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Rules & Regs

FCRA PREEMPTION NEARS DEADLINE AS CONGRESS DEBATES CHANGES

FAIRBANKS SETTLES FTC-HUD SUIT

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Fairbanks allegedly treated improperly.

Under terms of the agreement, Fairbanks founder and former chief executive **Thomas Basmajian** was ordered to pay \$400,000 in redress.

Additionally, the company is required to pay \$15 million to cover other fees, which include the costs of separate state investigations.

During a conference call Nov. 12 to discuss the settlement, Fairbanks CEO Jim Ozanne would not reveal in which states are investigating or mulling legal action. However, it's widely believed that investigations are ongoing or charges against Fairbanks are pending in seven states, namely Maryland, Florida, Massachusetts, Texas and Michigan, which is soon to decide whether to revoke Fairbanks's servicing license in the state.

Lenders are breathing sighs of relief as it seems more likely that federal preemption provisions of the Fair Credit Reporting Act will be maintained. But there is continuing concern that what appears to be the light at the end of the tunnel could be an oncoming train, in the form of a Congressional recess.

As well, lenders are poised to continue keeping secret their risk models for pricing loans to consumers.

Following the House's lead, on Nov. 5 the Senate passed its bill to amend the FCRA, by a vote of 95 to two. Democratic Senators **Dianne Feinstein** and **Barbara Boxer**, both of California, voted against the bill.

The biggest concern to home equity lenders now is whether Congress will hash out the differences in the House and Senate versions before the legislative session ends, which is expected to occur by Nov. 21. [Please see chart for more on the differences.] The current FCRA preemption provisions are set to expire Jan. 1.

Failure to extend them could lead to a slew of new state laws that would increase the compliance burden placed on lenders.

Both the Senate and House bills require credit reporting agencies to disclose credit scores to consumers upon request. However, the bills propose no measures that would force lenders to disclose internal risk-scoring models, upon which loan rates and fees are often based.

Compelling lenders to disclose inputs to their credit-scoring models could make it easier for borrowers to revise their mortgage and home equity loan applications, said attorney **Jonathan Jerison**, of the Washington, D.C.-based law firm of **Goodwin Procter LLP**. "Say one score would be better if you have two years and nine months on the job versus two years and eight," he said. "It could be hard for lenders to catch that." Many lenders worry that in the absence of federal preemption in this case, states would require lenders to disclose their risk models. "There is a good basis for this fear because the

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COMPARING THE BILLS

The following is a look at some of the provisions in the current Fair Credit Reporting Act, as well as similar provisions in the new House and Senate versions.

CURRENT FCRA	HOUSE BILL	SENATE BILL
Consumer reporting agencies are not mandated to issue free credit reports to consumers.	Mandates that, upon request, consumers receive one free report annually from a nationwide or regional reporting agency.	Mandates that, upon request, consumers receive one free report annually from a nationwide reporting agency.
Lenders are not mandated to disclose credit score information to consumers.	A consumers can ask a nationwide reporting agency for his current or most recent credit scores. Agency may charge for disclosure.	Mandates that, upon request, consumers have their credit scores disclosed to them by a reporting agency.
Mandates that consumers be provided with an adverse-action notice only when they have been denied credit or rejected for a creditor's counteroffer.	Retains current mandates, and also requires lenders to provide consumers with adverse-action notices when information from the consumers' credit report affects the terms of a credit offer.	Retains current mandates, and also requires lenders to provide consumers with adverse-action notices when information from the consumers' credit report affects the terms of a credit offer.
Preempts most state laws and regulations on credit reporting.	Preempts all state laws, except existing laws that mandate a higher level of credit report disclosures than required under the federal bill.	Preempts most state laws.

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LENDER INFO-SHARING RIGHTS

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issue of disclosure of internal models was hard-fought in California," said Jerison, referring to a state consumer privacy protection law.

While both Congressional bills extend the federal government's preemption, debate over other measures — especially regarding the sharing of customer information by financial services firms with their affiliate companies — caused the Senate to delay its final vote.

Maintaining the preemption provision will wipe out laws like the recently passed California Financial Information Privacy Act, which gives customers the right to forbid financial institutions from sharing their personal data with those banks' affiliated companies, or with subsidiaries.

Senators Feinstein and Boxer tried to add "opt out" wording to the California Financial Information Privacy Act but were unsuccessful. Instead, they were able to negotiate a provision that allows consumers to prohibit creditors from sharing their personal information with affiliated companies for marketing purposes only.

While Feinstein and Boxer believe consumers need more protection than that provision gives, financial institutions worry that an "opt out" allowance could disrupt their practices and operations.

"It would restrict your ability to cross-sell products across your affiliates, because you would have to give this opt-out period," said Jerison. That could spur financial institutions to collapse operating units into one company, he said. Though some businesses, such as insurance subsidiaries, would have to remain separate, he added.

Still, lenders may to have surrender information-sharing in exchange for the federal preemption.

"It's a fair trade-off," said **Clark Brinkerhoff**, an attorney with the **Federal Trade Commission**. "If we're going to extend preemption — consumer advocates, some of whom are real ideologues, are very much against it — maybe now is the time to add some consumer benefits."

Whether restrictions that do not appear in the House bill will be included in the conference report remains to be seen. "I think it depends on how much the industry will accept in order to get the state preemption provisions," said Jerison.

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