent cap on the annual asset growth of limited purpose banks, and allows limited purpose banks to take deposits under $100,000 for the purpose of securing a credit card. The growth cap, enacted in the Competitive Equality Banking Act of 1987, was intended as a temporary measure. At the time it was enacted, it was expected that Congress would shortly legislate in the area of bank powers. While banks have received additional powers and authorities through both legislative and regulatory action, the restriction on financial service providers' growth remains in place. Section 308 also clarifies that limited purpose credit card banks may accept collateral in connection with the issuance of secured credit cards. A secured credit card is a credit card for which the borrower has posted collateral, such as a savings or time deposit, to secure credit advances. Such programs provide needed credit to consumers who might otherwise be unable to qualify, including persons attempting to establish a credit history and individuals who previously have had credit problems. The amendment would also protect the safety and soundness of limited purpose credit card banks by clarifying that there is no restriction on such institutions accepting collateral for their extensions of credit.

Title III includes two amendments to the Fair Debt Collections Practices Act. Both changes provide needed clarification of the statute. The first amendment clarifies the requirements of Section 807(11). This subsection requires debt collectors to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is trying to collect a debt and is contacting the consumer for that purpose. The FTC staff has interpreted this subsection to require this disclosure only in the first communication with the debtor. Nevertheless, some Courts have interpreted this language as requiring the inclusion of this disclosure in every communication. This construction of the statute has resulted in numerous technical violations. The FTC has recommended narrowing this requirement to the initial communication, oral or written, in its last several reports to Congress on the FDCPA.

The second provision amends Section 809(b) of the FDCPA. This provision of the FDCPA provides that a consumer has 30 days to request a verification of a debt, and if such verification is requested the collector must cease collection activities. The FTC has recommended that Congress clarify that collection activity may take place without a verification request.

Title IV: Fair credit reporting

Title IV of the bill as ordered reported contains a series of amendments to the FCRA. The provisions of this Title are derived from S. 709, a bill introduced by Senators Bond and Bryan earlier this Congress, and is substantially similar to S. 783, a bill amending the FCRA, that the Committee reported and the Senate passed during the 103rd Congress.[18] A number of problems in the FCRA's implementation and interpretation have arisen in the years since the law's enactment. Many of these problems are a result of ambiguities in the statute; other problems have arisen as the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years.

To generalize, the chief concerns that are implicated by the FCRA are: 1. the accuracy of consumer reports and problems associated with resolving disputed information; 2. the privacy concerns raised by unfettered access to consumers reports; 3. operational concerns implicated by differing statutory schemes regulating the credit reporting industry at the state level; and 4. ambiguities as to what constitutes a "consumer report" for the purposes of the FCRA that have hampered the business operations of both credit reporting bureaus and credit report users.

Currently, the FCRA requires that credit reporting agencies reinvestigate disputed information in a "reasonable period of time." Many consumers have complained in the past about time delays in resolving disputes. These delays can often lead to an unwarranted denial of credit. The industry has made a serious effort to address these concerns, and has used available technology to expedite the resolution of disputes. Title IV would establish a specific reinvestigation time schedule for disputed information.

The FCRA prohibits credit bureaus from providing consumer reports to users that do not have a "permissible purpose" for obtaining the report; however, there is no correlative permissible purpose obligation imposed on credit report users. Title IV specifies that users of credit reports establish, on general or specific basis, a permissible purpose for obtaining a credit report.

While Title IV would clarify the circumstances under which a credit report may be obtained, it would also clarify that credit bureaus may provide certain products, such as "prescreened" lists,[19] direct marketing mailing lists and credit reports provided for commercial purposes, consistent with the FCRA. By so doing, Title IV clarifies ambiguities that currently exist as to when and how credit bureaus may provide such products. Similarly, Title IV will clarify that affiliates within a Holding Company structure can share any application information (last year's bill was limited to credit applications) and consumer reports, consistent with the FCRA. Under

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[18] See, S. Rep. 103–209, 103rd Cong., 1st Sess. (Star print). Congressional Record, May 2–4, 1994 (S 4965–4984; S 5026–5046; S 5129–5146).

[19] "Prescreened" lists are mailing lists used to market financial products, particularly credit cards. These lists are compiled by screening credit bureau records for individuals who meet certain specifications established by the requesting party. This Title would allow consumers to "opt-out" of inclusion in this process and provides safeguards against the disclosure of consumer-specific credit history information.

current law, such information can be deemed a "consumer report" and the information sharing entity can be deemed a "consumer reporting agency," thereby implicating all the restrictions of the FCRA. The affiliate sharing provisions of this Title will allow affiliates to share such information without being deemed a consumer reporting agency.

Title IV also clarifies the circumstances in which a furnisher of information to a credit bureau can be liable for providing inaccurate information. S. 783 adopted a "known or should have known" standard; Title IV attempts to provide greater certainty for information furnishers, and liability attaches only when the furnisher is actually notified of an inaccuracy. This provision exempts information furnishers from civil liability for providing inaccurate information in circumstances where the mandated notice has not been provided by the consumer.

Title V: Asset conservation, lender liability and deposit insurance protection

Title V contains provisions that would amend Federal banking and environmental law to clarify the liability of lenders for environmental clean-up of property that secures financing. This title will also clarify the liability of federal agencies that assume the ownership of foreclosed contaminated property through conservatorships or receiverships. The problem of massive potential liability, particularly for clean-ups undertaken pursuant to the CERCLA, or as it is more commonly known, the "Superfund" law, is largely the result of case law that has limited the "secured creditor exemption" contained in CERCLA.[20]

Another line of case law has stripped lenders of the secured creditor protection contained in Superfund when lenders have foreclosed on collateralized property—thereby stripping the exemption of its value by denying creditors their right to remedy default by exercising their security interest.[21] As a result, lenders risk being targeted as convenient "deep pockets," and subject to substantial liability for remedial costs, not because they caused environmental contamination or did not take proper precautions, but simply because they exercise a security interest.

Costs for environmental clean up by banks can easily be $10 million to $100 million. They average $30 million.[22] Many lenders have altered their lending practices to avoid potential draconian joint and several liability for Superfund clean-ups. Many small businesses and potential homeowners do not receive financing because lenders fear potential liability. 88% of banks changed their lending procedures in an effort to avoid environmental liability; 62.5% have rejected loan applications on the possibility of environmental liability; 45% discontinued financing of certain types of

[20] The Eleventh Circuit Court of Appeals deemed a secured creditor liable merely because it had the capacity to influence a borrower's environmental disposal decision. *U.S.* v. *Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990). (cert. denied, 498 U.S. 104 (1991)).

[21] See, *U.S.* v. *Maryland Bank & Trust Co.*, 632 F.Supp. 573 (D.Md. 1986); *Guidice* v. *BFG Electroplating and Manufacturing Co.*, 732 F.Supp. 556 (W.D. Pa. 1989).

[22] Anderson, Eugene and Jordan Stanzler. "Insurers May Cover Toxic—Waste Cleanups." American Banker; May 9, 1990.

loans (service stations, chemical business). One-third of the members of the Petroleum Marketers Association had loans denied.[23]

The Senate passed similar legislation in 1991 as part of S. 543, the Federal Deposit Insurance Corporation Improvement Act. The Senate approved a lender liability amendment to the Federal Housing Enterprises Regulatory Reform Act of 1992. Last year, the Banking and Environment Committees worked together and crafted language for inclusion in the Superfund Reauthorization bill. It is the hope of the Committee that the staffs of these two Committees will be able to continue to cooperate on this issue.

The provisions contained in Title V are closely modeled on the final language agreed to in that Superfund bill, with several adjustments. Most significantly, this bill would clarify lender liability rules not only with respect to Superfund, but also with respect to the underground tank provisions of the Solid Waste Disposal Act. In this regard, this bill is similar to the lender liability provisions (Title II) of S. 1124 that Senators D'Amato, Shelby, Bond, Bennett and Domenici offered last year. The need for remedial legislation has become more pressing in light of the Supreme Court's denial of certiorari in *Kelly* v. *Environmental Protection Agency*.[24] This case effectively precluded the EPA's handling of the lender liability problem through rulemaking.

Title VI: Miscellaneous clarifications, studies and reports

Title VI includes a number of regulatory clarifications, studies, and statutory improvements that are intended to provide more cost-effective delivery of financial services. These provisions were among those that the Committee adopted during its September 27th mark-up. Section 601 clarifies that stored value devices, such as certain "smart cards", are not subject to requirements of the Electronic Fund Transfer Act ("EFTA") to the extent that such devices are used as a cash equivalent such as when they are used as media for the storage of monetary value and to deliver funds for the payment for goods or services. Transactions in which value is "downloaded" onto a stored value card from an asset account would be subject to the EFTA to the extent that any such transfer from an account is currently subject to this law. The Committee intends this clarification to allow the development and utilization of this nascent cash-equivalent technology, and not to diminish any protections that may attach to credit and debit cards as currently used to access consumer credit and asset accounts, respectively. The Committee believes that as the private sector continues to develop stored value card technology, it should also attempt to educate customers on the prudent use of this technology. For multipurpose cards that involve stored value features as well as debit card or credit card features, the clarification set forth in Section 601 applies only to the stored value feature and does not affect the application of existing law to the debit card or credit card features of the card.

Section 602 of the bill clarifies Section 11 of the Federal Deposit Insurance Act to make explicit what is already implicit by virtue

[23] Letter dated July 24, 1991 to John Fogarty, EPA from Edward Yingling on behalf of the American Bankers Association, commenting on CERCLA ruling.
[24] 15 F.3d. 1100 (4th Cir. 1994).

of the text and structure of the statute and the underlying regulations (particularly the provisions concerning administrative claims and the priority of administrative expenses). It is the intent of this provision to give meaning and legally-binding effect to current FDIC and RTC policies which provide that any breaches of contracts entered into by the FDIC or RTC as receiver after appointment will be paid as administrative expenses of the receivership. This provision is also consistent with existing interpretations and policies of the federal banking agencies. Since this provision makes no change in current law as interpreted and applied, the substance of this provision should apply in pending litigation, appeals and administrative actions.

Section 603 closes a loophole in counterfeit law. Fictitious financial instruments are not reproductions of actual negotiable instruments; rather the instruments themselves are fictitious.[25] Federal prosecutors have determined that the manufacture, possession, or utterance of these instruments does not violate the counterfeit or bank fraud provisions contained in chapters 25 and 65 of the United States Code.

Fictitious financial instruments have caused hundreds of millions of dollars in losses to financial institutions, mutual funds and private individuals. The National Council of Churches and the Salvation Army are amongst the organizations that have lost significant sums of money in such schemes. In recent years, tax rebellion and militia groups, such as the Posse Comitatus and its splinter groups such as We the People and the Juris Christian Assembly fund their activities with fictitious financial instruments. Organized crime syndicates in West Africa have used fictitious financial instruments to finance drug smuggling operations.

This legislation also corrects a drafting error made when Congress passed the Counterfeit Deterrence Act of 1992. While attempting to raise criminal penalties imposed for counterfeiting, Congress actually lowered these penalties. This provision will restore counterfeiting sentences in accordance with Congressional intent in 1992.

Section 604 of the bill as ordered reported amends the Truth-in-Savings Act, while retaining most of the disclosure requirements that benefit consumers. The overwhelming majority of depository institutions did provide most of the disclosures required under Truth in Savings prior to the law's enactment, and continue to pursue good-faith compliance efforts. In fact, the industry spent nearly $500 million modifying compliance programs and disclosure materials to ensure that TISA's technical mandates were met. In light of the fact that TISA compliance has been integrated into the industry's compliance programs, the Committee decided to retain the APY and other TISA disclosures. Nevertheless, the Committee is mindful that the requirements of TISA compliance present a variety of potential technical pitfalls, and attendant liability. In light of these continuing concerns, the Committee decided to amend the law so that it would have an administrative remedial enforcement scheme.

[25] Fictitious financial instruments have been called many names, including "Prime Bank Notes", "Prime Bank Derivatives", "Prime Bank Guarantees", "Japanese Yen Bonds", "Indonesian Promissory Notes", "U.S. Treasury Warrants", and Philippine Victory Bonds".

SECTION-BY-SECTION ANALYSIS

Section 101. Coordination of TILA/RESPA

Section 101 provides the Federal Reserve Board (the Board) with the authority to modify the disclosure requirements of the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA) in order to achieve uniformity between the two laws. The purpose is to streamline, integrate and improve regulations, thereby reducing costs to lenders (including timing and content requirements) and improving the quality of disclosures.

Section 102. Elimination of redundant regulators

Section 102 of the bill would transfer RESPA rulewriting authority to the Board with the exception of Sections 8 and 9 of RESPA, which prohibit referrals, kickbacks and unearned fees and directed purchases of title insurance, respectively. This section clarifies that the appropriate federal banking regulators maintain enforcement authority over financial institutions' compliance with RESPA and that the Department of Housing and Urban Development (HUD) retains both rulewriting authority over Sections 8 and 9 of RESPA and general enforcement authority over non-financial institutions.

Section 103. General exemptive authority for loans

Section 103 provides the Board with the discretion to exempt from some of the requirements of TILA certain classes of loans that do not provide a "meaningful benefit" to consumers in the form of useful information or protection. Factors for consideration by the Board include: the size of the loan, the sophistication of the borrowers, whether the loan is secured by a principal residence, and whether the goal of consumer protection would be undermined.

Section 104. Reductions in Real Estate Settlement Procedures Act

Section 104 amends RESPA to clarify that the notice regarding sale of loan servicing does not have to include an estimate of the percentage of loan servicings the lender expects to sell annually. The provision also exempts subordinate lien mortgages from Section 8 of RESPA and clarifies that the definition of the term "business credit" under RESPA shall be the same as under TILA.

Section 105. Co-branding and affinity group endorsements

Section 105 clarifies that Section 8 of RESPA does not prohibit endorsements by persons or affinity groups not otherwise involved in providing settlement services in connection with a settlement transaction. Section 8 would still prohibit the payment of referral fees to settlement service providers.

Section 106. Exemption for certain borrowers

Section 106 gives the Board the authority to allow sophisticated borrowers to waive the disclosures required under TILA. Sophisticated borrowers are defined as individuals with net assets in excess of $1,000,000 or annual earned income of more than $200,000. The Board has the authority to increase both thresholds for inflation. The provision also requires that the waiver be handwritten, dated and signed.

Section 107. Alternative disclosures for adjustable rate mortgages

This provision would allow lenders (in consumer credit transaction not under an open-end plan) to choose between providing consumers with a 15 year historical table charting fluctuations in interest rates based on a $10,000 loan; or disclosing to the consumer the fact that annual percentage rates may increase or decrease substantially as well as what the maximum interest rate and payment would be based on a $10,000 loan.

Section 115. Restitution for violations of Truth in Lending Act

Section 115 provides regulators with the discretion to determine the appropriate restitution remedy to be imposed on an institution for TILA violations, consistent with safety and soundness. The provision gives regulators more discretion in imposing full restitution when such restitution plan would force an institution to become undercapitalized. The provision would allow regulators a choice between ordering partial restitution and ordering full restitution to be paid out over time to avoid adverse impact.

Section 201. Elimination of certain filing and approval requirements for certain insured depository institutions

Section 201 would allow bank holding companies that seek to merge or consolidate existing subsidiaries to do so without seeking approval under the Bank Merger Act (BMA) unless required to do so by the responsible agency within 10 days after receipt of notice of the proposed transaction. Under current law, banks owned by the same bank holding companies must seek approval from the appropriate federal banking agency for the surviving institution under the BMA before merging subsidiary banks. Approval under the BMA is based on standards identical to those already applied under the BHCA when the bank holding company acquired (either at the time of the merger or previously) the subsidiary banks.

Section 202. Elimination of redundant approval requirement for OAKAR transactions

Under current law, the merger of a bank and a savings association requires approval under two separate statutory provisions that apply the identical statutory review factors—the Bank Merger Act and the Oakar Amendment. This provision would remove the duplicative approval requirements under the Oakar amendment for the merger of a bank and a savings association if approval was already sought under the BMA. The provision does not alter other provisions of the Oakar Amendment relating to paying of assessments into the appropriate insurance fund or requirements that institutions meet capital requirements.

Section 203. Elimination of duplicative requirements imposed upon bank holding companies under the Home Owners' Loan Act

Currently, bank holding companies that own savings associations are subject to duplicative review, examination and reporting requirements under the Bank Holding Company Act (BHCA) and the Savings and Loan Holding Company Act (SLHCA). This provision would eliminate the application of the SLHCA to bank holding companies that are subject to the BHCA. It does not alter any requirements applicable to savings associations that are controlled by bank holding companies. The provision also ensures that OTS has a consultive examination role and a cooperative enforcement role with the Federal Reserve Board over bank holding companies that control savings associations.

Section 204. Elimination of per branch capital requirement for national banks and State member banks

Section 204 strikes the requirement that national and state member banks have aggregate capital in an amount no less than the aggregate minimum capital that would be required if each branch were a separately chartered national bank. Modern bank-wide capital requirements have made these branch-related capital rules obsolete.

Section 205. Elimination of branch application requirements for automatic teller machines

Section 205 clarifies that an "ATM" or "remote service unit" is not considered a "branch" for purposes of federal bank branching laws and is therefore not subject to prior approval requirements or geographic restrictions.

Section 206. Elimination of requirement for approval of investments in bank premises for well capitalized and well managed banks

Section 206 would allow well-capitalized and well-managed banks to invest an amount less than or equal to 150% of the bank's capital and surplus in bank premises without prior federal approval. The bank would be required to provide notice to the appropriate federal regulator within 30 days of the investment. Current law allows banks to invest up to 100% of capital in bank premises without prior federal approval.

Section 207. Elimination of approval requirement for divestitures

Section 207 eliminates the presumption that a bank holding company controls those shares that it divests of any company to a third party that is financed by a subsidiary of the BHC, or where there is an officer or director common to the company and the investor. Although the presumption was intended to prevent sham divestitures, the Board believes it can detect sham transactions through the examination process without the application burden the presumption imposes on the banking industry.

Section 208. Streamlined nonbanking acquisitions by well-capitalized and well-managed banking organizations

Section 208 permits well-capitalized and well-managed bank holding companies, without prior approval, to commence permissible nonbanking activities and to make acquisitions of companies engaged in permissible nonbanking activities that are limited in size. The Board would still receive advance notice so that it may require an application if it chooses and both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) would continue to receive notice for purposes of conducting competitive analysis of any proposal.

Section 209. Elimination of unnecessary filing for officer and director appointments

Section 209 narrows the requirement that any newly chartered or troubled institutions, or institution that has undergone a change in control in the last two years, file a notice 30 days before appointing a new officer or director. The provision would only require prior notice and approval for troubled institutions.

Section 210. Amendments to the Depository Institutions Management Interlocks Act

Section 210 restores the authority of federal banking agencies to grant additional exemptions from the prohibitions on officer and director interlocks between unaffiliated banking organizations, as long as the exemption wouldn't result in a monopoly or substantial lessening of competition. Also, the asset thresholds that provide an exemption for banks and bank holding companies from the prohibitions on management interlocks are also increased from $1 billion to $2.5 billion and $500 million to $1.5 billion, respectively. This section would further give the federal banking agencies the authority to adjust these thresholds annually to account for inflation or market changes. This section also eliminates the termination date on grandfathered interlocks.

Section 211. Elimination of recordkeeping and reporting requirements for officers

Section 211 makes several changes to the preferential lending restrictions of 22(h) of the Federal Reserve Act. Without changing any of the core restrictions on insider lending, section 211 would allow executive officers, directors, or principal shareholders to receive extensions of credit pursuant to a benefit or compensation program that is widely available to employees of the member bank and does not give preference to such executive officers, directors or principal shareholders over other employees of the member bank. Section 211 would also allow the Board to exempt from the restrictions of section 22(h) executive officers and directors of subsidiaries that control member banks, if such executive officers and directors do not have authority to participate, and do not participate in major policymaking functions of the member bank; and the assets of such affiliate do not exceed 10 percent of the consolidated assets of a company that controls the member bank and such subsidiary (and is not controlled by any other company).

Section 212. Consolidation of Appraisal Subcommittee; transfer of functions

Section 212 would consolidate the administrative functions of the Appraisal Subcommittee into the Federal Financial Institutions Exam Council (FFIEC). The Appraisal Subcommittee of the FFIEC was created in 1989 to develop and monitor state licensing and regulation of real estate appraisers. While the Subcommittee is established within the FFIEC and the subcommittee's members are appointed from staff of the bank regulatory agencies and HUD, the subcommittee's administrative functions have been managed independently of the FFIEC due to the appropriated nature of the $5 million dollar start-up loan provided to the subcommittee from the

Treasury. This section would also require that the subcommittee repay the outstanding amount on the Treasury loan by the year 1998 and phases out the grant authority to the Appraisal Foundation in that same year.

Section 213. Branch closures

Section 213 would clarify the branch closure notice requirements of Section 42 of the FDIA. This section largely codifies exceptions already adopted in an interagency policy statement on branch closures promulgated by the federal banking agencies. Under this section, excluded from the notice requirements are: ATM's; and relocations of branches or consolidations of one or more branches into another branch so long as the relocation or consolidation occurs within the immediate neighborhood and does not substantially affect the nature of the business or customers served. Branches closed in connection with emergency acquisitions or branches receiving other assistance from the FDIC are also excepted from the notice requirements.

Section 214. Foreign banks

Section 214 gives the FRB greater discretion in considering foreign bank applications. The FRB would no longer be compelled to deny an application solely because a bank is not subject to consolidated comprehensive supervision or regulation, a standard which exceeds the current international standard. The FRB is given the discretion to approve an application, with such conditions as it deems appropriate, as long as the home country is actively working toward and making progress in establishing arrangements for the comprehensive consolidated supervision or regulation of the applicant foreign bank. In addition, if the appropriate authorities in the home country are not making demonstrable progress in establishing arrangements for comprehensive consolidated supervision or regulation of such foreign bank, the FRB can terminate the foreign bank's state agencies or branches and recommend termination of its federal branches and agencies located in the United States.

In approving an application under this provision, the FRB is required to consider whether the foreign bank has adopted and is implementing procedures to combat money laundering. The FRB may also take into account whether the home country of the foreign bank is developing a legal regime to address money laundering or is participating in multilateral efforts to combat money laundering.

These amendments have two overarching goals. The first is to strike an appropriate balance between preserving prudently firm statutory standards and correcting unwarranted barriers to entry in the current approval process. The second is to encourage further progress toward comprehensive consolidated supervision by countries that do not currently accord such supervision.

This section also makes changes in current law to ensure the United States continues to provide parity of treatment for foreign branches and agencies of foreign banks with respect to exam fees. After the expiration of a three year moratorium, the International Banking Act requires the FRB to charge foreign banks with respect to the exams it conducts of their branches and agencies. Under this section, the FRB may only assess and collect foreign bank exam fees to the same extent it would charge state chartered member banks. Since the FRB does not presently charge state chartered member banks for their exams, it has expressed concern that current law will lead to disparate treatment between state chartered member banks and foreign banks. The foreign banks would be charged twice and state member banks only once for their examinations. This section also changes current law that requires annual on site examinations of foreign banks by providing they should be examined on site as frequently as would a national or state chartered bank by its appropriate regulator. These amendments do not preclude regulators from conducting on-site examinations more frequently if they deem it necessary. Finally, a strict time table is set up for final action by the FRB on foreign bank applications. The FRB is required to act within 180 days of receipt of the application. The FRB may extend this period for 180 days after providing notice of and the reasons for the extension.

Section 215. Disposition of foreclosed assets

Section 215 provides bank holding companies with the same flexibility as national banks by providing the Board with the authority to approve applications to hold foreclosed stock an additional five years. Under current law, bank holding companies are accorded up to five years to dispose of foreclosed assets. National banks, however, can hold foreclosed stock or real estate up to 10 years. The five-year extension would be dependent on the bank holding company showing the Board a good faith attempt to dispose of the foreclosed assets or a demonstration that disposing of the foreclosed shares during the initial five year period would have been detrimental to the bank holding company.

Section 221. Small bank examination cycle

Section 221 provides the federal banking agencies with the authority to examine Camel 2 institutions of up to $250 million in assets every 18 months. Current law allows federal banking regulators the discretion to examine Camel 1 institutions of up to $250 million and Camel 2 institutions up to $100 million (or up to $175 million after September 1996) on an 18-month exam cycle.

Section 222. Required regulatory review of regulations

Section 222 requires the FFIEC and the appropriate federal banking agencies to review all banking regulations every ten years to identify outdated or unnecessary regulatory requirements. After formal notice and comment, the FFIEC or the appropriate federal banking agency is then directed to publish the comments, eliminate any unnecessary regulations and report to Congress a summary of the comments and any need for legislative change.

Section 223. Identification of nonbank financial institution customers

Section 223 eliminates a 1992 law that authorized Treasury to issue a regulation requiring each insured depository institution to identify any customer that is a non-bank financial institution (broker-dealers, investment bankers, currency exchangers, etc). The Money Laundering Suppression Act of 1994 requires specified non-bank financial institutions to register with Treasury, thus making, in large part, the 1992 law unnecessary and duplicative.

Section 224. Repeal of commercial loan reporting requirements

Section 224 repeals Section 477 of FDICIA that requires the Board to annually report data on small business and small farm loans.

Section 225. Increase in Home Mortgage Disclosure Act; disclosure exemption

Section 225 would increase the current exemption for small depository institutions (banks, thrifts, and credit unions) from $10 million to $50 million. Additionally, the provision would allow depository institutions to keep HMDA information at its home office, give notice in its branches of the information's availability and provide the information within 15 days of request by a consumer.

Section 226. Elimination of stock loan reporting requirement

Section 226 eliminates the requirement that domestic financial institutions and their affiliates file consolidated reports on extensions of credit that are secured, in the aggregate, directly or indirectly by 25% or more of any class of shares an insured depository institution. This provision would still apply to foreign banks (branches and agencies thereof) and their affiliates.

Section 227. Credit availability assessment

Section 227 requires the Board to conduct a study on small business lending every five years in consultation with the federal banking regulators, the Administrator of the Small Business Administration and the Secretary of Commerce and report to Congress on its findings.

Section 241. National bank directors

Section 241 provides Comptroller with the authority to waive the residency requirement on national bank directors. As a general matter, current law requires that a majority of a national bank's directors must be residents of the state in which the bank is located.

Section 242. Paperwork reduction review

This section amends Section 303(a) of the Community Development and Regulatory Improvement Act to further provide that the federal banking regulators conduct a review of the extent to which existing regulations require insured depository institutions and credit unions to maintain unnecessary internal written policies and eliminate those requirements where appropriate.

Section 243. State bank representation on Board of Directors of FDIC

Section 243 provides that one of the appointed board members of the FDIC must have state bank supervisory experience.

Section 244. Consultation among examiners

This provision requires consultation between safety and soundness and compliance examiners within an agency. The federal banking agencies are encouraged to appoint a "chief examiner" when examining an institution for compliance to ensure consultation among examiners and to resolve inconsistencies in recommendations.

Section 301. Audit costs

This provision would eliminate the independent auditor attestation requirement for safety and soundness compliance, and allow the agencies the discretion to waive the requirement that all members of the independent audit committee be outside directors (but not less than a majority) in the case of hardship.

Factors to be considered include the size of the institution, and whether the institution has made a good faith effort to elect or name additional competent outside directors. Section 301 also provides federal banking regulators with the discretion to designate certain information in annual management reports as privileged and confidential.

Section 302. Incentives for self-testing

Section 302 creates a privilege for self-tests conducted by a financial institution to determine fair lending compliance under the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA). A report or result of a self-test (as that term is defined by regulations of the Board and HUD for purposes of ECOA and FHA, respectively) is considered privileged if a creditor conducts, or authorizes an independent third party to conduct, a self-test of any aspect of a credit transaction by a creditor, in order to determine the level or effectiveness of compliance with FHA or ECOA; and has identified any possible violations of this title and has taken, or is taking, appropriate corrective action to address the possible violations.

The provision would protect the results of a self-test from discovery pursuant to a civil suit or from being used by regulators or federal enforcement agencies in enforcing FHA or ECOA. The privilege may be waived by the creditor if the self-test results are offered in defense or if the self-test results are voluntarily released or referred to in that specific proceeding. In addition, the report or results of a self-test are not privileged from disclosure when the report or results of the self-test are sought in conjunction with an adjudication or admission of a violation for the sole purpose of determining an appropriate penalty or remedy. The purpose of the privilege is to encourage lenders subject to ECOA and FHA to undertake candid and thorough self-evaluations in order to identify and correct possible violations early and thus to eliminate fair lending problems at their roots.

Section 303. Exemption for savings institutions serving military personnel

Section 303 expands the exception from the Qualified Thrift Lender test for savings institutions that primarily serve military personnel (including widows, divorced spouses, and current or former dependents). The provision would amend the existing exemption to eliminate the current date restriction on when the holding company must have acquired control of the savings institution.

Section 304. Qualified thrift investment amendments

Section 304 would amend the Home Owner's Loan Act to provide thrifts more investment flexibility in becoming Qualified Thrift Lenders. Under current law, a savings association must meet both the QTL test and the IRS thrift tax test. Both tests have the same goal of encouraging residential mortgage lending, although their requirements differ.

In order to meet the QTL test, savings associations must hold at least 65% of their portfolio assets in specified assets or "qualified thrift investments." Qualified thrift investments under HOLA include mortgages, home equity loans, mortgage-backed securities, Federal Home Loan Bank stock and within specified limits, consumer loans. Savings Associations that fail to meet the QTL test are subject to severe activities restrictions, branching limits, dividend limits and restrictions on FHLBS advances.

In order to qualify under the IRS thrift test, a savings association must maintain 60% of its total assets in specified assets such as mortgages, and government securities. Failure to meet the IRS thrift test results in adverse tax consequences such as limitations on the availability of the bad debt reserve deduction and recapture of existing bad debt reserves.

Because of the differences between the two tests, savings associations must track their investments to ensure compliance under the different requirements of both tests. Given the fact that both tests are intended to achieve the same goal, the Committee believes that meeting one of the tests should be sufficient to qualify for the benefits that attach to the QTL test.

Section 304 provides more flexibility to thrifts in meeting these requirements by allowing savings association to qualify as QTL lenders by meeting either the QTL test or the IRS thrift test. In addition, the section expands the type and amount of investments that can be counted toward the qualified thrift lender test by: (1) eliminating the current limitations on credit card and educational loans under section 5(c) of HOLA; (2) increasing the amount of small business loans thrifts can make from 10% to 20% of total assets; and (3) allowing consumer credit card loans, education loans and small business loans to be counted as qualified thrift investments for purposes of the 65% portfolio asset requirement.

Section 305. Daylight overdrafts by Federal Home Loan Banks

Section 305 requires the Board to establish net debit caps for daylight overdrafts incurred by FHLBs consistent with the credit quality of each FHLB and calculated in the same manner as fees for other users. Alternatively, the Board may exempt the FHLBs from fees and penalties for daylight overdrafts.

Section 306. Application for membership in the FHLB System

Section 306 grants the FHLBs the authority to approve all applications for membership. Prior to approving an application of a CAMEL-rated 3, 4 or 5 institution, the FHLB must notify the Federal Housing Finance Board (FHFB). Individual banks currently provide the FHFB with the relevant information used in the analysis of approving prospective members. This section does not affect section 6(h) of the Federal Home Loan Bank Act.

Section 307. FHLB external auditors

This provision allows the FHLBs to jointly select external auditors rather than the FHFB.

Section 308. Limited purpose bank

Section 308 eliminates the 7 percent growth cap on the annual asset growth of limited purpose banks. The section also allows limited purpose banks to take deposits under $100,000 for the purpose of securing a credit card. The Bank Holding Company Act currently provides an exemption from the definition of "bank" for limited purpose credit card banks that, among other things, engage only in credit card operations, have only one office that accepts deposits and do not accept deposits under $100,000.

Section 309. Collateralization of advances to members

Section 309 will allow FHLBs to accept second mortgages that are insured by the federal government as primary collateral for advances. Under current law, FHLBs can accept secondary mortgages as collateral, but only in amounts equal to 30% of the capital of the member bank.

Section 310. Increasing limit on total advances by the FHLB system to non-QTL institutions

Section 310 increases, from 30% to 40%, the limit on the aggregate amount of advances by the Federal Home Loan Bank system to members that are not qualified thrift lenders.

Section 311. Fair debt collection practices

This provision clarifies that the Fair Debt Collection Practices Act requires a debt collector to disclose clearly in the first written communication with the debtor that the debt collector is trying to collect a debt and is contacting the consumer for that purpose. The provision also clarifies that unless a verification request is made, collection activity may take place during the 30 day period in which a consumer may make a request for a verification of the debt.

Section 401. Short title

Sections 401 through 426 comprise "the Consumer Reporting and Reform Act."

Section 402. Definitions

Adverse action

A prior interpretation issued by the FTC [55 Fed. Reg. 18,826 (May 4, 1990)] holds that actions taken in connection with credit, employment, or insurance may constitute adverse actions, but other actions taken pursuant to a permissible purpose, such as a refusal to cash a check, rent an apartment, or open a new account, do not. The language adopted by the Committee eliminates this distinction.

Section 402(a) of the Committee bill adds to section 603 of the Fair Credit Reporting Act new subsection (k) which sets forth the definition of the term "adverse action." Section 603(k) provides that for purposes of the FCRA, when used in connection with action involving credit based in whole or in part on a consumer report, the term "adverse action" has the same meaning as the definition of "adverse action" set forth in the Equal Credit Opportunity Act. Under Section 603(k), "adverse action" also includes a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or any amount of, any insurance, in connection with the underwriting of insurance. This portion of the definition applies to adverse determinations with respect to existing insurance or applications for new insurance.

The definition also covers a denial of employment or any other employment decision that adversely affects any current or prospective employee. In addition, the definition covers a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D).

Finally, the definition includes an action taken in connection with an application made by, or transaction initiated by a consumer if that action is adverse to the interest of the consumer. The term also includes an adverse change made to the terms of an account as the result of a review performed under section 604(a)(3)(E)(ii). However, the definition does not cover situations such as those where a creditor obtains consumer reports on its customers in connection with a review of its credit or other portfolio and, in connection with the review, a consumer's account is not changed, or is changed in a way that is not less favorable to the interest of that consumer, even if the accounts of other consumers are changed in a more favorable manner. Likewise, failure to include a consumer in a prescreening solicitation does not constitute adverse action.

Firm offer

Credit or insurance providers who obtain prescreened lists must provide a "firm offer" of credit or insurance to all consumers on the list.

Section 402(b) of the bill adds to section 603 of the FCRA new subsection (l) which defines the term "firm offer of credit or insurance." This definition is necessary because sections 404(a) and 411(b) of the bill set forth new requirements for prescreening which, among other things, provide that prescreening must involve a "firm offer of credit or insurance." Under section 603(l), an offer of credit will be deemed to be a "firm offer of credit" if the creditor making the offer will honor the offer if the consumer meets the criteria the creditor has established for the credit being offered. Under the definition, a creditor may withdraw the offer of credit if the consumer does not qualify for the credit. For example, the creditor may withdraw the offer of credit if the consumer does not meet the criteria used to select the consumer for the offer of credit (i.e., those criteria used by the consumer reporting agency or agencies that performed the prescreening to select those consumers who would receive the offer). In addition, the creditor may withdraw the offer of credit if the consumer does not satisfy any other criteria established by the creditor before the consumer was selected for the offer. When a consumer responds to the offer, the creditor may review a consumer report on the consumer, information provided in the consumer's application or response, and any other information bearing on the creditworthiness of the consumer to determine whether the consumer meets the criteria for the credit product being offered.

A creditor that utilizes prescreening in connection with credit products secured by collateral may condition the offer of credit on the consumer furnishing the collateral that secures the credit. For example, a creditor that uses prescreening to offer consumers credit card accounts secured by deposits may condition the offer of credit on the consumer establishing the deposit account that secures the credit and executing a security agreement. If the consumer responds to the offer of credit but fails to satisfy the security requirements for the credit account, the creditor may withdraw the offer of credit. However, the creditor must indicate to the consumer in the offer the type of security required for the secured credit product being offered.

The definition created by new subsection (l) also provides the same flexibility for prescreening involving insurance. Under the definition, a firm offer of insurance may be withdrawn if it is determined that a consumer responding to the offer does not meet the criteria established for the insurance being offered.

Credit or insurance transaction that is not initiated by the consumer

This term is used throughout the Committee bill to describe prescreening transactions.

Section 402(c) of the bill adds to section 603 of the FCRA new subsection (m) which clarifies the scope of the phrase "credit or insurance transaction that is not initiated by the consumer" for purposes of the prescreening provisions set forth in the bill. Section 603(m) makes it clear that the prescreening provisions of the FCRA do not apply where a consumer report is obtained by a creditor in connection with reviewing or collecting an existing account of the consumer for safety and soundness purposes, even if the creditor subsequently decides to change the credit available to the consumer. Thus, for example, a credit card issuer may obtain a consumer report on a consumer in connection with its regular annual or other review of the consumer's credit card account, and may decide to offer to the consumer a higher credit amount or an additional or improved product, such as a gold card.

Consumer report

Section 402(e) facilitates the sharing of information among entities related by common ownership or affiliated by corporate control by excluding certain information from the definition of "consumer report."

The definition of "consumer report" set forth in section 603(d) of the FCRA is amended by expressly excluding from that definition the sharing of certain types of information among related entities. Under section 603(d)(A), the definition of "consumer report" does not include any communication of information among entities related by common ownership or affiliated by corporate control if the information consists of the transactions or experiences between one of the entities and the consumer to whom the information relates. Thus, section 603(d)(A) makes it clear that the so-called "experience information exception" to the definition of "consumer report" exempts from the scope of the FCRA any communication of such information among related entities regardless of whether the information is communicated directly from one related entity to another or is furnished through another related entity, so long as each of the entities is related by common ownership or affiliated by corporate control.

In addition, section 603(d)(A) makes it clear that the term "consumer report" does not cover the sharing among related entities of any other types of information provided that it is clearly and conspicuously disclosed to the consumer that information may be shared among such entities and the consumer is given the opportunity to direct that the information not be shared among such entities. This provision clarifies that the communication of consumer report information, application information and any other information among affiliated entities is not a consumer report provided that the sharing is disclosed to the consumer and the consumer is afforded the opportunity to opt out of the sharing.

Employment agency communications

Section 402(f) of the Committee bill adds to section 603 of the FCRA new subsection (o) which excludes from the definition of consumer report certain communications by employment agencies.

Nationwide consumer reporting agency

Section 402(g) of the Committee bill adds to section 603 of the FCRA new subsection (p) which sets forth the definition of a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. This term is used in various provisions throughout the Committee bill.

Section 403. Furnishing consumer reports; use for employment purposes

USE OF REPORTS FOR BUSINESS PURPOSES

Section 403 amends section 604 of the FCRA concerning the permissible purposes required to access a consumer report. Under current law, consumer reporting agencies may furnish reports, provided that the user has a legitimate business need in connection with a transaction involving the consumer. This section provides that consumer reports may be furnished in connection with business transactions initiated by the consumer.

Current law also allows users to obtain a consumer report "in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer." This section also allows consumer reports to be furnished in connection with the review of accounts that are not credit accounts. For example, the Committee intends this section to provide a depository institution with the ability to procure a consumer report in connection with a non-credit account, such as a deposit account. Like creditors, banks and others may need to consult a consumer's report in order to determine whether the consumer's current account terms should be modified. For example, the institution may provide more favorable pricing terms after consulting the report. The permissible purpose created by this provision, however, is limited to an account review for the purpose of deciding whether to retain or modify current account terms. It does not permit access to consumer report information for the purpose of offering unrelated products or services.

This section also amends the "legitimate business purpose" provision to allow consumer reporting agencies to furnish information in connection with direct marketing transactions, provided that the consumer has not opted out through the system established under section 404.

Use of reports for employment purposes

Section 604 of the FCRA permits employers to obtain consumer reports pertaining to current and prospective employees. The Committee is concerned, however, that this provision may create an improper invasion of privacy. Section 403 of this bill requires that employers provide prior written disclosure to current and prospective employees that their consumer reports may be procured in connection with their employment. Further, employers must obtain a specific or general written authorization prior to procuring such a report.

Section 403 prohibits a consumer reporting agency from providing a report for employment purposes unless the person obtaining the report certifies to the agency that the required disclosures have been provided to the employee and that the information from the report will not be utilized in violation of Federal or state equal employment opportunity laws. Further, the agency must include with the report a summary of the consumer's rights under the FCRA.

The Committee is also concerned that the ability of employers to obtain consumer reports on current and prospective employees may unreasonably harm employees if there are errors in their reports. Therefore, the Committee bill requires that employers, before taking an adverse action based on a consumer report, provide the current or prospective employee with a copy of the report, a description of the individual's rights under the FCRA, and a reasonable opportunity to respond to any information that is disputed by the consumer. The Committee does not intend to require that employers await the results of a formal, 30-day reinvestigation by the consumer reporting agency before taking action based on a consumer report. Rather, the Committee bill specifies that a reasonable opportunity need not exceed five business days from the date of the receipt of the report by the consumer. However, the Committee does expect that employers will consider information provided by the consumer within the five-business day period.

This section provides an exception from the employer's obligation to provide a reasonable opportunity to respond if the employer has a reasonable belief that the consumer has engaged in fraudulent or criminal activity. The Committee intends this exception to apply only to situations where the employer believes that the fraudulent or criminal activity is ongoing and directly related to the employment involved. In contrast, the section is not intended to eliminate the opportunity to respond in instances where a consumer is denied employment or a promotion because that consumer's report indicates a past history of fraudulent or criminal activity.

Section 404. Use of consumer reports for prescreening and direct marketing; prohibition on unauthorized or uncertified use of information

Section 404(a) permits the use of consumer report information for prescreeningand direct marketing purposes. Both direct marketing and prescreening are activities in which consumer reporting agencies use their credit files to create and sell lists of consumers who meet specifications provided by third parties seeking to offer goods or services. Because these lists are created based on the consumer report files maintained by the agency, the lists themselves are currently considered a series of consumer reports under the FCRA. Therefore, the recipient must have a permissible purpose under the FCRA. To date, the FTC has taken a narrow view of the extent to which the use of consumer report information for prescreening or direct marketing purposes is permissible.

This section expands the ability of consumer reporting agencies to use consumer report information for prescreening and direct marketing. At the same time, however, the bill mandates that consumer reporting agencies create and maintain a system to allow consumers to "opt out" of the prescreening and direct marketing processes. By opting out, consumers can prohibit consumer reporting agencies from releasing their names or other information about their reports for prescreening and direct marketing.

Prescreening

The Committee seeks to balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers who meet the criteria for the credit or insurance being offered. While the direct marketing portion of section 404 limits consumer reporting agencies to providing lists that are not based on credit limit, credit payment history, credit balance, or negative information, the Committee understands that such factors must be considered in order to market credit or insurance. For this reason, the prescreening section of the Committee bill allows credit and insurance providers to obtain credit bureau data for credit and insurance transactions not initiated by the consumer based on this more sensitive information. In exchange for allowing credit and insurance providers to obtain credit bureau data based on more sensitive information, however, the section requires that the credit or insurance provider make a "firm offer," as defined in the bill, of credit or insurance to all consumers who meet the criteria for the credit or insurance being offered.

Section 404(a) of the bill adds to section 604 of the FCRA new subsection (c) which sets forth the conditions under which a consumer reporting agency may furnish a consumer report on a consumer to the person requesting the report in connection with a credit transaction that is not initiated by the consumer. Under section 604(c)(1)(A), a consumer reporting agency may furnish a consumer report in connection with such a credit transaction if the consumer authorizes the agency to provide the report to the person obtaining the report. For purposes of this provision, a consumer can authorize the furnishing of the report by notifying the consumer reporting agency directly, by notifying some other entity designated by the consumer reporting agency for that purpose, or by providing authorization to the user of the report. If a consumer provides such an authorization, the agency may furnish a full consumer report on the consumer.

Section 604(c)(1)(B) permits the furnishing of a consumer report in connection with a credit transaction that is not initiated by the consumer where the transaction consists of a "firm offer of credit or insurance," and, in accordance with the new prescreening opt-out requirements set forth in this Act, the consumer reporting agency has established a notification system which permits the consumer to be excluded from consideration for such transactions, and the consumer has not elected to be so excluded.

Section 604(c)(2) specifies the information that a consumer reporting agency may furnish to a creditor in connection with prescreening. First, under section 604(c)(2)(A), the creditor may receive the name and address of each consumer in connection with the prescreening.

Second, 604(c)(2)(B) permits a creditor to receive an identifier for each consumer, such as a number or code, provided that the identifier is not unique to that particular consumer and is used for the purpose of verifying the identity of the consumer. For example, a consumer reporting agency may furnish in connection with prescreening part of the social security number for each consumer. Thus, the creditor may use that number to verify that consumers responding to a prescreened offer were included in the prescreening. This could be accomplished by matching the partial social security number provided by the consumer reporting agency to the corresponding portion of the social security number furnished by the consumer on the response to the offer.

Third, 604(c)(2)(C) provides that a creditor may receive any "other information pertaining to a consumer that does not identify the relationship or experience of the consumer with a particular creditor or other entity." Under (c)(2)(C), a consumer reporting agency could not provide a creditor with a full credit report on prescreened consumers until a consumer actually responds to the creditor's offer. However, (c)(2)(C) does permit a creditor to receive other information to enable the creditor to determine how much credit to offer each consumer while protecting consumer privacy by ensuring that the prescreened report does not identify the consumer's specific credit relationship or experience with particular creditors or other entities.

Direct marketing

Section 404 allows consumer reporting agencies to sell lists for direct marketing transactions not initiated by the consumer. The agency may use a limited amount of information in a consumer's file to create a list, provided that the consumer has not notified the consumer reporting agency in writing or by telephone through the opt-out procedure that the consumer does not consent to such use. The information that may be provided to the user of the list, however, is limited to the names and addresses of specific consumers.

Further, the names and addresses may not be furnished if doing so would disclose "credit payment history, credit limit, credit balance, or any negative information pertaining to the consumer." This second provision effectively limits the criteria which may be used by the consumer reporting agency to select consumers for direct marketing lists to criteria that do not disclose those items.

The Committee intends this provision to safeguard the most sensitive credit information in the consumer's file. The direct marketing provisions of the bill do not apply to "credit or insurance transactions that are not initiated by the consumer."

Opt out

The Committee is aware that some consumers may find that direct marketing and prescreening entail an undesirable invasion of their privacy. Therefore, while this section facilitates prescreening and direct marketing, it creates an "opt-out" procedure through which a consumer may elect to have his or her name excluded from any list provided by the consumer reporting agency under section 604(c)(1)(B) and section 604(d)(1)(B) of the FCRA.

Section 404 provides that a consumer may prevent his or her name from appearing on prescreening or direct marketing lists furnished under section 604(c)(1)(B) or section 604(d)(1)(B) by notifying a consumer reporting agency in writing or by telephone that the consumer does not consent to the furnishing of his or her consumer report in connection with such transactions. Consumer reporting agencies providing prescreening or direct marketing lists must maintain toll-free telephone numbers for consumers to use to notify the agency of their desire to opt-out. In addition, those consumer reporting agencies that compile and maintain files on a nationwide basis, as defined in the bill, must establish a joint notification system to enable consumers to opt-out of lists created by all such agencies operating nationwide with one telephone call. The Committee intends that, to make this system effective, such agencies must publicize the existence and purpose of this joint system in newspapers with nationwide circulation. The consumer's election to opt out will be effective for 2 years following the consumer's notification of the consumer reporting agency, or permanently, if the consumer specified in writing.

Use of information obtained from reports

Section 404(b) prohibits any entity from obtaining consumer report information without a permissible purpose. Further, the Committee bill requires users to certify that purpose. These requirements are intended to fill a gap in existing law. While current law prohibits consumer reporting agencies from providing a consumer report to a user who lacks a permissible purpose, it is not a violation of current law to obtain the report without a permissible purpose unless the user knowingly employs false pretenses in doing so. This situation has frustrated consumers, enforcement authorities and the consumer reporting agencies by making it difficult to prevent the improper obtaining of consumer reports. By providing an affirmative obligation for users to have a permissible purpose, the Committee intends to provide the FTC, the state law enforcement authorities, and private citizens with recourse against those who unlawfully access consumer reports, regardless of whether or not the user acted under false pretenses.

Specifically, the bill provides that a person may use or obtain information from a consumer report only if the consumer report was obtained for one of the permissible purposes set forth in section 604 of the FCRA and is within the scope of the certification between the person and the provider of the report. The bill, however, does not require separate certifications for each request, but only that the request be within the scope of the applicable certification agreement. Thus, a person who obtains a consumer report will be in compliance with new section 604(f) if the person obtains the report for one of the permissible purposes set forth in section 604, and the report is covered under the person's certification agreement with the provider of the consumer report.

Section 405. Consumer consent required to furnish consumer report containing medical information; furnishing consumer reports for commercial transactions

Section 405 of the bill amends section 604, the permissible purposes section of the FCRA, to require a consumer reporting agency to obtain consumer consent before it furnishes a consumer report containing medical information for employment purposes or in connection with a credit or insurance transaction or a direct marketing transaction. This section works in tandem with section 603(i) of the FCRA which defines the term "medical information" as medical information or records obtained "with the consent of the individual to whom it relates." Together, these two sections protect critical consumer privacy rights in the area of medical information by requiring consumer consent for the collection and the furnishing by a consumer reporting agency of medical information about a consumer. It is not the intent of this section, however, to prohibit consumer reporting agencies from furnishing information in a consumer report about the medical payment history of consumers.

Section 406. Obsolete information and information contained in consumer reports

The Committee intends that consumer reports contain timely as well as accurate information. Section 406 limits the length of time that information may be included in a consumer report and clarifies the type of information that may be reported.

Seven year reporting period

Current law generally prohibits consumer reporting agencies from including in a consumer report accounts placed for collection or charged to profit and loss which antedate the report by more than seven years. The Committee is concerned that this seven year limitation is ineffective. In some cases, the collection action occurs months or even years after the commencement of the preceding delinquency. Under these circumstances, the consumer reporting agency may maintain the information for seven years beginning on the date that the collection action is first reported. Consequently, the consumer report may contain such information even if the delinquency commenced more than seven years before the date on which the report is provided to a user.

The Committee bill specifies that the seven-year period with respect to information concerning a delinquent account charged to profit and loss, placed for collection, or subjected to a similar action, may begin no more than 180 days after the commencement of the delinquency immediately preceding the collection, charge to profit or loss, or similar action. A creditor is under no obligation to place a delinquent account for collection within a specified period, or initially to report the delinquency. If a collection or similar action is reported, however, the seven year reporting period will commence not later than 180 days after the beginning of the delinquency rather than on the date of any subsequent action. The Committee intends this requirement to apply only to information furnished to a consumer reporting agency more than 455 days after enactment of the Consumer Reporting Reform Act. Information reported to the consumer reporting agency prior to that date will be unaffected.

Additional information on bankruptcy

Section 406 requires consumer reporting agencies to include in any report containing information regarding an individual who has filed bankruptcy, an identification of the chapter of Title 11 of the United States Code under which the consumer filed if that information is provided to the agency by the source of the information. The Committee is aware that many creditors look more favorably upon Chapter 13 filings than filings under other Chapters of Title 11, and this provision ensures that such information is available to such a creditor. In cases where the bankruptcy was withdrawn by the consumer prior to a final judgment this section also requires the agency to indicate in the report, upon receipt of documentation certifying such withdrawal, that the filing was withdrawn.

Indication of closure of account

The Committee is also concerned that consumer reports may not reflect the current status of accounts that have been voluntarily closed by consumers, or may improperly suggest that an account was closed because the consumer did not meet the account's terms. The Committee bill requires creditors to inform consumer reporting agencies when a consumer voluntarily closes a credit account and specifies that the consumer reporting agencies must indicate such information in any subsequent consumer reports containing information about such account. This provision applies only to credit accounts which are closed solely as a result of a voluntary request by the consumer. This provision does not cover, for example, an account which is closed by a creditor as a result of a consumer's delinquencies or other abuse of the account, even if the consumer also asks to have the account closed.

Indication of dispute by consumer

The Committee bill also provides that, if a consumer reporting agency is notified pursuant to section 623(a)(3) that information regarding a consumer that was furnished to the agency is disputed by the consumer, the agency must indicate that fact in each consumer report that includes the disputed information.

Section 407. Compliance procedures

Section 407 imposes significant new duties on consumer reporting agencies with respect to certain providers and users of consumer report information. Section 407 requires consumer reporting agencies to provide a notice to providers and users of consumer report information outlining the requirements of the FCRA.

Section 407 also imposes duties upon those persons or businesses who procure consumer reports for the purpose of reselling the information. Such "resellers" are, by definition, consumer reporting agencies, and the Committee intends that they be subject to all the applicable requirements of the FCRA. In addition, the section provides that a person or business may not procure a consumer report for the purpose of reselling the information unless the person discloses to the consumer reporting agency providing the report the identity of the ultimate user and the permissible purpose under which the report will be resold to the ultimate user. The person procuring the report for resale must establish and maintain reasonable procedures to identify the ultimate user of the information, to certify the user's purpose for obtaining the information, to certify that the information will be used for no other purpose, and to verify such information once it has been provided to the consumer reporting agency.

Section 408. Consumer disclosures

All information in the consumer's file required to be disclosed

Under current law, consumer reporting agencies must provide a consumer, upon request and proper identification, with the nature and substance of all information (except medical information) in its files on the consumer. This provision has been interpreted to allow consumer reporting agencies to comply by furnishing consumers with summaries of their reports. The Committee is concerned that such summaries do not provide consumers sufficient access to their reports. Therefore, section 408 explicitly requires consumer reporting agencies to provide, upon request, all information in the consumer's file. The Committee intends this language to ensure that a consumer will receive a copy of that consumer's report, rather than a summary of the information contained therein. This provision also clarifies that the FCRA does not require a consumer reporting agency to make any disclosures to a consumer regarding credit scores, risk scores, or any other scores or predictors relating to the consumer.

More information concerning recipients of reports required

Section 408 also requires that consumer reporting agencies provide to consumers an identification of those persons or businesses (including each end-user identified under section 607(e)(1)) that procured such consumer's report (1) for employment purposes within the previous two years and (2) for other purposes within the previous year. The latter provision expands current law, which requires an identification of all persons who have procured the consumer's report for non-employment purposes during the preceding six months. Section 408 also requires the consumer reporting agency to provide the name (including the trade name, if applicable) and address of each recipient of the report, as well as the recipient's telephone number, if requested by the consumer.

Information regarding prescreening inquiries

The section requires consumer reporting agencies to provide consumers with a record of all recipients of prescreened lists that identified that consumer provided by the agency during the previous year.

Summary of rights

Section 408 requires that consumer reporting agencies include with each disclosure provided to a consumer under section 609 of the FCRA a written summary of the consumer's rights under the FCRA and, if the consumer reporting agency operates nationwide, a toll-free telephone number at which personnel are accessible to consumers during normal business hours. The summary of rights must include a description of the FCRA and the rights of the consumer, an explanation of how the consumer may exercise his or her rights, a list of all Federal agencies responsible for enforcement of the FCRA, including the address and telephone number of each agency, and a statement that the consumer reporting agency is not required to remove accurate derogatory information from a consumer report. The summary of rights also must include a statement that the consumer may have additional rights under state law and that the consumer may wish to contact a state or local consumer protection agency or state attorney general to learn of those rights. The FTC will prescribe the specific form and content of the disclosure.

Form of disclosures to consumer

Section 408 requires consumer reporting agencies to make all required disclosures to consumers in writing. If the agency elects to provide disclosures in an alternative form, it may also do so as long as the consumer authorizes the disclosure, furnishes proper identification, and specifies the form of disclosure. The provision further specifies that such non-written disclosures may be made to the consumer in person, by telephone, by electronic means, or by any reasonable means available from the agency.

Simplified disclosure

To ensure that consumers understand their reports once they receive them, this section provides that the consumer reporting agencies must, within 90 days of enactment, develop a form which shall maximize the comprehensibility and standardization of such disclosures. The Committee does not intend the maximization standard to be interpreted as a perfection standard. However, the Committee expects that report information will be provided in a form that can be understood by the average consumer.

Section 409. Procedures in case of the disputed accuracy of any information in a consumer's file

The Committee is aware that the consumer reporting system handles almost two billion pieces of data per month and will never be perfectly accurate. Mistakes will occur, and not all of them can be prevented. Section 409 is the heart of the Committee's efforts to ensure the ultimate accuracy of consumer reports by placing important requirements upon consumer reporting agencies after inaccuracies have been detected. Therefore, section 409 is designed to ensure that consumers are able to address problems and correct errors in a timely fashion.

Nothing in section 409 or any other section is intended to require consumer reporting agencies to arbitrate disputes between consumers and credit grantors as to completeness or accuracy of information in the consumer's file.

Reinvestigation procedures

Section 409 requires consumer reporting agencies to reinvestigate disputed information and to record the current status of that information within the later of 30 days after receipt of the initial notice of the dispute from the consumer or 15 days after receipt of additional relevant information from the consumer concerning the dispute. The latter provision will ensure that an agency has a minimum of 15 days to consider any additional information provided in the course of the reinvestigation period. The Committee does not intend this provision to suggest that a consumer has any obligation to submit additional information, however, or that the failure to submit such additional information should be construed against the consumer.

Prompt notice of dispute to furnisher of information

Once a consumer informs a consumer reporting agency of a dispute, the consumer reporting agency must notify the furnisher of the information within five business days. This five business day notification requirement is intended to provide the furnisher with sufficient time within the 30 day reinvestigation period to investigate and verify the information.

Determination that dispute is frivolous or irrelevant

The section allows a consumer reporting agency to terminate a reinvestigation if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant. The Committee does not intend to permit consumer reporting agencies to use this determination as a shield from the reinvestigation requirement.

Not later than five business days after making a determination that a dispute is frivolous or irrelevant, the agency must mail a written notice to the consumer indicating such determination, containing the reasons for the agency's determination. The notice also must identify information required to investigate the disputed information. The identification of such information may consist of a standardized form describing the general nature of such information. The Committee expects that a consumer will be afforded an opportunity to respond to those concerns that led the consumer reporting agency to make its determination.

The Committee recognizes that a consumer may submit information after a reinvestigation that is substantially similar to information that the consumer has submitted during the reinvestigation process. The Committee expects that the consumer reporting agency may not consider a subsequent submission in such circumstances.

Consideration of consumer information

In conducting the reinvestigation, the agency must consider any relevant information furnished by the consumer during the 30 day period. If the consumer submits additional information more than 30 days after the initial dispute is filed, the Committee expects that such information will be treated as a new dispute.

Deletion of inaccurate or unverifiable information

If the reinvestigation reveals that the information being disputed is inaccurate or cannot be verified within the 30 to 45 day time period mandated by this section, the agency must delete the information. The information deleted shall consist solely of the information that was disputed by the consumer and shall not include any portion of the same item that was not disputed. This section further requires consumer reporting agencies to maintain reasonable procedures to ensure that such information does not reappear in the consumer's file or on subsequent reports furnished to users.

Reinsertion of previously deleted material

The Committee is aware that consumers experience considerable frustration when previously deleted information reappears. In addition to requiring consumer reporting agencies to establish procedures to prevent the deleted information from reappearing, section 409 prohibits a consumer reporting agency from reinserting information in the consumer's file following a deletion unless the furnisher of information certifies that the information is completed and accurate.

Within five business days of the reinsertion, the agency must notify the consumer of the reinsertion in writing or by other means if authorized by the consumer and acceptable to the agency. As part of, or in addition to, the notification, the agency must provide to the consumer, in writing, a statement that the information has been reinserted, that the consumer has the right to add a statement to the file disputing the accuracy or completeness of the information in the file, and the name, business address, and telephone number of the furnisher of the information.

Notice of results of reinvestigation

Regardless of the outcome of the reinvestigation, the consumer reporting agency must provide to the consumer a written notification of the results within five business days of completing the reinvestigation. The notification must include the following: (1) a statement that the reinvestigation is completed; (2) a consumer report that is based on the consumer's file as that file is revised following the reinvestigation; (3) a description or indication of any changes made to the report as a result of the reinvestigation; (4) a notification that the consumer has the right to add a statement to the file disputing the information; and (5) a notification of the consumer's right to request that the agency furnish either notification of the modification or a summary of the statement submitted by the consumer to any person designated by the consumer who has received a copy of the consumer's report for employment purposes in the previous two years or for other purposes within the previous six months.

In addition, if the reinvestigation results in finding that the disputed information is accurate and complete, the notification must include an indication that the consumer may request a description of the procedure used to make the finding and the name, business address, and telephone number of the furnisher of the information. The Committee assumes that the consumer may be dissatisfied because the information has not been changed and believes that such a situation will be best resolved by enabling the consumer to contact directly the furnisher of that information. At the same time, if the information is found to be inaccurate and then corrected, the consumer is unlikely to be interested in the procedure used to make the finding or the name and address of the furnisher. In the event that the consumer desires such information, the consumer may receive it upon request, and the consumer reporting agency must provide the information within 15 days of receiving such request.

Expedited dispute resolution

The consumer reporting agency need not comply with paragraphs (2), (6) and (7) of section 611(a) if the agency deletes the disputed information from the consumer's file within three business days of being notified of the dispute, promptly notifies the consumer by telephone, provides written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion within five business days after making the deletion, and including in the telephone notice, or in a written notice accompanying the confirmation and the consumer report, a statement of the consumer's right to request under subsection (d) that the agency furnish notifications under that subsection. In this situation the agency's telephone contact with the consumer and provision of a consumer report on the consumer eliminates the necessity to provide written notification of the outcome of the reinvestigation. The Committee believes that this provision will ease any compliance burden on reporting agencies who may choose to simply delete certain information rather than go through the reinvestigation process. The Committee assumes that such a deletion will benefit the overwhelming majority of consumers because a consumer is unlikely to dispute positive information.

Section 410. Charges for certain disclosures

Reasonable charges

Section 410 allows a consumer reporting agency to impose a reasonable charge for making a disclosure pursuant to section 609 (which shall not exceed $8), and certain provisions of section 611 (which shall not exceed the charge imposed on each designated recipient for a consumer report). The section prohibits charges for any other notification or disclosure required by this title.

Free consumer reports

The Committee believes that consumers must have access to their report information in order to identify problems. Section 410 expands the circumstances under which a consumer is entitled to a free report.

The section enhances a consumer's right to a free report when an adverse action is taken based on a consumer report. For 60 days following the consumer's receipt of notice of an adverse action, that consumer is entitled to a free copy of his or her report upon written request. This provision amends current law, which prohibits a charge for a consumer report only for 30 days following an adverse action. The section also provides that a consumer reporting agency must provide a free consumer report to a consumer who has received notification from a debt collection agency affiliated with the consumer reporting agency stating that the consumer's credit rating may be or has been adversely affected.

Finally, the section allows a consumer to obtain a free copy of that consumer's report once during any 12-month period if the consumer certifies in writing that the consumer is unemployed and intends to apply for employment within 60 days, is a recipient of public welfare, or has reason to believe that the file contains inaccurate information due to fraud.

Section 411. Duties of users of consumer reports

Adverse actions

The Committee is concerned that consumers are often unaware of their rights in the event of an adverse action. The FCRA currently requires that a user who takes an adverse action in connection with a consumer report must notify the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency that provided the report. The Committee believes that such information is incomplete, however, in that it fails to inform the consumer of his or her rights, including the right to a free report for 60 days after an adverse action has been taken.

Section 411 requires a user of a consumer report who takes an adverse action based in whole or in part upon that report to provide several disclosures to the consumer. The user must provide the following in written or electronic form: a notice of the adverse action; the name, address, and telephone number (including a toll-free number if the agency operates nationwide) of the agency that furnished the report; a statement that the consumer reporting agency did not make the decision to take the adverse action; a notice of the consumer's right to a free copy of the report for 60 days, upon written request, from the agency that furnished the report; and a notice of the consumer's right to dispute with the agency the accuracy or completeness of any information in the report furnished by the agency.

Disclosures for prescreening and direct marketing

The Committee is aware the bill expands the ability of consumer reporting agencies to provide consumer reports for the purpose of prescreening and direct marketing. At the same time, the Committee bill offers consumers the opportunity to opt-out and prohibit consumer reporting agencies from furnishing information to users for prescreening or direct marketing. To further protect consumers, this section requires that a notice of the consumer's right to opt-out be included with any prescreening or direct marketing solicitation. The Committee understands that consumers will not receive notification of their right to opt out until they receive a solicitation.

Prescreening disclosure

Section 411 adds to section 615 of the FCRA new subsection (d) which imposes certain requirements on creditors that, in connection with a credit transaction that is not initiated by the consumer, engage in prescreening by using a consumer report obtained for that purpose. Section 615(d) applies only when a prescreened list is obtained from a consumer reporting agency under section 604(c)(1)(B).

Section 615(d)(1) provides that a creditor who uses a consumer report in connection with a credit transaction which is not initiated by the consumer and which consists of a firm offer of credit must, when providing a written solicitation to the consumer in connection with the transaction, clearly and conspicuously include on or with the solicitation a statement that information contained in the consumer's consumer report was used in selecting the consumer for the solicitation. The statement also must disclose that the consumer received the offer because the consumer satisfied the criteria for creditworthiness under which the consumer was selected for the offer. This disclosure provision does not require the creditor to disclose any of the criteria established by the creditor, but simply reflects the fact that, based on the information available to the creditor (typically through consumer reporting agencies or demographic firms) at the time the prescreening was conducted, the consumer appeared to meet such criteria.

The statement included on or with the solicitation also must indicate, to the extent applicable, that the credit may not be extended if the consumer responds to the offer and does not meet the criteria used to select the consumer for the offer, or does not satisfy other applicable criteria, or does not furnish any collateral required by the creditor. This disclosure will be required for creditors who, as is permitted under this bill, obtain a new consumer report on each consumer responding to the offer and review that report as well as information provided by the consumer (e.g., the consumer's employment status and income) and other information bearing on creditworthiness to determine whether the consumer actually meets the criteria established by the creditor for the offer. This disclosure is intended to avoid misleading consumers.

Finally, the statement on or with the solicitation must disclose that the consumer has the right to prohibit information contained in the consumer's file with any consumer reporting agency from being furnished for prescreening purposes and either that the consumer may exercise that right by notifying the joint notification system established by the nationwide consumer reporting agencies under section 604(e)(6), or, in the case of prescreening performed by a consumer reporting agency not covered by the joint notification system, by contacting that agency's notification system. The statement must include the address and toll-free telephone number of the appropriate notification system.

Section 615(d)(3) requires that a creditor who is subject to section 615(d)(1) must maintain a record of the criteria used by the creditor to determine whether to extend credit in connection with solicitations covered by section 615(d)(1), until the end of the 3-year period beginning on the date the particular solicitations are transmitted to consumers.

The bill also establishes similar requirements for a person who uses a consumer report that is provided to the person under section 604(c)(1)(B) in connection with an insurance transaction that is not initiated by the consumer.

Direct marketing disclosure

This section imposes similar disclosure requirements upon entities obtaining consumer report information under section 604(d)(1)(B) for direct marketing. Such a direct marketing solicitation must include a clear and conspicuous written statement indicating that the information concerning the consumer was provided by a consumer reporting agency and that the consumer has the right to opt-out by contacting the consumer reporting agency in writing or by telephone, thereby prohibiting a consumer reporting agency from using the consumer's information in the future for direct marketing transactions. Further, the disclosure must provide the name, address and toll-free number of the consumer reporting agency.

Section 412. Civil liability

Section 412 amends the sections of the FCRA pertaining to civil liability for willful and negligent non-compliance with the Act. In a situation where a person negligently violates the FCRA, a consumer is entitled to recovery in an amount equal to actual damages sustained by the consumer as a result of the failure to comply with the FCRA. In cases of willful non-compliance, the consumer is entitled to recover either: (i) the actual damages sustained by the consumer as a result of the failure to comply with the FCRA; or (ii) damages in an amount ranging from $100 to $1,000.

Section 412 also provides that a natural person who obtains a consumer report under false pretenses or knowingly without a permissible purpose may be held liable for actual damages sustained by the consumer, or $1,000, whichever is greater. In addition, section 412 provides that a consumer reporting agency is entitled to recover from any person who obtains a consumer report from the agency under false pretenses or knowingly without a permissible purpose an amount equal to actual damages it sustained as a result of the improper obtaining of the report or $1,000, whichever is greater.

The Committee is aware of concerns expressed by furnishers of information and the consumer reporting agencies that these provisions will result in unwarranted litigation. At the same time, the Committee does not want to disadvantage consumers who have been wronged. To balance the rights of consumers with those of consumer reporting agencies and furnishers, section 412 provides that the prevailing party may recover reasonable attorney's fees on a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with a civil liability action under FCRA was filed in bad faith or for purposes of harassment. The Committee intends this provision to apply to both plaintiffs and defendants.

Section 413. Responsibilities of persons who furnish information to consumer reporting agencies

Currently, the FCRA contains no requirements applying to those entities which furnish information to consumer reporting agencies. Section 413 imposes certain obligations upon those furnishers of information to consumer reporting agencies. The Committee believes that bringing furnishers of information under the provisions of the FCRA is an essential step in ensuring the accuracy of consumer report information.

General

This section provides that an entity shall not furnish any information to a consumer reporting agency if the person knows that the information is incomplete or inaccurate.

Section 413 adds to the Fair Credit Reporting Act new section 623 which sets forth the responsibilities of those entities that regularly furnish information to consumer reporting agencies. Section 623(a)(1) provides that a person may not furnish any information to a consumer reporting agency if the person "knows" that the information is incomplete or inaccurate. Section 623(a)(1) is intended to provide protection to a consumer in the circumstance where such a person actually knows that information furnished by that person to a consumer reporting agency is inaccurate. Section 623(a)(1) is intended to provide protection without having a chilling effect on the free flow of credit information. For example, if a person determines through an internal audit that information in its records on a consumer is wrong, that information may not be furnished to a consumer reporting agency. Similarly, if a consumer uses procedures reasonably established by a creditor to notify the creditor that information furnished to a consumer reporting agency by the creditor is inaccurate, and the information in fact is inaccurate, the creditor may not subsequently furnish the information to a consumer reporting agency. On the other hand, section 623(a)(1) does not apply where a consumer attempts to notify the creditor of an error without using procedures established by the creditor for such notifications. For example, section 623(a)(1) would not apply to a creditor if a consumer makes a notation on a payment stub claiming a consumer reporting error or indicates to one of a retail credit grantor's sales clerks that information furnished by the creditor to a consumer reporting agency is erroneous. Under such circumstances, the creditors would not "know" that the information is incomplete or inaccurate.

Duty to correct and update

This section requires any furnisher of information to correct and update information previously furnished to a consumer reporting agency that the furnisher determines is inaccurate. This provision creates an affirmative obligation for furnishers of information to correct such information where the furnisher determines that the information is wrong.

Duty to provide notice of continuing dispute

If any information provided by a furnisher continues to be disputed by a consumer, the furnisher of that information must include with that information a notice of the dispute. This provision applies to information that is disputed under section 611 of the FCRA (amended by section 409 of the Committee bill).

Duty to provide notice of closed accounts

Section 413 requires a person who regularly and in the ordinary course of business furnishes information to a consumer reporting agency concerning a consumer who has a credit account with that person to notify the agency when the account is voluntarily closed by the consumer. This provision is intended to complement the new requirement of section 605 of the FCRA (as amended by section 406 of the Committee bill) that a consumer reporting agency indicate in a consumer report if an account has been voluntarily closed by the consumer. Under this provision, the information must be furnished with the information regularly furnished by the person to the consumer reporting agency for the period in which the account is closed. This provision applies only to credit accounts which are closed solely as a result of a voluntary request by the consumer. This provision does not cover, for example, an account which is closed by a creditor as a result of the consumer's delinquencies or other abuse of the account, even if the consumer also asks to have the account closed.

Duty to provide notice of delinquency of accounts

This provision requires a creditor, when furnishing information concerning a delinquent account being placed for collection, charged to profit or loss, or subjected to a similar action, to within 90 days after furnishing the information, notify the agency of the month and year of the commencement of the delinquency that immediately preceded the action. The creditor is under no obligation to place the delinquent account for collection within a specified period, or initially even to report the delinquency. If the creditor later commences a collection action, however, and provides such information to a consumer reporting agency, the creditor must provide the month and year of the delinquency immediately preceding the action. This information will provide the consumer reporting agency with a reference date which it must use to determine obsolescence under section 605 of the FCRA (as amended by section 406 of the Committee bill).

Likewise, if an account is placed for collection with several different collection agencies, the reporting period will begin upon the same reference period.This requirement applies only to information furnished more than 455 days after enactment these provisions. Information which is reported prior to that time will be unaffected by this provision.

Duties of furnishers upon notice of dispute

In addition to the duties of furnishers of information concerning the initial provision of information, under section 623(b), a person who has furnished information on a consumer to a consumer reporting agency which subsequently is disputed by the consumer under section 611 of the FCRA must complete an investigation with respect to the disputed information and report to the consumer reporting agency the results of that investigation before the end of the 30-day period set forth in 611(a)(1)(A), or the additional 15-day period set forth in section 611(a)(1)(B), whichever is applicable. In addition, the person must review relevant information submitted to the consumer reporting agency by the consumer and provided to the person in accordance with section 611(a)(2).

Limitations

Section 623(c) limits the remedies available for, and enforcement powers with respect to, violations of section 623(a). Section 623(c) provides that only the agencies listed in section 621 are authorized to bring any action for a violation of section 623(a). Actions brought by such agencies for violations of section 623(a) may be brought only under section 621. No private right of action may be brought for any violation of section 623(a).

Section 414. Investigative consumer reports

Section 414 of the bill establishes new requirements for investigative consumer reports. Under the FCRA, "investigative consumer report" is a defined term. Generally, it is a consumer report that contains information on a consumer's character, general reputation, personal characteristics, or mode of living obtained through interviews with neighbors, friends, or associates of the consumer or with others who may have knowledge concerning the items of information contained in the report. Because an "investigative consumer report" is a consumer report, all requirements in the FCRA apply to these reports. Section 414 of the bill affords consumers new protections with respect to these reports because of the subjective nature of the information they may contain.

The bill amends section 606 of the FCRA, which generally provides that a person may not procure or cause to be prepared an investigative consumer report unless the consumer is provided certain written disclosures. Under the bill, consumer reporting agencies may not prepare or furnish an investigative consumer report unless they have received a certification from the person who requested the report that the required disclosures have been or will be made.

The bill further amends section 606 to prohibit consumer reporting agencies from making an inquiry for the purpose of preparing an investigative consumer report on a consumer where the inquiry, if made by an employer or prospective employer, would violate any applicable federal or state equal employment opportunity law or regulation. Consumer reporting agencies are also prohibited from furnishing an investigative consumer report that includes public record information—such as records of arrests, convictions or tax liens—unless the agency has verified the accuracy of the information within the 30-day period ending on the date the report is furnished. This general rule for investigative consumer reports that contain public record information is not intended to affect the applicability of section 613 of the FCRA which creates a special rule for all consumer reports that contain public record information, where such reports are furnished for employment purposes.

Section 414 of the bill further amends section 606 to prohibit a consumer reporting agency from preparing or furnishing an investigative consumer report containing information adverse to the consumer obtained through personal interviews with neighbors, friends, or others who have knowledge of such item of information unless (1) the agency has followed reasonable procedures to obtain confirmation of the information from an additional source that has independent and direct knowledge of the information or (2) the person interviewed is the best possible source of the information. This provision is intended to help guard against unsubstantiated information in investigative consumer reports. For example, if a consumer reporting agency preparing an investigative report is informed by a consumer's neighbor that the consumer fails to pay rent on time, the agency would have to make reasonable efforts to obtain confirmation of that information from a person with independent and direct knowledge—in this case the consumer's landlord.

Section 415. Increased criminal penalties for obtaining information under false pretenses

Section 415 of the bill increases the criminal penalties that may be imposed under sections 619 and 620. Section 619 imposes penalties on persons who obtain information from a consumer reporting agency under false pretenses. Section 620 provides for penalties against any officer or employee of a consumer reporting agency who knowingly or willfully provides information from the agency's files to a person not authorized to receive such information.

Section 416. Administrative enforcement

Section 416 amends the administrative enforcement section of the FCRA (section 621) to enhance the FTC's enforcement authority with respect to entities within its jurisdiction. By providing the FTC with the power to enforce provisions of this title in the same manner as if the violation had been a violation of any FTC trade regulation rule, the Committee gives the FTC the authority to seek civil money penalties for violations of the Act, unless other exceptions apply. This authority is consistent with the FTC's authority to seek civil penalties under the Equal Credit Opportunity Act and the Fair Debt Collection Practices Act.

However, section 416 limits the authority of the FTC to seek, and the courts to impose, any civil penalty on a person for a violation of section 623(a)(l). Specifically, no civil penalty may be imposed on a person for a violation of section 623(a)(l) unless: (i) the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action brought by or on behalf of the FTC; and (ii) the person has violated the injunction or order. Moreover, no civil penalty may be imposed for any violation occurring before the date of the violation of the injunction or order.

This section also clarifies that enforcement of the FCRA in connection with entities that are subject to enforcement under section 8 of the Federal Deposit Insurance Act will be conducted by the regulatory authorities specified in the Federal Deposit Insurance Act.

Section 417. State enforcement of Fair Credit Reporting Act

Section 417 amends section 621 of the FCRA by adding a new subsection (c) that permits state officials to enforce the FCRA. This subsection is intended to enhance the states" ability to address consumer reporting issues within each state. State attorneys general are frequently the first governmental agency to which consumers turn when they experience consumer reporting problems.

Section 621(c)(1)(A), as added by the bill, permits the chief law enforcement officer of a state, or an official or agency designated by a state, to bring an action to enjoin violations off the FCRA. Under section 621(c)(1)(B), any such state official may also bring an action on behalf of its residents to recover damages for which a defendant is liable to such residents under the civil liability provisions of the FCRA as a result of a negligent or willful violation of the FCRA or damages of not more than $1,000 for each such violation. The Committee intends that no action brought by a state official under section 621(c)(1)(B) will be deemed a class action by virtue of the state seeking to recover damages on behalf of its residents.

Although section 623(c), as added by the bill, bars private citizens from bringing suit against furnishers of information for violations of certain duties imposed on them, this bar does not apply to an appropriate state official who brings an action, under section 621(c)(1)(B), on behalf of state residents for violations of section 623(a)(2), (3),(4) or (5). In such actions, the state could recover damages, which would be awarded to its injured citizens, for which the furnisher would have been liable to those citizens under the FCRA but for section 623(c).

Actions brought under 621(c)(1)(A) and 621(c)(1)(B) may be brought in any appropriate United States district court or in any other court of competent jurisdiction. Any action that may be brought under section 621(c) is in addition to whatever actions and remedies may be available under state law.

Under section 621(c)(2), as amended by the bill, a state is required to serve written notice to the FTC or the appropriate federal regulator prior to filing an action under 621(c)(1)(A) or 621(c)(1)(B). If prior notice is not feasible, the state must serve such notice immediately upon instituting the action. The FTC or appropriate regulator may appear as an intervenor in any state's action and my file appeals.

Section 621(c)(3) provides that, for purposes of bringing an action under section 621(c), nothing in the section shall prevent the chief law enforcement officer of a state or an official or agency designated by a state from exercising the powers conferred on these officials by state law to conduct investigations, administer oaths or affirmations, or to compel the attendance of witnesses or the production of evidence. Under section 621(c)(4), whenever the FTC or other appropriate federal regulator has instituted a civil action for violation of the FCRA, no state may, during the pendency of the action, bring an action under section 621(c) against any defendant named in the FTC's or regulator's complaint for any violation of the FCRA alleged in the complaint.

Section 621(c)(5) provides that a state may not bring an action under section 621(c) against a person for a violation of section 623(a)(1) unless the person has been enjoined from committing the violation, in a action previously brought by the state under section 621(c)(1)(A), and the person has violated the injunction. In any action brought by a state for the violation of such an injunction, the state may not recover any amounts for any violation incurred before the date of the violation of the injunction on which the action is based.

Section 418. Federal Reserve Board authority

Section 418 of the bill adds to section 621 a new subsection (e) which gives authority to the Federal Reserve Board to issue interpretations of the FCRA with respect to financial institutions or to the holding companies and affiliates of such institutions, in consultation with other specified federal banking regulatory agencies.

Section 419. Preemption of State law

Section 419 amends section 623 of the existing FCRA, redesignated as section 624 by this Act. Section 624 provides that certain provisions of the FCRA preempt any corresponding provisions of state law. More specifically, under section 624, no state or local authority may impose any requirement, prohibition or other provision with respect to any subject matter regulated under Section 604(c) or (e) relating to prescreening. Section 604 (c) and (e), among other things, provide that a consumer reporting agency may furnish prescreened lists in connection with a firm offer of credit or insurance, provided that the consumer reporting agency has established the opt-out notification system required under section 604 and the consumer has not opted out. Section 604 also specifies the information that a consumer reporting agency may furnish on a prescreened list. Section 624 also preempts any state or local provision relating to the definition of "firm offer of credit or insurance" set forth in the Act. In short, under section 624, any state or local authority is precluded from employing or establishing any provisions relating to any aspect of prescreening.

Section 624 also preempts any state or local law relating to the subject matter of section 611, regarding the time periods for reinvestigation of consumer disputes and the notices established for such reinvestigation, except that such preemption does not apply to any state law in effect on the date of enactment of this Act.

In addition, section 624 completely preempts any state or local provision relating to the subject matter of section 615(a) and (b), regarding the duties of a person who takes any adverse action with respect to a consumer. Similarly, section 624 preempts any state or local provision relating to section 615(d), regarding the duties of a person who uses a consumer report in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance. Further, section 624 preempts any state or local provision relating to the subject matter of section 615(e), regarding the duties of a person who uses a consumer report in connection with any direct marketing transaction that is not initiated by the consumer.

Moreover, section 624 preempts any state or local provision relating to the subject matter of section 605 relating to information contained in consumer reports, except that such preemption does not apply to any state law in effect on the date of enactment of this Act.

In addition, section 624 preempts any state or local law with respect to the exchange of information among affiliated persons and preempts any state or local law with respect to the form and content of any disclosures required to be made under section 609(c). Finally, section 624 preempts any state or local law relating to section 623(b)(2), except that such preemption does not apply to any state law in effect on the date of enactment of this Act.

By preempting state and local provisions relating to the subject matter regulated by these provisions of the FCRA, section 624 establishes the FCRA as the national uniform standard in these areas. This section recognizes the fact that credit reporting and credit granting are, in many aspects, national in scope, and that a single set of Federal rules promotes operational efficiency for industry, and competitive prices for consumers. However, section 624 does not supersede any settlement, agreement, or consent judgment between any state attorney general and any consumer reporting agency in effect on the date of enactment of this Act, and does not supersede any provision of state law which is enacted after January 1, 2004, states explicitly that the provision is intended to supplement this Act, and gives greater protection to consumers than is provided under this Act.

Section 420. Action by FTC and Federal Reserve Board

While the Committee has included preemption provisions in order to provide for national uniformity in many of the disclosures and procedures required by the provisions in this bill, the Committee is concerned that consumers must be protected adequately and that the protections should continue to evolve as technology and the economy change. Therefore, section 420 provides that the FTC may, after opportunity for comment and consultation with state and Federal agencies, impose on entities subject to FTC jurisdiction more stringent requirements than those created by several of the sections of this bill that are preempted by section 419. In particular, the FTC may impose more stringent requirements in the areas of reinvestigation time periods, adverse action disclosures, prescreening disclosures, and the notices of consumers'' rights.

The Committee has provided the FTC with the authority to modify these provisions to ensure that the disclosures and procedures required by the bill remain effective to the greatest extent practicable. The Federal Trade Commission has suggested, for instance, that the 30 day reinvestigation period may be unnecessarily long in the future as technology allows reinvestigations to be accomplished more quickly. The Committee has included this provision to enable the Commission to shorten the 30-day period if it becomes necessary. Any modifications adopted by the FTC apply only to entities within the jurisdiction of the FTC. The bill also authorizes the FRB to impose more stringent requirements on persons described in paragraphs (1), (2), of (3) of section 621(b) of the FCRA or on the holding companies and affiliates of such persons.

Additionally, the Committee understands that states have the power to protect their own citizens, including protection from abuses in the credit reporting industry. Therefore, the FCRA, as amended by the Committee bill will not infringe upon the rights of states to legislate more stringent requirements that fall outside the scope of those areas specifically preempted to the extent such requirements are not inconsistent with any provisions of the FCRA.

Section 421. Amendment to Fair Debt Collection Practices Act

This provision amends Section 807(11) of the Fair Debt Collection Practices Act. It is intended to harmonize inconsistent judicial interpretations regarding Section 807(11). A similar provision was included in S. 783, as reported by the Committee during last Congress, and the current language was the product of negotiations between House and Senate Banking Committee staff. Many of the provisions agreed by the staffs during these negotiations were included in S. 709 as introduced this Congress. Most of these provisions were likewise incorporated in Title IV of this bill; the provision incorporated in Section 421 was amongst these provisions.

Section 422. Furnishing consumer reports for certain purposes

Section 422 sets forth a provision that allows agencies authorized by law to enforce child support orders to obtain consumer reports for the purpose of establishing child support obligations and determining the appropriate level of payments. The Committee believes that this provision will result in a more efficient and cost-effective process for obtaining reports against parents who fail to provide court-ordered child support payments.

This provision further provides that the person who is the subject of the consumer report must be provided 10 days prior written notice that the report will be requested, and also provides that consumer reports obtained in furtherance of establishing child support payment obligations cannot be used or shared by the state or local agency for any other proceedings. In addition, the provision requires that the state or local agency take steps to maintain the confidentiality of consumer reports.

Section 423. Disclosure of information and consumer reports to FBI for counter-intelligence purposes

This section creates a new section 625 which grants the Federal Bureau of Investigation the authority to obtain certain information about a consumer when investigating foreign counterintelligence activities.

Since the late 1980's, the FBI has been seeking each year to include in the House and Senate intelligence authorization bills a "national security letter" exemption from the FCRA to require consumer reporting agencies to provide the FBI with consumer reports of suspected terrorists upon a certification by the Director of the FBI or the Director's designee. The House and Senate committees have repeatedly refused to grant the FBI this extraordinary authority. Because of the recent and notorious terrorist activities in the United States, the Committee believed that giving the FBI additional, but limited, authority to obtain consumer information and reports on certain suspects would be appropriate on a temporary and experimental basis.

This section is intended to afford the FBI more ready access to consumer information, but only upon a certification or, if seeking a consumer report, a showing in court that: (1) the consumer information is necessary for the conduct of an authorized foreign counterintelligence investigation and, if seeking more than identifying information (which requires a different showing), (2) there are specific and articulable facts giving reason to believe that the consumer about whom information is sought is a foreign power or an agent of a foreign power and is engaging or has engaged in international terrorism or clandestine intelligence activities that involve or may involve a violation of criminal statutes. With new section 625, the Committee did not extend to the FBI unchecked authority to seek consumer information on suspected individuals, as would be the case under the national security letter exemption, but rather gave the agency a streamlined process for obtaining such information where warranted.

Furthermore, in response to the FBI's stated concerns about leaks in the course of counterintelligence investigations, the Committee provides that court actions to obtain consumer reports under section 625 be conducted in camera.

Section 625 instructs the FBI to report to the House and Senate intelligence committees and banking committees on a semiannual basis about the use of this section. The FBI's authority to obtain consumer information and reports under section 625 expires 5 years after the date of enactment of these amendments to the FCRA.

Section 424. Effective dates

Section 424 sets forth the effective dates for amendments made by this title. In addition, section 424(c) provides that any person or other entity that is subject to the requirements of the Act may, at its option, comply with any provision of this Act prior to the effective date of the relevant provision, provided that such person complies with each of the corresponding provisions of the Act which relate to that particular provision. For example, this section would allow creditors to voluntarily comply with the prescreening provisions of the Act prior to the effective date of the Act, provided that the credit bureau which furnishes the prescreening list complies with all applicable prescreening requirements of the Act and the creditor furnishes the prescreening notice required under section 615(d).

Section 425. Relationship to other law

Section 425 provides that none of the provisions of this title shall supersede or otherwise affect section 2721 of title 18, United States Code.

Section 501. Short title

Section 502. Federal Deposit Insurance Act amendment

Section 502 amends the Federal Deposit Insurance Act to clarify that federal banking agencies are not subject to strict liability for the release of hazardous substances on property acquired through receivership, conservatorship, liquidation, winding up the affairs of an insured depository institution or its subsidiary, or through criminal, civil or administrative enforcement proceedings. An agency may be held liable if it caused or contributed to the release of the hazardous substance. Federal banking agency liability under state law is limited to the value of the agency's interest in the property. Further, the agency may negotiate with the State for a settlement of property.

This section also provides that the immunity of the federal banking agency extends to first subsequent purchaser of the property; unless the purchaser would otherwise be liable due to a prior or affiliated relationship with the property; a failure to take reasonable steps to stop the release or threatened release to protect the public health and safety; or the fact that subsequent purchasers caused or contributed to the release of the hazardous substance on the property. If, however, a federal or state environmental agency orders the federal banking agency to remediate or take corrective action due to the subsequent purchaser's failure to take reasonable steps to do so, the subsequent purchaser must reimburse the federal banking agency for the cost of the clean-up (to the extent that the clean-up increased the fair market value of the property).

In addition, neither the federal banking agency or the subsequent purchaser may be subject to a lien for damages existing at the time of the transfer of the property. The federal banking agency is exempted from any law requiring the agency to grant any covenants to remediate pursuant to their acquisition of a property.

Section 503. CERCLA amendments

Lender liability

Section 503 clarifies the liability of lenders under CERCLA or Subtitle I of the Solid Waste Disposal Act for the release or threatened release of a hazardous substance on property: held or controlled by the lender through foreclosure; subject to a security interest; or held, subject to control, pursuant to terms of a lease or extension of credit. Lenders are only liable for the actual benefit conferred upon the lender by the removal of the hazardous substance. This limitation does not apply, however, if the lender caused or contributed the release of the hazardous substance.

This section also directs the Administrator of the Environmental Protection Agency, after consultation with the FDIC, to publish guidelines 180 days from enactment of this section to assist lenders in developing adequate procedures to evaluate environmental risk and damage of property before extending credit.

Fiduciary liability

CERCLA is also amended to provide that fiduciaries may not be held liable for damages in excess of the assets held in the fiduciary capacity that are available to indemnify the fiduciary. This limitation does not apply where a person is liable under CERCLA independent of any action or ownership as a fiduciary. A fiduciary may also be personally liable when its failure to exercise due care caused or contributed to the release of the hazardous substance. A fiduciary may not, however, be held personally liable for: undertaking action directed by an on-scene coordinator or undertaking corrective action; addressing the problems of the hazardous substance by lawful means; ending the fiduciary relationship; including a term or condition relating to compliance with environmental law in the fiduciary agreement; monitoring or undertaking inspection of the property; providing financial or other advice to involved parties; or altering the terms and conditions of the financial relationship. Fiduciaries are also not liable for declining to take any of these actions.

Definition of owner or operator

The section defines the term "owner or operator" under CERCLA as excluding the United States, its departments, agencies, instrumentalities, or any conservator or receiver appointed by them. Exempt entities must acquire the property by receivership, conservatorship, liquidation, in connection with the exercise of any seizure or forfeiture, or pursuant to law, and must not participate in management that results in the release of hazardous substances.

Individuals not participating in management are excluded from the definition of "owner or operator" even if they hold an indicia of ownership in the property primarily for the purpose of protecting their security interest. "Owner or operator" also does not include persons who did not participate in management of a vessel or facility prior to the foreclosure even if subsequent to foreclosure measures are taken to preserve, protect or prepare the vessel or facility for resale as long as the divestment takes place in a commercially reasonable time and under commercially reasonable terms.

Definition of participation in management

The section clarifies that "participation in management" requires action in management or organizational affairs, not just having influence or the unexercised right to control. It includes a person who exercises decision-making control over environmental compliance, is responsible for hazardous substance handling, or exercises day-to-day decision-making control with respect to environmental compliance or other operational aspects. "Participation in management" does not include: action taken prior to the creation of the security interest; holding or releasing such interest; including a condition for environmental compliance in a contract; monitoring or undertaking terms and conditions on a credit agreement; monitoring inspections of the facility; requiring or conducting action to correct the release of a hazardous material; agreeing to alter the terms of the credit or security interest; or exercising other remedies for breach, so long as these activities do not rise to the level of "participating in management".

Section 504. Solid Waste Disposal Act amendments

Section 504 amends the Solid Waste Disposal Act to incorporate by reference the changes made by section 503 to CERCLA regarding lender and fiduciary liability and the definition of "owner or operator".

Section 505. Effective date

The amendments made by these sections are applicable to any claim not finally adjudicated as of the date of enactment.

Section 601. Electronic Fund Transfer Act clarification

Clarifies that the Electronic Fund Transfer Act (EFTA) does not apply to stored value cards or value stored on such cards to the extent that such devices are used as a cash equivalent. Transactions where the card is actually used to access an "account" (as defined in the EFTA) to load value onto the card would continue to be subject to the EFTA. For multipurpose cards that offer both stored value and debit card features, this section applies only to the stored value feature and does not affect the application of existing law to the debit card or credit card features of the card.

Section 602. Treatment of claims arising from breach of post-appointment agreements

Section 602 clarifies that any final judgment for monetary damages for breach of contract entered against a federal banking agency shall be considered to be an administrative expense of the conservator or receiver if the agreement was made after the appointment of the agency as administrator.

Section 603. Fictitious financial instruments

This provision criminalizes the production and sale of phony financial instruments and designates counterfeiting as a Class B felony.

Section 604. Amendments to the Truth in Savings Act

Section 604 repeals sections 268 and 271 of the Truth in Savings Act (TISA). Section 268 of TISA required institutions to make periodic statements of account information to consumers including APY, interest earned, fees imposed, and the number of days in the reporting period. Section 271 of TISA provided for civil liability (individual and class actions) for violations of TISA. TISA compliance remains subject to administrative enforcement, with violations subject to administrative action. This section also exempts non-automated credit unions from the requirements of TISA. Section 604 further eliminates the requirement that institutions provide subsequent account disclosures for automatically renewable time deposits with a term of 30 days or less. The Committee is aware of the Board's implementations of Section 266(a)(3) in Regulation DD, dealing with the timing and content of disclosures for renewable time deposits. By adopting this amendment, Congress does not intend to alter or raise questions about the appropriateness of the Board's rules in Regulation DD for time accounts with a term exceeding 30 days.

Section 605. Consumer Leasing Act amendments

Section 605 provides the Federal Reserve Board with the authority to adopt appropriate regulations, commentary, and model forms to provide useful information to the consumer on leasing. The section also revises the advertising provisions of the Consumer Leasing Act to require clear and conspicuous disclosure of lease terms when a lease is promoted through an advertisement. If the lease advertisement states the amount of any payment or states that no initial payment is required, the advertisement must also state the fact that the transaction is a lease, the total initial payments required, whether a security deposit is required, the number, amounts and timing of scheduled payments and any charges that may be imposed at the end of a lease term. Owners or personnel of the medium in which the advertisement appeared are not liable for violations of these advertising requirements.

Section 606. Credit union study

Section 606 requires the Secretary of the Treasury in coordination with the Federal Reserve Board, the FDIC, the OCC and the National Credit Union Administration to conduct a study and review of the oversight and supervisory practices of the NCUA regarding the National Credit Union Share Insurance Fund.

Section 607. Report on the reconciliation of differences between regulatory accounting principles and generally accepted accounting principles

Section 607 requires each appropriate banking agency to submit a report within 180 days to the Banking Committees of the House and Senate detailing those actions they are taking to conform the requirements of GAAP and RAP as they apply to reports and statements filed with the agency.

Section 608. State-by-state and metropolitan area-by-metropolitan area study of bank fees

Section 608 amends Section 1002 of FIRREA to require the Board to study bank fees at the state and metropolitan statistical area level to identify any discernible national trend in the cost and availability of retail banking services and fees.

Section 609. Prospective application of gold clauses in contracts

Section 609 concerns gold clauses in real estate contracts. Gold clauses are sometimes used in real estate contracts to specify that payment is to be tendered in gold or in a dollar amount equivalent to gold. In 1933, gold clauses were made unenforceable. In 1977, the Congress permitted gold clauses to be used again in real estate contracts. This provision would clarify that the ban on gold clauses continues for those contracts prior to 1977 and cannot be revived, through assignments or novations, unless the parties specifically agree to it.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following statement regarding the regulatory impact of the bill.

S. 650 significantly reduces the regulatory paperwork and reporting burdens on financial institutions by eliminating, modifying, streamlining and improving various regulatory and statutory requirements. Many of the bill's provisions would also lower the cost of regulation by decreasing the number of applications that must be processed and reviewed by federal banking regulators.

CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirements of paragraph 12 of the rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

COST OF THE LEGISLATION

The Committee has requested from the Congressional Budget Office an estimate of the costs which would be incurred in carrying out S. 650. Due to unforseen delays at the Congressional Budget Office, however, it is the Committee's view that it is impracticable to obtain a cost estimate in accordance with the requirements of subparagraphs (1) and (2) of rule XXVI(11)(a) at this time.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 14, 1995.

Hon. ALFONSE M. D'AMATO,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As requested, CBO is preparing a cost estimate for S. 650, the Economic Growth and Regulatory Paperwork Reduction Act of 1995, as ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs on September 27, 1995. We have not completed our analysis of the bill yet, but we will complete and transmit the cost estimate as soon as possible. We expect to provide the estimate no later than December 22, 1995, but will make every effort to complete it earlier in the week.

If you have any further questions, we will be pleased to answer them. The staff contacts are Mary Maginniss and Mark Booth.

Sincerely,

JUNE E. O'NEILL, *Director.*

ADDITIONAL VIEWS OF SENATOR ROD GRAMS

As a strong supporter of regulatory paperwork reduction, I was pleased to support S. 650. This legislation is entitled the "Economic Growth and Regulatory Paperwork Reduction Act of 1995," and with good reason.

The provisions in this bill will go a long way in reducing the regulatory burden which is currently preventing entrepreneurs from having access to the credit they need to create jobs. By passing this legislation, we have made a major step forward in removing these obstacles to economic growth.

There are, however, some outstanding problems left unaddressed by the Banking Committee, problems which I hope we will take up in the near future.

For example, one of the biggest obstacles to credit availability is the Community Reinvestment Act (CRA). The CRA was originally designed to help financial institutions meet the credit needs of their local communities. But as well intended as that goal may have been in 1977, the CRA has resulted in just the opposite.

The additional paperwork burden, reporting requirements, and increased examinations that come from the CRA have made it even more difficult for banks and thrifts to do the job they're supposed to do.

Nowhere is that trend more evident than in the case of small community banks. These banks, the neighborhood institutions which are the foundation of our financial system, have found it increasingly difficult to meet the requirement of the CRA and remain in business.

Ironically, it's these very same institutions which have done the best job in lending to their communities in the first place. If a small community bank does not do business in its local community, it goes out of business. In other words, for small banks, community lending is not a convenience; it means survival.

During the Committee markup of S. 650, I offered an amendment which would have exempted small banks—those with assets under $250 million—from CRA requirements. Given the consensus of the Banking Committee not to include CRA provisions in the bill, I withdrew that amendment.

I do, however, continue to urge the Banking Committee to address CRA reform during the 104th Congress. If we are serious about expanding community lending and preserving small community banks, something must be done to curb the excesses of the CRA.

Along the same lines, I also offered an amendment during the Committee markup which would have added a five-year sunset provision to five separate laws: the CRA, the Truth in Lending Act, the Truth in Savings Act, the Home Mortgage Disclosure Act, and the Real Estate Settlements Procedures Act.

I offered this amendment because I do not believe laws passed by Congress should be left on the books for eternity without further review and examination. If a law serves a purpose and does so effectively, it should and will be reauthorized by Congress. If not, the law and the regulations promulgated under that law should expire.

Unfortunately, Congress has repeatedly failed to meet its responsibility to taxpayers and consumers in reviewing the laws it passes. The U.S. Code is filled with outdated statutes which serve little or no purpose, and some even have a negative impact on consumers and taxpayers. I believe it is the job of all authorizing committees to regularly review the laws already on the books before they pass new ones.

Sunsetting laws does not mean repealing them. Laws would only expire if Congress failed to meet its responsibility to reexamine and renew these statutes within a specified period of time. If Congress is willing to do its job, sunset doesn't have to mean lights out.

What it would guarantee is that every law passed by Congress will be reviewed again, that mistakes will be corrected, that bad laws will be forced to expire and good laws allowed to continue.

Nothing sums up the arguments for sunsetting laws better than the response by Federal Reserve Chairman Alan Greenspan to a question I posed: "If a law is sound, it will be repassable after a period of time. It should not just go on unnoticed."

Truer words were never spoke. In the name of good government, I will continue my efforts to ensure that laws under the jurisdiction of the Banking Committee and all other authorizing committees will not go forward without a sunset.

ROD GRAMS.

ADDITIONAL VIEWS BY SENATORS MACK, FAIRCLOTH, BENNETT, AND GRAMS, ON THE CONSUMER REPORTING REFORM ACT

The intention of this bill is to roll back some of the unnecessary regulatory burdens faced by our nation's financial institutions in order to make them more competitive. This legislation is a good effort to free up our financial institutions from regulations unrelated to safety and soundness that cause these institutions to focus on compliance with federal regulations rather than serving their customers.

The Consumer Reporting Reform Act (CRRA) which amends the Fair Credit Reporting Act was added to S. 650 in the Senate Banking Committee by voice vote. Although a few of the provisions of the CRRA provide some regulatory relief from the Fair Credit Reporting Act, on balance the CRRA adds new burdens and increases liability for credit grantors that voluntarily provide information to credit bureaus. This legislation does not belong on a bill intended to eliminate unnecessary burdens imposed on financial institutions.

While the Consumer Reporting Reform Act passed the Senate in the 103rd Congress, no hearings have been held in the 104th Congress. Unless the burdens imposed by the CRRA are significantly reduced, these provisions should not be included in any regulatory relief bill that is ultimately sent to the President for his signature.

CONNIE MACK.
LAUCH FAIRCLOTH.
ROBERT F. BENNETT.
ROD GRAMS.