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# Uninsured Motorist Coverage: Can a Signed Waiver in Statutory Form be Relied Upon in California

Duane Heffelbower

# CONSUMER CREDIT REPORTING: THE CALIFORNIA EXPERIENCE

EUGENE R. ORECK

## BACKGROUND

In 1970 Congress passed the Fair Credit Reporting Act (FCRA)[1] and the California Legislature passed the Consumer Credit Reporting Act.[2] These two Acts were precipitated by Congressional hearings held in 1968[3] and 1969[4] concerning abuses by commercial credit bureaus, and by a California study of credit and personnel reporting practice.[5] The Congressional hearings themselves were generated by the broad range of consumer problems which resulted from the tremendous increase in consumer credit in the United States from approximately four million dollars in 1945 to over 150 billion today.[6] This amount constitutes an increase of over 37,500%. California alone is responsible for 10% of the total consumer credit market.[7]

Among the statistics introduced as evidence in the committee hearings and included in the California report were the following.

1. The Associated Credit Bureau of America (ACB of A), an association of over 2,000 members serving over 400,000 credi-

1. Act of October 26, 1970, Public Law No. 91-508, § 601, 84 Stat. 1127, 15 U.S.C. § 1681 (1970).

2. AB 149, enacted Cal. Stats. 1970, c. 1348, p. 2512, § 1.

3. Hearings on Commercial Credit Bureaus Before the Special Subcommittee on Invasion of Privacy of the House Committee on Banking and Currency, 90th Cong. 2nd Sess. (1968).

4. Hearings on S. 823 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 91st Cong. 2nd Sess. (1969).

5. *Report by the Governor's Task Force on Credit and Personnel Reporting Practices*, submitted to Governor Reagan, Jan. 19, 1970 [hereinafter cited as *Task Force Report*].

6. FTC activities in the Credit Reporting and Collection Field, address by Commissioner Paul Rand Dixon before the International Conference of the Associated Credit Bureaus, Inc., Wash., D.C., May 9, 1973. Reported in CCH CONSUMER *Credit Guide*, Consumer Credit Report No. 120, 1973 at 5 [hereinafter cited as Dixon].

7. *Task Force Report, supra*, note 5, at 2.

tors in 36,000 communities, has compiled credit files on more than 100 million Americans, and in 1967, issued about 97 million credit reports.[8] In California, the ACB of A serves 125 credit bureaus by providing information from credit files on 13 million individuals.[9]

2. Credit Data Corporation of California (CDC) maintains 20 million credit files on tape, adding 50,000 new files per week.[10] The President of CDC has stated that within five years CDC could compile a computer file on every American who has ever applied for credit.[11] In California, the ACB of A and the CDC produce approximately 15 million credit reports annually, which is about 15% of the national total.[12]

3. The Retail Credit Company of Atlanta, Georgia, sends 35 million "investigative" reports to 40,000 customers annually.[13] These reports are primarily for employment and insurance purposes and include information on drinking habits, marital problems, sexual behavior, general reputation, habits and morals. This information is gathered for the most part through personal interviews with neighbors, friends, associates and acquaintances of the person being investigated. A typical investigation is completed in just thirty minutes.[14] In California, approximately 2 million such reports are provided to thirty-five reporting firms annually.[15]

Numerous "horror" stories resulting from credit errors and abuses were also presented to the committees.[16]

As a result of the abuses brought to light by the hearings of the House Special Subcommittee on Invasion of Privacy and in an attempt to avoid regulatory legislation,[17] the Associated Credit Bureau of America published its own "Credit Bureau Guidelines

8. 115 CONG. REC. 2410 (1969) (remarks of Senator Proxmire).

9. *Task Force Report, supra*, note 5, at 2.

10. 115 CONG. REC. 2410 (1969) (remarks of Senator Proxmire).

11. *Id.*

12. *Task Force Report, supra* note 5, at 3.

13. 115 CONG. REC. 2410 (1969) (remarks of Senator Proxmire).

14. *Id.*

15. *Task Force Report, supra* note 5, at 3.

16. A popularization of these abuses was presented in a 1968 television production, "Epitaph for a Computer Card," on *Judd for the Defense*, transcript reported in 115 CONG. REC. 1425 (1969) (remarks of Senator Proxmire).

17. 115 CONG. REC. 2414 (1969) (remarks of Senator Proxmire).

to Protect Consumer Privacy" in January of 1969.[18] The fact that a major part of the "Guidelines" was eventually incorporated into the FCRA is a measure of the influence of the ACB of A.[19]

## I. PURPOSE AND SCOPE OF THE ARTICLE

The purpose of this article is:

(1) to identify the problems arising from large scale credit reporting and the solutions proposed to resolve them; (2) to assess the effectiveness of these proposed solutions; (3) to identify the interest groups which have become involved in credit reporting legslation and to assess the impact they have had on the shape of such legislation; and (4) to present a Model Credit Reporting Act intended as a guideline for future legislation.

The article is primarly concerned with California's major attempts at enacting credit reporting legislation from 1970 through 1973.[20] The FCRA is also discussed, although not in great detail. References to the FCRA are primarily for purposes of comparison and for the purpose of evaluating the need, if any, for both state and federal legislation in this area. Since the most creative solutions have often been embodied in defeated amendments and since the success of these amendments is indicative of the strength of the interest groups involved, the article will discuss the major amendments to the various California consumer credit bills.

## II. THE PROBLEMS

### *A. The Primary Complaints*

There are three primary problem areas in credit reporting:

#### *1. Inaccurate and Misleading Information*[21]

Errors in accuracy usually arise from one or more of the following reasons: (a) confusion of the person being investigated with another person; (b) biased information, in which the consumer's side of the story is not presented or is distorted; (c) malicious gossip and hearsay (this is particularly inherent in consumer investi-

18. 115 CONG. REC. 555 (1969) (remarks of Congressman Gallagher); 115 CONG. REC. 2410 (1969) (remarks of Senator Proxmire).

19. *See* notes 1 and 18 *supra.*

20. AB 149 and 2367 in 1970; AB 1413 in 1971; AB 271 and SB 1148 in 1972; AB 800 in 1973.

21. 115 CONG. REC. 2411 (1969) (remarks of Senator Proxmire).

gative reports;[22] (d) computer errors, and (e) errors resulting from omission of relevant information.[23]

*2. Irrelevant Information*[24]

This is included in credit files because the credit reporting industry does not believe it should have the responsiblity for determining the relevancy of the information it collects and distributes.[25]

*3. Lack of Confidentiality*[26]

This problem arises when information of an intimate and personal nature is included in a person's file,[27] usually due to overzealous investigation and underzealous editing on the part of the reporting industry. Confidential information is generally gathered by means of hearsay and is therefore subject to distortion and bias on the part of the declarant.[28] It is generally of no relevance to credit reports which are concerned with a credit applicant's ability to pay and payment habits.[29]

*B. Discussion*

Before attempting to analyze these problems and possible solutions in greater detail, it should be noted that the credit reporting industry vigorously denies the existence of a substantial problem in this area. Rather they contend that the examples uncovered by Congressional investigative committees, the FTC and private interest organizations are merely "isolated examples," not worthy of a major correctional effort.[30]

One of the findings of the Governor's Task Force on Credit and Personnel Reporting Practices was that, "[t]he Task Force has

22. Two examples of this were presented by Senator Proxmire. 115 CONG. REC. 2411 (1969).

23. *Id.*

24. *Id.*

25. 115 CONG. REC. 2413 (1969) (remarks of Senator Proxmire).

26. 115 CONG. REC. 2411 (1969) (remarks of Senator Proxmire).

27. *Id.*

28. 115 CONG. REC. 2410 (1969) (remarks of Senator Proxmire).

29. 115 CONG. REC. 2411 (1969) (remarks of Senator Proxmire).

30. Since the adoption of the "Industry Guidelines," reported in 115 CONG. REC. 555 (1969) (remarks of Congressman Gallagher), this has been the principal claim of the credit reporting industry. 115 CONG. REC. 9477-9479 (1969) (remarks of Congressman Gallagher); personal interview with Mr. Donald Carlton Burns, chief legislative advocate, Retail Credit Co., San Francisco, Calif., Oct., 1973 [hereinafter cited as Burns].

found the incidence of consumer complaints of abuses in credit and personnel reporting practices to be very low, . . ."[31] This statement is misleading. Relying upon statistics compiled by the credit reporting industry itself,[32] the Task Force concluded that about five out of each 1000 credit reports resulted in a complaint or inquiry. For investigative reports this figure was about four out of every 1000.[33] Applying these figures to the total number of credit and investigative reports issued annually in California,[34] it appears that there were about 75,000 complaints or inquiries concerning credit reports and 8,000 concerning investigative reports received during 1969, the year of the Task Force Study. The fact that approximately 83,000 persons registered complaints appears to belie the findings of the Task Force that the incidence of consumer complaints was "very low."[35] It is to be noted that these statistics pertain only to errors discovered through consumer complaints. They are not in any way indicative of the actual number of errors made by credit or investigative reporting agencies. Since this data was compiled more than one year prior to the enactment of legislation providing for notice to consumers whose credit was denied due to information contained in a credit report,[36] it is reasonable to assume that other consumers did not register complaints simply because they were unaware of the existence of such reports or of the identity of the reporting organization.[37]

## III. THE SOLUTIONS

### *A. AB 149*

AB 149[38] attempted to increase consumer awareness as an in-

31. *Task Force Report, supra* note 5, at unnumbered first page.

32. *Id.*, at 5.

33. *Id.*, at 6.

34. *Id.*, at 3. 15 million credit reports and 2 million investigative reports.

35. *Task Force Report, supra* note 5 at unnumbered first page.

36. The FCRA, which contains provision for "Notice" in 15 U.S.C. § 1681m (1970), did not become effective until April 25, 1971. The California Credit Reporting Act, Cal. Civ. Code § 1750 et seq. (West 1973), renumbered Cal. Civ. Code § 1785.1 et seq. (West Supp. 1974), which was enacted in 1970 and became effective Jan. 1, 1971, did not contain any provision for notice. Notice provisions were not incorporated into the California Act until 1972 (*see* text ccompanying notes 224-227, *infra*).

37. 115 CONG. REC. 2412 (1969) (remarks of Senator Proxmire); *see also* FTC Release, Statement of Lewis A. Engman, Chairman FTC, Before the Subcommittee on Consumer Credit of the Senate Committee on Banking, Housing and Urban Affairs, on S. 2360, Fair Credit Reporting Act Amendments of 1973, Wash., D.C., Oct. 10, 1973 [hereinafter cited as Engman].

38. Introduced Jan. 12, 1970.

direct solution to the problem of error correction. The bill in its original form provided that "credit rating organizations" mail a copy of each "credit rating report" made for "compensation," to the "person" investigated within five working days of the date it is provided to the client or consumer.[39]

Defining these terms was a major problem with this section of the bill. For instance, most credit reporting organizations do not "rate" the credit worthiness of the investigated person but merely provide all the information they can amass in relation to the investigatee's credit to the user or credit grantor.[40] Even if the bill would have included such credit reporting organizations, it is unlikely that it was the intention of the author to include within the scope of the bill organizations which provide investigative reports upon applicants for insurance or employment. That conclusion follows from the fact that the sources of investigative reports are generally included as a part of and within the report itself[41] and that these sources are, for obvious reasons, closely guarded secrets.[42]

This same problem extends to the term "person." AB 149 could be construed to cover reports by a credit reporting organization to any individual businessman or to a corporation as well, but it seems most likely that the bill was only meant to cover individuals.

However, even if the bill's coverage were determined to be limited to individual consumers, the notice provisions of this section of the bill were the most comprehensive of any bill discussed herein. They would have provided the consumer with *both* notification *and* a copy of the credit report within a few days of the report being furnished to the merchant to whom the consumer applied for credit. If anything is likely to cause action on the part of a consumer, receipt of an inaccurate credit report would be it.

Unfortunately, the only action that consumers had at their disposal under AB 149, should they contest the truth of any fact contained in the report, would be to write to the credit rating organization with a specific demand for correction.[43] Upon receipt of such demand the credit rating organization would have thirty (30) days

39. AB 149, 1970 Regular Session, § 1722.

40. 115 CONG. REC. 2414 (1969) (remarks of Senator Proxmire); 115 CONG. REC. 15648 1969) (remarks of Senator Brooke).

41. Burns, *supra* note 30.

42. *Id.*

43. AB 149, 1970 Regular Session, § 1722.

to correct or reaffirm. Unless the untrue allegation contained in the report was the product of a willful misrepresentation, or the report included facts not related to the person's ability to pay, habits of payment or general credit standing, the consumer had no further recourse. In fact the bill specifically prohibited legal action in the absence of a willful misrepresentation.[44]

The bill specifically excluded coverage of oral reports provided to clients or customers. This would seem to be a huge loophole for any credit rating organization wishing to avoid compliance and would most certainly have excluded the giant Credit Data Corporation of California whose primary mode of operations is to provide immediate credit history information to subscribers by telephone.[45] The bill would also seem to have enabled non-profit credit reporting organizations established by local merchants to avoid the Act's coverage since it specifically covers only reports prepared for "compensation."[46]

Although consumers by law had the right to make a specific demand upon the credit rating organization for correction of an alleged untrue fact, there was no provision for the credit rater to inform the consumer of such right. In the absence of information to this effect, it is doubtful that consumers would be aware of their right to make such a demand.

A final and major flaw of AB 149 was the total lack of enforcement provisions should a creditor willfully violate the rules promulgated by the bill (with the exception of Section 1723 concerning a willful untrue allegation of fact).

When compared to the problems to be solved, the bill fell woefully short. Although consumers could be put on notice that a problem existed, they were given no meaningful way to correct errors, give their side of the story, or eliminate irrelevant information.[47]

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44. *Id.*, § 1723.

45. *Task Force Report, supra* note 5, at 3.

46. AB 149, 1970 Regular Session, § 1722. The establishment of such operations by merchants was the original method of obtaining credit information. *Task Force Report, supra* note 5, at 2.

47. Note the comments of Senator Proxmire to the effect that consumers have a "right to have their interests represented and protected." 115 CONG. REC. 2414 (1969), and those of the Governor's Task Force that an individual has "the right to have reasonable access to the information being circulated about him; the right to have adverse information verified; the right to have errors corrected when detected; and the right of confidentiality of such information for legitimate purposes and protection against its use by inappropriate persons or for inappropriate purposes." *Task Force Report, supra* note 5, at 7-8.

The first amendment to AB 149[48] introduced a completely new bill in place of the original one.[49]

The major changes were the deletion of the notice provisions of the original bill and the inclusion of detailed definitions of the terms left undefined in the original bill.[50]

The new notice provisions allowed credit applicants to obtain a copy of their credit report at the time of the credit application by prepaying the costs of preparing and sending the report.[51] However, since there was no requirement for creditors to inform applicants of their right to make such a request, it is unlikely that many such requests would have been made.

The definitional terms clearly show that the bill was intended to apply only to "natural persons" applying for credit to buy "retail goods" for "personal use."[52] It is also evident that the only informational transactions covered are those involving a transmittal of "credit information" or a "credit rating" from a "reporter" to a paying "retailer of goods or services for which the application has applied."[53] Therefore business, employment or insurance transactions are clearly excluded.

The definitions, however, create a new problem. Is there a difference between "credit information" and "credit rating report", or is the distinction merely an attempt to close up a possible technical loophole? If there is a difference, does "credit information" also include information of a personal nature as well as of a credit nature? Is there a difference between the two? These questions remain largely unanswered today, and represent a major issue of contention between those who would like to see stricter guidelines as to what constitutes "relevant" credit information,[54] and the credit reporters who believe that the merchant should receive all the "credit" information they can amass without any responsiblity on

48. Amended in Assembly, June 11, 1970.

49. Even the code section was changed. The original Bill began as an amendment to the Business and Professions Code. The amended Bill commenced with § 1750 of the Civil Code.

50. AB 149, as amended in Assembly, June 11, 1970.

51. AB 149, 1970 Regular Session, § 1757.

52. *Id.* § 1750(a).

53. *Id.*, § 1750(b)(d).

54. *See* statement of Senator Proxmire at 115 CONG. REC. 2414 (1969).

their part to determine "relevancy."[55] Most likely, the term "credit information" as used in this amendment was meant to refer to information about the applicant's "ability to pay, his habits of payment, and his general credit standing, . . ." referred to in a later section dealing with the reporter's liability.[56]

The amendment included oral reports within the scope of the bill, by providing that if the merchant thereafter prepared a "written credit rating report or memorandum" based upon the oral report, the merchant was required to mail to the applicant a copy of whatever written document was prepared whether or not the applicant requested it.[57] This exception to the deletion of self-activating notice provision probably occurred as a drafting oversight, since it was quickly corrected in the next amendment.[58] With exception of this correction, the second amendment was without additional significance.

The major significance of the third amendment was the introduction of disclosure requirements.[59] They provided that a reporter disclose to consumers, upon request:

(1) The nature and substance of all information concerning the consumer contained in its files at the time of request;

(2) The sources of such information; and

(3) The creditors to whom the reporter has furnished reports within the six month period preceding the request.[60]

These disclosure requirements would seem to include information and sources relating to investigative as well as credit reports, but since the bill covers only reporters of credit data or ratings it is unlikely that investigative information would be included in the file since investigative reporters are generally separate, specialized organizations.[61]

A further important portion of the third amendment requires a reporter to "reinvestigate and record the current status" of the

55. 115 CONG. REC. 15647 (1969) (remarks of Senator Brooke).

56. AB 149, 1970 Regular Session, § 1756.

57. *Id.*, § 1753.

58. AB 149, amended in Assembly June 22, 1970.

59. AB 149, amended in Assembly June 30, 1970.

60. AB 149, 1970 Regular Session, § 1752(a).

61. *Task Force Report, supra* note 5, at 3.

information disputed whenever a consumer disputes an item of information in the file,[62] although there is no requirement that the reporter notify the consumer of the right to request such reinvestigation. If the disputed information is found to be "inaccurate or can no longer be verified,"[63] it must be deleted. The consumer could also request that the reporter send notification of such deletion to specified creditors who had received reports containing the deleted information within the last six months.[64] There is also a provision that the consumer be informed of the right to make such a request.[65] However, a reporter having "reasonable grounds to believe that the dispute . . . is frivolous or irrelevent" is excused from making any requested reinvestigation.[66]

Unfortunately, this self-policing mechanism gives the reporter the opportunity to deny to a possible serious claimant the only method available for correction of errors.

In any case where reinvestigation does not resolve the dispute, the consumer is allowed to file with the reporter a brief statement setting forth the nature of the dispute. If the consumer so requests, this statement must be furnished to specified past, and all subsequent users. Unfortunately, there is no provision requiring credit reporters to inform consumers of their right to prepare such a statement, and therefore the consumer is dependent once again on the good faith of the reporter.

Furthermore, consumers have no right to see their file, but may only have the information in the file disclosed to them. The credit reporting organization must be trusted to make a complete and accurate disclosure of all the information in the file. Since the credit file and its sources must be disclosed to consumers, there seems to be no valid reason for denying consumers the right to physically inspect their file.[67]

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62. AB 149, 1970 Regular Session, § 1755(a).

63. *Id.*

64. *Id.*, § 1755(d).

65. *Id.*

66. *Id.*, § 1755(a).

67. A recent FTC study indicated that "[t]here is often wholesale withholding of information concerning character, reputation and morals. Since the consumer does not have the right to examine his own file or receive a copy of the information, he is unable to question the completeness of the disclosure." Engman, *supra* note 37, at 8.

Another feature of this amendment is the deletion of the original notice requirements and the inclusion of noticeably weaker ones.[68] These new provisions merely require that notice of the identity of the credit reporter be provided by the credit user upon "written request . . . from the applicant within sixty (60) days of the applicant's learning . . ." of being denied credit, or having credit charges increased "wholly or partly because of information from a reporter. . ."[69] Since it appears that the applicant need not be informed of the right to request such information, applicants who are told that the basis of denial was a credit report would not necessarily be aware of their right to request the identity of the reporter and to seek disclosure of the information in their credit file.

The effectiveness of the industry lobby is clearly evident in the disclosure provisions of AB 149, which closely resemble the "guidelines" published by the ACB of A.[70] The major difference between the two is that the "guidelines" would require that a consumer grant a reporter legal immunity as a condition of disclosure whereas the Bill does not contain such a requirement.[71]

The original bill's prohibition against legal actions carried over. An applicant is prevented from instituting legal action against a credit reporter based upon any untrue allegations contained in the report unless it can be shown to be the result of a "willful misrepresentation"[72]

In this form the bill passed on July 31, 1970, and was signed into law by the Governor on September 17, 1970.[73]

AB 149 does not solve the problems endemic to wide scale credit reporting. It addresses itself to the problem of inaccurate information but does not deal with the problems of irrelevant information and lack of confidentiality. The bill provides consumers with a right to disclosure, to dispute facts contained in the report, to request and receive a reinvestigation and to include their side

68. AB 149, 1970 Regular Session § 1754.

69. *Id.*

70. *See* note 18, *supra.*

71. AB 149, 1970 Regular Session, § 1754; 115 CONG. REC. 2410-2414 (1969) (Remarks of Senator Proxmire); 115 CONG. REC. 555 (1969) (Remarks of Congressman Gallagher).

72. AB 149, 1970 Regular Session, § 1755(c).

73. Stats 1970, c. 1358, p. 2512, § 1.

of the story should the reinvestigation fail to resolve the dispute.[74] These rights accrue to consumers upon being denied credit wholly or in part on the basis of the credit report, but the reporter is not obligated to inform them of these rights.

Even if consumers were to take advantage of these rights, there is a question of the weight to be given the consumer's version of the facts. Proponents of the Act state that creditors will give equal or greater weight to the consumer's argument, particularly if the consumer's story is that no payment was made due to a deficiency in goods received from a low-class retailer. The argument is that since credit extensions mean more sales and greater profits it is in the best interests of creditors to approve credit extensions.[75] The other side of the story is exemplified by the efforts of low income consumer groups to establish a national credit union due to their inability to obtain retail credit.[76]

There are several reasons for the success of AB 149 where other bills had failed in the past.[77] One reason, as mentioned earlier, was the increasing pressure for some type of legislation arising from the Congressional hearings and the California Task Force Report. Another reason could well have been the presence in the legislature of AB 2367. This bill, introduced in April of 1970[78] still contained stringent provisions requiring State regulation over credit reporting four amendments later, in July, 1970.[79] Its existence alone was reason enough for credit reporter lobbyists to allow the much weaker AB 149 to be enacted in order for them to concentrate their efforts on the defeat of AB 2367. In addition, the FCRA was well on its way to passage by Congress, and since its provisions would have been stricter than those of AB 149, the passage of AB

74. AB 149, note 2, *supra*. However, in a recent study the FTC indicates that the procedures for reinvestigation and correction of disputed information were often incomplete or entirely non-existent. The study further indicated that "[c]orrected reports were not always sent to recipients," and that "[f]ollow-up reports often contained many of the inaccuracies found in the original challenged report." Engman, *supra* note 37, at 8.

75. Burns, *supra* note 30.

76. 115 CONG. REC. 13997 (1969) (remarks of Senator Scott); *see also* statement of Senator Proxmire, 115 CONG. REC. 2414 (1969) and study by Urban Coalition on credit problems of low-income consumers reported in 116 CONG. REC. 33251-33252 (1970) (remarks by Congressman Culver).

77. AB 1021, 1081, 3218, SB 501, 674 in 1968; AB 985, 1368, 1768, SB 762, 1142 in 1969.

78. AB 2367, introduced in Assembly, April 3, 1970.

79. Amended in Assembly, fourth time, July 28, 1970. *See* text accompanying notes 81-134, *infra*.

149 created no additional problems for the credit reporting industry. The industry hoped that the enactment of AB 149 and the FCRA would eliminate any legislative desire to pass further credit reporting legislation. Once the passage of the FCRA seem assured, the credit reporting lobby adopted a new strategy of letting no bill pass containing stricter provisions than those of the FCRA.[80]

*B. AB 2367*

AB 2367 presented features included in previous bills and in the "guidelines" of the ACB of A which went beyond those of the FCRA.[81] The bill, by covering both consumer and business transactions,[82] recognized the need of the entire banking and credit industry for accurate and fair credit reporting. That need is expressed in the statement of purpose of the FCRA.[83]

The bill also provided that:

> "No credit reporting organization shall require a consumer to grant immunity from legal action to the credit reporting organization, or its sources of information, as a condition for obtaining access to his own credit report."[84]

This provision, which is in direct opposition to a provision of the "guidelines" of the ACB of A,[85] is not specifically included in the FCRA, but is included by implication in its provisions for disclosure.[86] The provision left no room for misinterpretation. It explicitly provides that a consumer's right to disclosure cannot be conditioned upon any grant of legal immunity.

A third provision of AB 2367 required a credit bureau to obtain "service contracts" from its subscribers and users in which the subscriber or user was obligated to certify that requests for information would be made only for the purpose of credit granting or "other bona fide business transaction."[87] Believing this latter definition to

80. Burns, *supra* note 30.

81. 115 CONG. REC. 555 (1969) (remarks of Congressman Gallagher).

82. AB 2367, 1970 Regular Session, § 9880(h)-(k).

83. 15 U.S.C. § 1681(1) (1970).

84. AB 2367, 1970 Regular Session § 9883(d).

85. 115 CONG. REC. 555 (1969) (remarks of Congressman Gallagher).

86. 15 U.S.C. § 1681(d)(h) (1970).

87. AB 2367, 1970 Regular Session, § 9883.2.

be susceptible to abuse, the Bill indicated that it meant, for example, "the evaluation of present or prospective credit of insurance . . ." or employment.[88]

This provision also provided for notification to the consumer of the identity of the credit reporter should the user deny credit, insurance or employment on the basis of the requested report.[89]

A fourth provision, which is to be found in the FCRA and in later bills, required that when public record information is reported, full details be shown including whether or not the adjudication or disposition was included in the agency's file. It would have also required the reporter to make a reasonable effort to update such information in revising the report in the future,[90] and no longer report records of arrests or indictments if a conviction did not follow, and in the case of a conviction if a full pardon had later been granted.[91]

A fifth provision required a reporter to delete, within thirty days, any item no longer verifiable from the original records of the informant.[92]

Finally, in its original form, AB 2367 provided for a minimum and maximum amount of punitive damages for willful noncompliance with the provisions of the bill.[93] This same provision was included in the original draft of the FCRA but was removed in the House-Senate Conference.[94]

The most significant aspect of AB 2367 was its provision for the regulation of the California credit industry. The core of the regulatory scheme envisioned by AB 2367 consisted of a licensing board within the Department of Consumer Affairs, to be known as the Credit Reporting Organization Board.[95]

This Board was to have seven members; two licensed credit

88. *Id.*

89. *Id.*

90. *Id.*, § 9883.4(a)(1).

91. *Id.*, § 9883.5(d).

92. *Id.*, § 9883.5(f).

93. *Id.*, § 9883.9.

94. 115 CONG. REC. 33408-33412 (1969) (remarks of Senator Proxmire); 116 CONG. REC. 35940-35943 (1970) (remarks of Senator Proxmire); S. Doc. No. 517, 91st Cong., 1st Sess. (1969).

95. AB 2367, 1970 Regular Session, § 9885.

reporters, one engaged in credit reporting and one engaged in personnel or insurance reporting (investigative); one subscriber to the services of a reporter; and four public members not connected in any way with the credit reporting business.[96] The Board would act in an advisory capacity to the Executive Officer of the Board and to the Director of the Department. The principal duties of the Board would be to inquire into the needs of credit reporting agencies and the public, to make recommendations for their welfare and progress and to advise and assist in the Department's rulemaking function.[97] The Board would be required to meet at least four but not more than six times a year and four members would constitute a working quorum.[98] Undoubtedly the alignment of the Board was determined carefully in the hope that it would be agreeable to the credit lobby. Although the public members outnumbered the industry members by four to three, the industry members would be expected to have the edge both in knowledge and personal involvement in the area. The industry members would likely be more diligent in attending meetings and presenting proposals than would the lay members. It was also quite likely that one or more non-industry members would be business people whose interests would lie more with the credit industry than with the consumer.

An executive officer appointed by the Governor would head the Board.[99] The Executive's duties would be primarily investigative in nature. For example, it would be the Executive Officer's job to see that all credit reporting organizations become licensed, gather evidence of violations by unlicensed credit agencies and furnish such evidence to the prosecutor in the jurisdiction where the offenses take place. The executive officer would also gather evidence of violations by licensed agencies for criminal and/or administrative proceedings under the regulations of the Act.[100] To perform these functions, the executive officer could require witnesses to attend and to be examined under oath.[101] The bill also provided for an Assistant Executive Officer and clerical staff to serve under the Executive Officer.[102]

96. *Id.*, § 9885.5.

97. *Id.*, § 9886.

98. *Id.*, § 9885.8.

99. *Id.*, § 9885.

100. *Id.*, § 9885.2.

101. *Id.*

102. *Id.*, § 9885.1.

The Director of the Department within which the Board would operate was assigned the responsibility for establishing rules and regulations, not only for the licensing and general enforcement provisions of the Act, but also for the conduct of licensees.[103] This rulemaking grant impliedly would give the Director the power to both implement and enforce rules; a greater grant of power than that given to the FTC under the FCRA.[104] For example, the Director could both establish standards for determining the necessity of a reinvestigation called for by section 9883(c) of the Act and enforce compliance with such standards. AB 2367 would enable the Director to delegate this rulemaking authority to the Executive Officer.[105]

It appears clear that the Executive Officer was allotted a key position in the administration of AB 2367. Moreover, since the Act would give the Governor responsiblity for appointing the executive officer, it was expected that the first executive officer under this Act would not be unsympathetic to the needs of the credit reporting industry.[106] Undoubtedly this was meant to be another selling point to the credit lobby.

The major concern of the executive officer would be that of licensing.[107] The bill provided that:

> "No person shall engage in this State in the business of credit reporting for others . . . unless he shall hold a valid credit reporting organization license . . ."[108]

The licensing provisions were quite detailed. The executive officer would determine the form in which the licensing application was to be filed as well as "require the submission of any other information, evidence, statements or documents."[109] A license would be required for *each* office of the credit organization.[110] Credit

103. *Id.*, § 9885.3.

104. A provision to grant the FTC rulemaking powers vis-à-vis the FCRA is included in S. 2360, 93rd Cong., 1st Sess. (1973), the most recent proposal to amend the FCRA.

105. AB 2367, 1970 Regular Session, § 9885.

106. For example, of the eighteen members appointed by the Governor to study the credit reporting industry, twelve were business men (six from the credit industry iself). *Task Force Report, supra* note 5, at 2.

107. AB 2367, 1970 Regular Session, commencing with § 9890.

108. *Id.*

109. *Id.*, § 9891.

110. *Id.*

organizations would not be allowed to operate under a fictitious name which might be confused with a government function (such as the State Credit Agency, etc.) or which would "tend to describe any business function . . . not actually engaged in by the applicant."[111] An application was required of "each individual applicant, . . . each manager, partner of a partnership and officer of a corporation or unincorporated association."[112] The licensing requirements were so detailed that, as to corporations, the applicant was required to state;[113]

> ". . . the true names and complete residence addresses of all stockholders, and the number of shares of each and of all classes held by each, and the total number of shares of each class issued and outstanding; . . . [H]owever, if a corporation . . . has 25 or more shareholders . . . then the application need list only the names and addresses and shareholdeings of those stockholders owning 10 percent or more of the outstanding shares."

A record of all such application and their disposition was to be kept in the office of the Executive Officer.[114]

The reason for the detailed requirements of the licensing application was based on the criteria for refusal of such license. The license could only a refused, basically, on the grounds that the applicant, partner, shareholder, officer, trustee or responsibile managing officer of the credit reporting agency was "unfit", i.e., was not of good moral character, had been convicted of a felony, had a license revoked for cause or had been disqualified from further employment in the credit reporting industry.[115] Therefore, the executive officer required a great deal of personal evidence concerning the background of all applicants. Additionally, there were provisions for new applications upon a change of address or upon a change in the status of any applicant.[116] Licenses were to be granted on an annual basis only with request for continuations ". . . on such

111. *Id.*

112. *Id.*, § 9891.1.

113. *Id.*, § 9891.5.

114. *Id.*, § 9885.4.

115. *Id.*, § 9893.1.

116. *Id.*, § 9893.3-9895.

forms as may be designated by the executive officer."[117]

Although the licensing provisons were clearly the major point of the regulatory scheme, AB 2367 also contained enforcement provisions.[118] The enforcement provisions provided, inter alia, for investigation by the Executive Officer of any written complaint by any person alleging facts that would constitute misconduct or violations of the Act on the part of credit reporting organizations.[119] This provision was an extremely important part of the bill since the consumer's legal remedies required proof of willful noncompliance[120] or of gross negligence in order for a cause of action to lie.[121] However, the credit reporting organization was protected by the fact that disciplinary action against it could only be taken upon a finding at a full hearing, conducted by a hearing officer under the applicable provisions of the Government Code,[122]

> ". . . that a credit reporting organization *willfully violated* the provisions of this chapter, or the rules and regulations established under it or that it has been guilty of other violations inconsistent with the faithful discharge of its duties or obligations. . ." (emphasis added).

This in sum was the regulatory scheme of AB 2367. Its strength was demonstrated by the fact that after unsuccessfully attempting to dilute the regulatory provisions of the bill[123] the credit reporting lobby, making use of the imminent passage of the FCRA and the actual passage of AB 149, succeeded in killing the bill in the Senate.[124]

Would the provisions of AB 2367 have been adequate to resolve the problems connected with the large scale credit reporting? Is regulation by an independent government agency warranted?

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117. *Id.*, § 9897.

118. *Id.*, § 9895.

119. *Id.*

120. *Id.*, § 9883.9.

121. *Id.*, § 9884.

122. *Id.*, § 9895.1.

123. The regulatory provision remained substantially the same after six amendments in the Assembly and Senate.

124. Burns, *supra* note 30. AB 2367 died in the Senate Committee on Insurance and Financial Institutions, Aug. 21, 1970. California Legislature, 1970 Regular Session, Assembly Final History at 721.

Under its rulemaking powers, a regulatory agency may establish standards to measure credit reporting organizations' compliance with intent and spirit of the law. For instance, section 9883.3 of AB 2367 would have required that credit reporting organizations which furnish both investigative and credit reports "adopt rigid safeguards" to keep the specialized investigative-type data separate from the normal credit-type information. A regulatory agency has the power to define such general terms with greater particularity, thereby enabling it to determine with greater precision whether or not a credit reporting organization is complying with the provision.

The existence of a regulatory agency provides the consumer with an alternative channel of relief. It is safe to say that the burden on the consumer of proving actual damages from credit or insurance rejections (which comprises the vast majority of credit and investigative reports[125]) makes court action impractical for the average consumer.[126]

A regulatory agency becomes a source of knowledge and statistical data about the industry it regulates. At present, the extent of the problems inherent in the consumer credit reporting industry are largely unknown. The credit reporting industry claims that although there may have been problems in the past, the adoption of guidelines within the industry[127] and the passage of the FCRA have largely eliminated them.[128] This claim is rejected by proponents of tougher credit reporting legislation.[129] The establishment of a

125. *Task Force Report, supra* note 5, at 3.

126. 119 CONG. REC. S. 15605 (daily ed. Aug. 3, 1973); see also statement by John H. F. Shattuck, Staff Counsel, A.C.L.U., on S. 2360 to amend the Fair Credit Reporting Act, Before the Consumer Credit Subcommittee of the Senate Committee on Banking, Housing and Urban Affairs, Oct. 4, 1973 [hereinafter cited as Shattuck], in which Mr. Shattuck advocates expanded regulatory powers for the FTC under the FCRA.

127. 115 CONG. REC. 9477-79 (1969) (remarks of Congressman Gallagher); *Task Force Report, supra* note 5, at 6-7.

128. Burns, *supra* note 30; Press Release, Retail Credit Co., of Preliminary Statement of W. Lee Burge, President, Retail Credit Co. [hereinafter cited as Burge], Before Subcommittee On Consumer Credit of the Committee on Banking, Housing and Urban Affairs, United States Senate, Oct., 1973, and statement of Guy L. Holloway, President, Commercial Services, Inc. and the Associated Reporting Companies, on S. 2360—"The Fair Credit Reporting Act Amendments of 1973"; San Francisco Sunday Examiner and Chronicle, Oct. 14, 1973, § A at 25.

129. Personal interview with Mr. Timothy Howe, Legislative Analyst to Assemblyman Harvey Johnson, assigned to the office of the Legislative Committee of the Assembly Majority Leader, Sacramento, California, 1973 [hereinafter cited as Howe]; 115 CONG. REC. 2410-2415 (1969) (remarks of Senator Proxmire); 119 CONG. REC. S. 15604-15604 (daily ed. Aug. 3, 1973); Dixon, *supra* note 6; San Francisco Sunday Examiner and Chronicle, Oct. 14, 1973, § A at 25; "It is clear to us that the Act has been less than successful . . . the entire procedure from the

regulatory agency with appropriate record keeping methods would eliminate the questions which remain as to the effectiveness of present law and self-regulatory schemes. Once this is accomplished, the agency would be in a position to recommend legislation to eliminate remaining problems, or if the problems fell within the ambit of the agency's enabling legislation, they could be dealt with by a promulgation of regulations within the agency itself, without resorting to the more cumbersome legislative process.

Financial support of such an agency could be provided by licensing fees.[130] If the remaining problems are as few as the credit reporting agencies claim,[131] a regulatory agency would be able to survive on a minimal budget, funded by a minimal license fee.

It should be noted that, as a general rule, regulatory agencies are not hostile to the industries they regulate. Experience has shown that such agencies, with notable exceptions, prosecute only blatant violations of the law, and do not promulgate particularly burdensome regulations.[132] For this reason, a regulatory agency should neither be looked upon as a cure-all for the problems created by mass credit reporting, nor should it be regarded by the credit reporters with any particular dread.

In its findings, the Governor's Task Force specifically stated that:

> ". . . the great majority of reporting firms exhibit a capability for self-regulation, in accordance with the accepted guidelines (ACB or A) for protection of the consumer." p.7

However, the Report also noted, at page 8, that

> "Several Task Force members indicate a strong

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user's disclosure to the correction of erroneous information and renotification has proved to be ineffective." Engman, *supra* note 37, at 4.

130. AB 2367, 1970 Regular Session, § 9898.

131. *See* text accompanying note 30, *supra.*

132. *See,* R. Clontz, Jr., Fair Credit Reporting Manual 387-388 (1971) [hereinafter cited as Clontz] in which the author expresses the industry's relief at the even-handed treatment received from the FTC under the Truth-in-Lending Act and the FCRA; *but cf.* statement of Walter F. Vaughn, Vice-President, American Security and Trust Co., Wash., D.C., on Behalf of the American Bankers Association and the Consumer Bankers Association, Before the Subcommittee on Consumer Finance of the Senate Committee on Banking, Housing and Urban Affairs, on S. 2360, a Bill to Amend the Fair Credit Reporting Act, Oct. 2, 1973, in which Mr. Vaughn voices the banking industry's opposition to extension of the FTC's regulatory powers under the FCRA to the banking industry.

> feeling that State regulation in this field would better serve the needs of California citizens."

As previously noted,[133] it appears that over 80,000 California consumers experience difficulties with credit reporting organizations each year. The comments of the author of the FCRA and its proposed predecessor S. 2360 and those of the Chairman of the FTC indicate that the problems consumers face in dealing with credit reporting organizations are widespread and have not been eradicated or significantly reduced by industry action.[134] It therefore appears that there is substantial justification for attempting to ameliorate the problems related to credit reporting through state regulation.

### *C. The Fair Credit Reporting Act*

A few months after the passage of AB 149, Congress enacted the FCRA.[135] Although this Act has evoked significant interest from commentators, detailed coverage of it is not within the scope of this article.[136] It is necessary, however, to obtain some familiarity with its provisions in order to compare the California Act with it and to determine the necessity for a duplicate State provision. The eight major provisions of the FCRA are as follows:

1. Consumers must be told the name and address of the reporter whenever adverse action by a user is taken in whole or in part, on the basis on a consumer report.[137]

2. Consumers who request disclosure of their credit file must be informed of the "nature and substance" of the information contained in the file. The disclosure must include the source(s) for the information contained in the consumer's file. However, sources for "information contained in investigative reports" are exempt from disclosure. It must also include the recipients of consumer reports furnished within the last two years for employment purposes and the last six months for any other purposes.[138] Disagreement exists

133. *See* text accompanying notes 32-35, *supra.*

134. *See* notes 37 and 129, *supra.*

135. Public Law No. 91-508, § 601, 84 Stat. 1127, 15 U.S.C. § 1681 (1970).

136. A detailed analysis of the FCRA can be found in the following sources: CLONTZ, *supra* note 132 and Koon, *Translating the Fair Credit Reporting Act,* 48 DENVER L.J. 51 (1971-1972).

137. 15 U.S.C. § 1681m(a) (1970). But where the report upon which the adverse action is based is received from a source *other* than a consumer reporting agency, the user is only required to inform the consumer of his/her right to disclosure upon written request. 15 U.S.C. § 1681m(b) (1970).

138. 15 U.S.C. § 1681g(a) (1970).

as to the extent of the disclosure required by this section. The FTC interprets it as meaning everything in the consumer's file, claiming that the reference to "nature and substance" in the Act are to prevent verbatim transmissions of coded information that would mean nothing to the consumer.[139] Others see this terminology as requiring only a "general statement of the nature and scope" of the file contents.[140]

3. Consumers who "directly convey" to the reporter a dispute as to the "completeness or accuracy" of any item of information disclosed to them must be afforded a reinvestigation of such item by the reporter "within a reasonable time" *unless* the reporter "has reasonable grounds to believe that the dispute . . . is frivolous or irrelevant."[141] The position of the FTC is that the reporter should assume that each dispute is bonafide unless there is "clear and convincing evidence to the contrary."[142] The FTC Guidelines indicate that a conscientious and complete effort at reinvestigation is required by the reporter, which "may require more than returning to the original source, asking the same question and receiving the same answer."[143] The Guidelines suggest contacting additional sources or making a more detailed investigation of the veracity and accuracy of the original source.[144]

4. Consumers may include in their file a brief statement of their side of the story, which must be included in all *subsequent* reports, if the reinvestigation fails to resolve the dispute.[145]

5. A reporter may only furnish consumer reports to persons the reporter "has reason to believe" intend to use the information for credit, insurance, employment or other "legitimate business need . . . in connection with a business transaction involving the consumer," or to a government agency in connection with eligibility for a license or other benefit where financial responsiblity is a require-

139. FEDERAL TRADE COMMISSION, COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, 12 (2nd Ed. 1973) [hereinafter cited as FTC GUIDELINES]. It should be noted that these guidelines do not have the force or effect of statutory provisions and are not binding upon the FTC. They are merely interpretations by the FTC staff to assist the business community. *Id.*, at ii.

140. CLONTZ, *supra* note 132, at 188.

141. 15 U.S.C. § 1681i (1970).

142. FTC GUIDELINES, *supra* note 139, at 14.

143. *Id.*, at 15.

144. *Id.*

145. 15 U.S.C. § 1681(b)(c) (1970).

ment.[146] The Guidelines indicate that the reporting agency must take "all steps necessary to insure" that their reports are used for "permissible purposes" only. This would include requiring service contracts which certify the purpose(s) and prospective use(s) for which the report is being requested and visiting prospective users to insure that they are not fictitious creditors.[147]

6. A reporter must follow "reasonable procedures to assure maximum possible accuracy of the information. . ." contained in its report.[148] It is also required to eliminate "obsolete" and "adverse public record" data based upon a schedule included in the Act.[149]

There are no guidelines in the Act for steps to be taken by a reporter to assure "maximum possible accuracy." The FTC suggest procedures be established to check the accuracy of information throughout the various reporting phases of collection, assembly and dissemination. Security, to insure that information is not stolen, is particularly stressed when data processing operations are involved. The FTC also strongly indicates its dislikes of any "denial quota" for investigators or the recording of the percentage of denials or cases in which adverse information has been or has not been turned-up by an investigator.[150] The tendency that these practices have for producing inaccurate information are obvious.

The requirement that obsolete or adverse public record information be eliminated requires only that such information be deleted from subsequent reports issued by the credit reporter.[151] The FTC indicates that this provision also obligates reporters to keep their files current.[152] Certainly this is not the clear import of the language of the Act. The interpretation that credit reporters are not required to "purge" their files is supported by a further provision in the same section,[153] which excludes from the provisions covering "obsolete or adverse data (1) credit transactions involving more than $50,-000 or more; (2) life insurance underwriting of a policy of $50,-000 or more; and (3) employment at an annual salary of $20,-

146. *Id.*

147. FTC GUIDELINES, *supra* note 139, at 7-8.

148. 15 U.S.C. § 1681e(b) (1970).

149. 15 U.S.C. § 1681c (1970).

150. FTC GUIDELINES, *supra* note 139, at 9.

151. 15 U.S.C. § 1681c (1970).

152. FTC GUIDELINES, *supra* note 139, at 9.

153. 15 U.S.C. § 1681c(b) (1970).

000 or more. If the agency were required to periodically delete per the schedule in the Act, it would not be able to disseminate such data to clients falling within the excluded categories.

7. Consumers who are the subject of an "investigative report" must be notified by the party requesting the report that such report may or will be prepared. Such notice must include notification of the consumer's right to make a written request for a disclosure of the "nature and scope" of the report.[154] In this case, the FTC believes that at least three areas should be included in such disclosure: (1) The items or questions to be covered; (2) the type and number of sources; and (3) the identity of the reporter.[155] Commentator Ralph C. Clontz, Jr., disagrees with this interpretation and believes that a "general statement of the nature and scope" would be sufficient to satisfy the statute.[156]

8. Enforcing compliance with the Act is delegated to the FTC. The Act provides that the Commission shall have "such procedural, investigative, and enforcement powers, including the power to issue procedural rules in *enforcing compliance* . . . and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter."[157] (emphasis added).

The provisions of the FCRA appear to fill the gap between rather weak acts such as the California Consumer Credit Reporting Act and regulation of the industry by an agency established for that purpose. The Act contains provisions for notice to the consumer, as well as provisions for locating and correcting errors, eliminating obsolete information and protecting confidentiality of information. Whether or not these provisions are adequate is subject to question.

One problem with the provisions relating to the determination of whether or not the file contains any errors or incomplete information is that the consumer is not allowed to physically inspect the file.

Another major problem is that the sole notification requirement is that a consumer be notified of the identity of the credit

154. 15 U.S.C. § 1681d (1970).

155. FTC GUIDELINES, *supra* note 139, at 30.

156. CLONTZ, *supra* note 132, at 389.

157. 15 U.S.C. § 1681s (1970).

reporter whenever adverse action is taken by a user based upon a consumer report. That provision does not provide the consumer with notification of his rights to disclosure under the Act. Without such information, only the most well informed consumers or those with access to legal assistance will be able to fully take advantage of the provisions of the Act enacted for their benefit.

Records of arrest, indictment or conviction which antedate the report by less than seven years may be reported, regardless of whether in the case of an arrest or indictment, a conviction has never resulted or, in the case of conviction, a pardon has been granted. With the exception of reports for employment purposes, a reporter is not required to disclose the full and complete details of such information, such as disposition or adjudication, even if it is available from public records. It is difficult to understand a credit, insurance, or employment user's need for arrest or indictment information where a conviction did not follow. Information of this nature has a particularly deleterious effect upon ghetto residents who have a much higher percentage of arrests, particularly as juveniles, than do non-ghetto residents.[158] Even if such a need could be demonstrated, the information would seem to be of little value unless it was complete as to the actual charges, dates, and disposition where such information is available from public records.[159] As was pointed out above, there are no standards showing what information is or is not of value in determining whether or not a particular consumer will be a good credit, insurance or employment risk.[160]

The Act appears to have its greatest impact in the area of confidentiality. Recent interpretations by the FTC indicate that it is impermissible to issue such devices as credit guides,[161] or protective bulletins.[162] This is based upon the reasoning that such reports cannot be issued for the permissible purposes outlined in the Act since "no recipient could conceivably ever have a transaction with

158. J. BOSKIN, URBAN RACIAL VIOLENCE IN THE TWENTIETH CENTURY, (1969).

159. Disclosure of adverse public information for employment purposes must be "complete and up-to-date" as of the date of the report. 15 U.S.C. § 1681k (1970).

160. 115 CONG. REC. 15648 (1969) (remarks of Senator Brooke); *see also* note 54 *supra*, and Shattuck, *supra* note 126.

161. "Credit guides: are alphabetical listings which rate consumers as to how they pay their bills. FTC GUIDELINES, *supra* note 139, at 36.

162. "Protective Bulletins" are lists of consumers who have passed bad checks or who are not "credit worthy for some other reason". They also may include "persons whose *alleged* personal characteristics or affiliations disqualify them for employment." *Id.*, at 38 (emphasis added).

every individual whose name is contained" in such a report.[163] The FTC has broadly interpreted the term "consumer report" so as to include reports such as Motor Vehicle Reports.[164] However, they have indicated that such information is not within the Act if passed between government agencies. This is based upon the reasoning that the language of the Act indicates that it was intended for commerical transactions and not the passing of information between government agencies.[165]

This latter reasoning is not clearly persuasive. In fact, the FCRA restricts the disclosure of information other than a consumer's name, address, place of employment or former places of employment to government agencies not requesting a report for licensing or other government benefit in which financial or personal information is required. Prior to the passage of the FCRA government law enforcement agencies such as the FBI made great use of the information gathered by consumer reporters, especially those in the specialized business of preparing investigative reports.[166] The argument that government agencies are exempt from the provisions of the Act was not sustained in a recent federal court decision which found that the FTC itself is bound by the provisions of the Act in that they cannot obtain reports from consumer reporting agencies without court order or consent of the person whose report is being sought.[167] In that case, the FTC was attempting to obtain random consumer reports under the enforcement provisions of the Act, but the court held that since the agency could obtain these documents via court order or by permission of individual consumers, although a more difficult procedure, the provisions of the Act should not be overridden.[168] Applying the reasoning of the court it would seem that whenever a government agency falls within the definition of a "consumer reporting agency"[169] it may supply information only in accordance with the "permissible use" provisions of the Act, unless specifically exempted therefrom.[170]

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163. *Id.*, at 37.

164. *Id.*, at 40.

165. 15 U.S.C. § 1681f (1970).

166. 115 CONG. REC. 2410 (1969) (remarks of Senator Proxmire).

167. FTC v. Manager, Retail Credit Company, Miami Branch Office, 357 F. Supp. 347 (D.D.C. 1973).

168. *Id.*

169. A "consumer reporting agency" is any person who furnishes to a third party information it has gathered on any individual. 15 U.S.C. § 1681a(f) (1971).

170. The FTC intends to appeal this decision. Engman, *supra* note 37.

The provisions of the Act make it extremely unlikely that a consumer will be able to enforce his rights in a civil suit. This defect is succinctly pointed out in the following remarks by the Act's author, Senator Proxmire.

> "The present law does not provide for minimum liability with the result that there have been no awards since the law went into effect in April of 1971."[171]

An example of how the Act works to prohibit consumers from bringing a successful negligence action, authorized by section 1681 o,[172] is the case of *John Miller v. Credit Bureau, Inc.*[173] The defendant credit bureau had submitted a report to a customer that the plaintiff had "adverse information" in his file. In fact, the adverse information was from a bank with a customer who had the same name as the plaintiff, and from a hospital which had a dispute with the plaintiff over a $12.00 bill. Presumably, although the case report does not specifically indicate it, the plaintiff was denied credit by the defendant's customer. The defendant had made no effort to verify the information, but had merely gathered it and sent it to the customer, in violation of 15 USCA section 1681 a(d). However, since the court was unable to find that the defendant agency acted "willfully" in not making the required verification investigation, and was thus unable to allow punitive damages,[174] the plaintiff received no award since he was unable to prove any actual damages.

The plaintiff's difficulties in bringing a successful civil suit are further compounded by the numerous defenses provided to credit reporters and users by the Act. For instance, no action may be brought against a credit reporter or user in defamation or invasion of privacy based upon information gained via the disclosure requirements of the Act, unless it can be shown that the information was false *and* furnished with malice or willful intent to injure the cus-

171. 119 CONG. REC. S. 15605 (daily ed. Aug. 3, 1973); *see also*, Engman, *supra* note 37.

172. "Any consumer reporting agency or user which is negligent in failing to comply with any requirements imposed under this section with respect to any consumer is liable to that consumer in an amount equal to . . . (1) any actual damages sustained by the consumer as a result of the failure . . ." 15 U.S.C. § 1681o (1970).

173. No. SC 29451-71, D.C. Superior Court, Small Claims and Conciliation Branch, Jun. 22, 1972, memorandum opinion reported in CCH, *Poverty Law Reports*, ¶ 15,762, Aug. 21, 1972.

174. 15 U.S.C. § 1681n (1970).

tomer.[175] Users who fail to comply with the notice provisions of the Act cannot be held liable if they can show by a preponderance of the evidence, maintenance of "reasonable procedures to assure compliance."[176] These provisions represent a mid-position between the credit industry's desire for complete immunity, particularly in return for disclosure, and the opposite extreme of disallowing any special defense provisions and stipulating a minimum actual damage award for every negligent violation.[177] The compromise was reached, no doubt after a great deal of bargaining, in a House-Senate conference.[178]

Finally the law enforcement provisions of the FCRA seem to be almost useless in practice. By the provisions of the Act the FTC was given the duty of enforcing compliance without being given the concomitant power to issue regulations. Such rule making power was specifically discussed and deleted from the Act by the Senate Conference Committee.[179] The recent court ruling in *F.T.C. v. Manager, Retail Credit Co.* has further limited the FTC's power to determine compliance. Since enactment of the Act the FTC has been less than fully active in carrying out their task. To date, the Commission has obtained cease and desist orders against only five insurance companies and six credit bureaus.[180] However, it should be noted that all of these actions have been brought since August

175. 15 U.S.C. § 1681h(e) (1970). Note: This prevents plaintiffs from using information discovered through disclosure requirements in an action brought outside the scope of the Act. However, such information can be used to attempt to prove willful noncompliance or negligence in failing to conform to the requirements of the Act. 15 U.S.C. § 1681n (1970).

176. 15 U.S.C. § 1681m(c) (1970).

177. 115 CONG. REC. 555 (1969) (remarks of Congressman Gallagher); 116 CONG. REC. 35940-35943 (1970) (remarks of Senator Proxmire); 119 CONG. REC. 15604-15605 (daily ed. Aug. 3, 1973); Federal Trade Commission, FTC VIEWS, reported in CCH CONSUMER CREDIT GUIDE, Consumer Credit Report No. 26, at 6 (1973). The argument advanced in favor of a minimum liability provision is that it would provide reporters with an economic incentive to comply with the Act. Such incentive is presently absent due to the slight chance of recovery by a consumer in an action brought against a reporter. Engman, *supra* note 37. The opposing viewpoint is that such a provision would place an unwarranted burden of being an insurer upon credit reporters. Statement of Donald L. Badders, TRW Credit Data, Before the Consumer Affairs Subcommittee of the U.S. Senate Banking, Housing and Urban Affairs Committee, Oct. 1, 1973.

178. H.R. Rep. No. 1587, 91st Cong., 2d Sess. (1970); S. Doc. No. 1139, 91st Cong., 2d Sess. (1970); also reported in 116 CONG. REC. 35940-35943 (1970) (remarks of Senator Proxmire).

179. *Id.*

180. Actions against the Insurance Companies reported in Federal Trade Commission, FTC NEWS, Aug. 2, 1972; actions against the Credit Bureaus reported in docket no. C-2333, Federal Trade Commission, FTC DECISIONS, Dec. 15, 1972 and docket no. C-2287, Federal Trade Commission, FTC DECISIONS, Sept. 19, 1972.

1972, and therefore, may indicate a stepped-up operation in the future.

*D. AB 1413*[181]

AB 2367 was reintroduced in the 1971 session as AB 1413 by the legislative committee of the Majority Leader.[182] However, the author of AB 2367, Assemblyman James Hayes, was unable to author the new bill and it was assigned to newly elected Assemblyman Ken MacDonald.[183]

In its original form, AB 1413 mirrored the unamended form of AB 2367, with a few significant exceptions:

1. Transactions between consumers and report makers were excluded.[184]

2. Land title companies were excluded.[185]

3. A consumer was defined to mean an "individual,"[186] thus removing all doubts as to coverage of businesses.

4. The consumer reporting organization was obligated to disclose the contents of its master file "including the contents of the investigative consumer reports" upon request by the consumer[187] and also to perform necessary reinvestigation and updating without charge and without regard to whether the consumer had been denied credit due to the consumer report.[188] It is not clear whether a formal request for updating is required. The provision may be construed as requiring the reporting organization to make a reinvestigation and perform an update whenever it is found necessary;

181. Introduced April 1, 1971.

182. It is common practice in the California Assembly for a bill to be carried over from session to session by the staffs of the various committees and assigned to legislators who wish to build up their legislative program. Howe, *supra* note 129.

183. *Id.*

184. AB 1413, 1971 Regular Session, § 9880(j). This exclusion was designed to exempt financial institutions from coming under the coverage of the act when they supply information to another bank or credit reporting agency concerning transactions solely between themselves and a customer. *See* 116 CONG. REC. 17635, Oct. 9, 1970.

185. AB 1413, 1971 Regular Session, § 9880(h).

186. *Id.*, § 9880(k).

187. *Id.*, § 9881(b).

188. *Id.*, § 9881(c). The FCRA allows credit reporting organizations to charge a reasonable fee for disclosure when the request for disclosure is not prompted by a denial of credit, insurance or employment. *See* 15 U.S.C. § 1681(j) (1970).

as when consumers inform the reporting organization that they believe there is an error in their file.

5. The reporting organization was required to inform the consumer of the identity of the recipient(s) of any consumer report furnished for credit, insurance or employment purposes "within the two-year period preceding the request," by the consumer for such information.[189]

6. A service contract requirement, that went beyond the original requirements of AB 2367, provided that a consumer must give a user "written approval for [an] employment, insurance, or credit report or check to be performed on him."[190] It also required the user to inform the consumer, *specifically*, that such written approval would authorize the report or check, and to attach a copy of such written approval to its request to the credit reporting organization.[191]

7. Gathering or maintaining ethnic, religious or political information about consumers was prohibited.[192]

8. A prohibition against release of lists containing the name, address or telephone numbers of consumers was included.[193]

The first three changes from the original AB 2367 were included to avoid unnecessary conflicts with businesses in genereal and small companies in particular.

Exceptions four through six added significantly to the consumer's disclosure and noitification rights. Consumers would have received notice from the user at the very beginning of the reporting cycle that a report on them was likely to be made in response to a particular application for employment, insurance or credit. At the same time, the consumer would probably be able to obtain the identity of the credit reporter with whom the user dealt. (This was not required by AB 1413. Notice of the identity of the reporter was only required upon the denial of credit, insurance or employ-

189. *Id.*, § 9881(b).

190. *Id.*, § 9881.1(3).

191. *Id.*

192. *Id.*, § 9881.12.

193. *Id.*, § 9881.13. This short-lived provision would have prevented Credit Bureaus from disseminating, *inter alia*, "credit guides," and "protective bulletins," which were later determined to be prohibited under the FCRA by the FTC GUIDELINES, *supra* note 139, at 36-38. *See* text accompanying notes 161-165, *supra*.

ment, or the increase of credit charges as a result of the report.)[194] The user however would presumably have no reason to withhold such information if the consumer requested it, since the ACB of A claims that most credit bureaus have terminated the industry practice of specifically prohibiting such disclosures by users.[195]

Should the consumer obtain the indentity of the reporter, (s)he could obtain an interview with such reporter and, upon request, receive full disclosure of the contents of his/her credit file. If an item of inaccurate information were discovered, the consumer could request a reinvestigation and thereby prevent adverse action by the user based upon such report. This, along with the requirement that the reporter delete derogatory information which is no longer verifiable, would have been an effective measure in preventing disclosure and notice problems.

Exceptions seven and eight dealt with irrelevant information and lack of confidentiality, respectively.

The credit lobby wasted no time in exerting their influence upon the new bill. By the second amendment, AB 1413 differed from the FCRA only in the provisions concerning use of ethnic, religious and political information, deletion of unverifiable information (extended from 30 days to three months) and enforcement by local law enforcement agencies.[196]

The next amendment[197] left the provisions for local enforcement as the only remaining difference between AB 1413 and the FCRA.[198] The credit reporting lobby had achieved its first goal: to get a bill identical to the FCRA.[199] Complete defeat of the bill was the next goal.[200]

AB 1413 had six major defects which prevented it from accomplishing in any meaningful manner a resolution to the problems

194. AB 1413, 1971 Regular Session, § 9881.11.

195. 115 CONG. REC. 2410-2415 (1969) (remarks of Senator Proxmire); 115 CONG. REC. 555 (1969) (remarks of Congressman Gallagher).

196. Amended in Assembly, June 8, 1971; Burns, *supra* note 30.

197. Amended in Assembly, July 13, 1971.

198. Apparently the investigative reporters were unhappy about not being able to supply information about a consumer's "extremist political activities" to employers. "Analysis of Assembly Bill 1413 (As Amended)", p. 3, by Assembly Committee on Governmental Organizations, California State Assembly, Sacramento.

199. Burns, *supra* note 30.

200. *Id.*

of inaccurate, misleading and irrelevant information. However, it could have been successful in preventing information from being passed around indiscriminately and for "impermissible purposes."

Four uneventful amendments later,[201] AB 1413 died in the Senate.[202] The reasons for its death are somewhat in dispute. Mr. Donald Carlton Burns, chief legislative advocate for the retail Credit Co., claims that it died due to his personal lobbying efforts.[203] Mr. Timothy Howe, legislative analyst to California State Assemblyman Harvey Johnson, believes that it died "for lack of interest." Mr. Howe believes that despite the efforts of the lobbying forces, the Act would have passed had anyone joined the author to fight for its passage.[204] For no apparent reason the bill did not obtain any assistance or invoke any interest from either consumer organizations[205] or from the State Department of Consumer Affairs. Apparently, however, the Department has kept itself informed of the legislative activity surrounding the various credit reporting bills, and plans to introduce recommendations of its own in the next session.[206]

### *E. AB 271*

Introduced on February 1, 1972, AB 271 was the committee revival of AB 1413.[207] In order to avoid the pitfalls of AB 1413, and insure a greater chance for passage of the bill in an election year, AB 271 in its original form was identical to the FCRA with the three following exceptions:

(1) Enforcement power was given to the Attorney General and each local District Attorney;[208]

(2) Actions for defamation or invasion of privacy which were based upon information obtained through the disclosure provisions

201. Amended in Senate August 9, September 23, October 7, and November 2, 1971.

202. California Legislature, 1971 Regular Session, Assembly Final History at 507.

203. Burns, *supra* note 30.

204. Howe, *supra* note 129.

205. *Id.*

206. Personal interview with Ms. Christina Rose, Staff Person, Dept. of Consumer Affairs, State of California, Sacramento, Calif., Sept., 1973.

207. *See* Note 182, *supra.*

208. AB 271, 1972 Regular Session, § 9998.60.

of the Act would not lie unless they constituted a "willful misrepresentation"[209] (under the FCRA, such actions must constitute a malicious or willful intent to injure the consumer);[210]

(3) AB 271 must be interpreted in a manner consistent with the FCRA.[211]

The first and third exceptions speak for themselves; the second one is puzzling. Certainly "willful or malicious intent to injure" is extremely difficult to prove, but the elements of a cause of action in "willful misrepresentation" seem equally difficult for a plaintiff-consumer to prove. The major difficulty lies in the fact that a plaintiff must prove that the defendant intended to induce him to act or refrain from acting and that the plaintiff justifiably relied on this inducement in so acting or refraining from acting.[212] If a merchant-user were to falsely represent a fact to a plaintiff-consumer which was intended to and did cause action to the consumer's detriment, the consumer would have a cause of action under this statute, whereas he would not have under the FCRA. This type of contact between consumer and merchant is not likely in the context of a credit reporting transaction. A cause of action, to be of any utility, should be available against the credit reporter. It would not be so available under AB 271 since credit reporters direct their reports to merchants rather than to consumers and do not intend any reliance whatsoever by anyone other than those merchants.

The bill was sent to the Senate in its original form on April 2, 1972.[213] In the Senate a unique notice provision was added which would have required early notice to the consumer from the information source itself. The amendment provided that any person who transmitted adverse credit information in the nature of a consumer report (basically information bearing upon credit, repu-

209. Id., § 9998.22(e).

210. 15 U.S.C. § 1681(h)(e) (1970).

211. AB 271, 1972 Regular Session, § 9998.4. The FCRA specifically provides that state credit reporting acts not "inconsistent" with its provisions are not affected by it. 15 U.S.C. § 1681t (1970). The staff of the Assembly Committee on Governmental Organizations was concerned that this provision could be construed to prohibit state's from enacting legislation with more stringent provisions than that of the FCRA (Committee Analysis of AB 1413, as amended, page 3). On the other hand, Senator Proxmire, author of the FCRA, does not interpret the Act as precluding states from enacting tougher laws. 116 CONG. REC. 35940-35943 (1970) (remarks of Senator Proxmire).

212. W. PROSSER, LAW OF TORTS 686 (4th ed. 1971).

213. CALIFORNIA LEGISLATURE, 1972 REGULAR SESSION, ASSEMBLY FINAL HISTORY at 160.

tation, personal characteristics etc.) to a consumer reporting agency would be obligate to send a notice by mail to the consumer informing him/her that adverse information had been transmitted to a reporting agency for inclusion in his/her credit file.[214] This provision was in addition to that requiring notice from a user taking adverse action based upon a consumer credit report.

The above provision was deleted in the second amendment.[215] After one additional amendment[216] which provided for enforcement by either the Attorney General or a District Attorney (but presumably not both), the Act was returned to the Assembly for concurrence in the amendments, passed, and was enrolled to the Governor.[217]

Why did AB 271 pass while AB 1413 did not? According to Mr. Burns[218] the bill passed because the credit lobby had reconciled itself to the fact that sooner or later such a bill would be passed. Based on this assumption, the lobby had determined to make it closely identical to the Federal Act in order to avoid two sets of possibly conflicting requirements. That was accomplished. Also contributing to the credit lobby's reversal of policy was the belief that if AB 271 was passed, the impetus for reform would abate, at least for a few years.[219]

According to Mr. Howe, the bill passed for two reasons: (1) it was an election year and (2) the interest in passing a stronger state act was still alive.[220] Since the industry had resigned itself to the passage of a bill in this form, its lobbyists were not anxious to press legislators to oppose it, particularly in an election year.[221]

On August 25, 1972, the Governor vetoed the bill.[222] This act came as a surprise to almost everyone concerned with the legis-

214. AB 271, § 9998.21, as amended May 8, 1973.

215. *Id.*, amended in Senate Jun. 1, 1972.

216. *Id.*, amended in Senate Jun. 19, 1972.

217. *Id.*, passed in Assembly Aug. 3, 1972, enrolled to Governor Aug. 15, 1972.

218. Burns, *supra* note 30.

219. *Id.*

220. Howe, *supra* note 129.

221. *Id.*

222. CALIFORNIA LEGISLATURE, 1972 REGULAR SESSION, ASSEMBLY FINAL HISTORY at 160.

lative passage of the act. The Governor's stated reasons for the veto were that since the bill was so similar to the Federal Act it was unnecessary and that having dual bills of this nature could raise problems concerning inconsistent Federal-State regulations.[223] The Governor's action made further efforts to enact more stringent credit reporting legislation necessary.

### *F. AB 1148*

Subsequent to the introduction of AB 271, a very short (one page) but important bill was introduced in the Senate for the purpose of amending the existing California Credit Reporting Act.[224]

The bill began as an attempt at covering those few situations in which a credit reporter investigates the credit-worthiness of a person who has not applied for credit. The bill passed the Senate, two amendments later,[225] with a stronger notice provision than that in AB 271 and the FCRA.[226]

Current California law as amended by AB 1148[227] requires that a creditor notify an applicant in writing of the denial of credit or increase in the cost thereof. Such notice must include: (1) the name and address of the reporter, (2) a statement of the person's right to disclosure and (3) a statement outlining the method of obtaining disclosure. The provisions give the applicant exactly what is needed at that point: a clear statement of what immediate follow-up rights are available to him.

### *G. AB 800*[228]

In its original form, AB 800 contained novel and innovative solutions to the problems of credit reporting.

(1) The consumer would have been provided access to the sources of information contained in an investigative report if unable to otherwise refute any allegations of untrue facts contained in

223. Veto message reported in JOURNAL OF THE ASSEMBLY, CALIFORNIA LEGISLATURE, 1972 REGULAR SESSION, Nov. 8, 1972 at 7465.

224. SB 1148, introduced Mar. 15, 1972.

225. *Id.*, amended in Senate May 25, 1972 and Jun. 22, 1972.

226. Stats. 1972, c. 1422, p. 3104, § 1.

227. CAL. CIV. CODE, § 1750 et seq. (West 1973), renumbered CAL. CIV. CODE, § 1785.1 et seq. (West Supp. 1974).

228. Introduced in Assembly Mar. 15, 1973.

such reports.[229] At present, sources of consumer investigative reports are not open to disclosure other than by court order.[230]

Whether and under what conditions credit reporters should be required to disclose their sources of the information contained in investigative reports is one of the most controversial issues in credit reporting.[231] Investigative reports are based upon personal interviews with friends, acquaintances and associates of the subject under investigation. The reports are most frequently employed in connection with the underwriting of insurance or the hiring and promotion of employees. The user would like to know about those aspects of a person's social or personal life which would make him an insurance risk, an undesirable employee or candidate for promotion.[232] Obviously, many sources of such information would be unwilling to cooperate with the reporter if they thought that the subject would have fairly easy access to their identity.[233] On the other hand, the information being supplied is that which is most easily distorted due to bias or misinformation. There is therefore a greater probability that such information will be in error than is the case with credit data. Due to the slight factual basis for much investigative information, it is difficult for a consumer to do more than generally deny it, since there are no specific facts to refute.[234]

AB 800, however, does give the reporter an alternative to revealing a source's identity; the reporter can simply accept the consumer's denial and delete the information.[235] On the other hand, this may be contrary to the reporter's duty to its clients, particularly when the reporter believes that the information is valid.

In the final analysis, this provision may be too strong. Certainly reporters should not be able to ignore freely the consumer's complaint while keeping their sources secret as well. However, by requiring stringent and complete reinvestigations, and by increasing the consumer's ability to obtain relief, a middle line may be drawn between the consumer's needs and those of the credit industry.

229. AB 800, 1973 Regular Session, § 9998.32(2)(ii)(b).

230. 15 U.S.C. § 1681g (1970).

231. Engman, *supra* note 37.

232. 115 CONG. REC. 2410 (1969) (remarks of Senator Proxmire).

233. *Task Force Report, supra* note 5.

234. Engman, *supra* note 37.

235. AB 800, 1973 Regular Session, § 9998.10.

(2) Investigative reports could not be procured unless the "details of the investigation are clearly and accurately disclosed (to the consumer) in writing in advance . . . and . . . written permission is obtained authorizing an investigative consumer report." This included informing the consumer of his right "to request . . . copies of the investigative consumer report and a copy of section 9998.10" (that section of the Act which provided for disclosure to consumers.)[236]

Since a copy can be edited to delete the sources of the information and yet supply the consumer with full details, this appears to be one method in which the consumer can insure that the investigation did not go beyond the authorization without significantly affecting the report's confidential factors.

As to the initial authorization requirement, a basic question arises: Is a credit, insurance or employment application in itself to be considered an authorization to conduct any and all manner of investigation?

Since most consumers are not aware of the fact that they are the subject of such investigations[237] such an assumption appears to be unwarranted unless there is evidence to the contrary. The wisest solution would seem to be to inform the consumer that such an investigation is a prerequisite to acceptance of the consumer's application. In this manner, the consumer would be given the opportunity to determine whether or not a refusal to allow such a personal investigation is worth the denial of the application.

(3) Consumers would be permitted to examine the information in their file and the sources thereof (except for sources of investigative consumer reports subject to the provisions of item one above).[238]

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236. *Id.*, § 9998.18.

237. 115 CONG. REC. 2410 (1969) (remarks of Senator Proxmire). *See also* the statements of the FTC and the ACLU which propose that the Act should provide a way to insure that consumers make a conscious decision to authorize any extensive personal investigation. Engman, *supra* note 37 and Shattuck, *supra* note 126. Credit reporters argue that prior authorization would create a substantial delay in reporting and that it would be difficult to provide advance notice of the details of the investigation, since the line of questioning and the interviewees' are often determined in the filed in response to the direction the investigation takes. Press Release of the American Life Insurance Association, "ALIA Questions Need for Proposed Amendments to Fair Credit Reporting Act", Institute of Life Insurance, Wash., D.C., Oct. 2, 1973. In addition, the Retail Credit Co. believes that such information would be of "minimal interest" to consumers who, in their opinion, are presently "fully informed about and accept the fact of investigation." Burge, *supra* note 128 at 4 and 7.

238. AB 800, 1973 Regular Session, § 9998.32.

These latter two sections provided the consumer with the right to *physically* inspect his file. Currently, a consumer has no right to physically inspect his file under either the FCRA or the California Act.

Since, according to the president of the ACB of A, most credit bureaus presently allow consumers to physically inspect their files, such a requirement should not be oppposed by that lobby.[239] The problem of source anonymity could be resolved by deletion of the sources' names from the investigative reports. An objection that has been raised to this proposal is the expense involved in deletion.[240] However, given the lobby's own claims that few consumers request the opportunity to see their files,[241] the costs involved should not be unreasonable.

(4) A reporter which compiles public record information must notify the consumer whenever it reports adverse information to a client. Such notice must include the name and address of the client. In addition, the reporter must maintain "strict procedures" to insure that its information is *complete* and *up-to-date.*[242]

This section would go a long way toward solving the problem of incomplete public record information. Information contained in public records is often incomplete due to inadequate court documentation systems.[243] Under this provision the consumer would be notified by the reporter at the time the information was reported and would have an opportunity to correct incomplete information. At present, a reporter has the option of either notifying the consumer or establishing procedures to insure that the data is complete and up to date.[244]

The Governor's Task Force report on Credit and Personnel Reporting Practices in California stated that inadequate procedures employed in the filing of public records information was "the most frequent single cause of error" in public records data contained in credit reports. As an answer to this problem, the Task Force sugguested that ". . . legislation be enacted to require mandatory and

239. *See* note 128, *supra.*

240. Burns, *supra* note 30.

241. *Id.*

242. AB 800, 1972 Regular Session, § 9998.38.

243. *Task Force Report, supra* note 5 at 6.

244. 15 U.S.C. § 1681 (1970).

timely filing of public record. . ."[245]

Until that suggestion is adopted, there is no reason not to adopt a solution which places on the consumer the burden of showing public records data to be incomplete. If the credit reporter is required to notify the consumer of an adverse entry in his file, the burden on the consumer of showing that the information is incomplete is minimal.

(5) A reporter may not report information not "reasonably relevant" to the purposes for which it is sought or that constitutes an "undue infringement" of the consumer's "right of privacy."[246]

This requirement would prohibit the present practice of amassing all available information and would force reporters, creditors, insurers and employers to determine what information is required by their respective needs. This would promote confidentiality by preventing certain unnecessary and/or private information from getting into the file in the first place. The lack of governing standards for such a prohibition might create some difficult problems. Until more detailed guidelines for credit bureaus are made available, it may be unfair to demand that they make such risky decisions on their own.

(6) A credit reporter and its informants would be liable in tort for communicating defamatory information "notwithstanding any contrary provision of law or any defense based upon qualified privilege" if it can be shown that the reporter or its informant failed to exercise "ordinary standards of due care."[247]

This provision attempts to eliminate the common law barrier of qualified privilege of common interest to an action in defamation; a barrier which has made legal relief difficult for the consumer to obtain.[248]

Extending liability to a reporter in addition to its informants may be too extreme. For one thing, the reporter may be the recipient of defamatory statements notwithstanding every effort on its

245. *Task Force Report, supra* note 5 at unnumbered first page.

246. AB 800, 1973 Regular Session, § 9998.42.

247. *Id.*, § 9998.50.

248. W. PROSSER, LAW OF TORTS 789-796 (4th ed. 1971). *See also* Clark, *Protection of the Consumer Interests and the Credit Rating Industry*, 2 PACIFIC L.J. 635 (1971); Popp, *The Consumer vs. the Credit Bureau: Whom Does the Law Protect*, 7 CALIF. W.L. REV. 218 (1970).

part to avoid such information. For another, since no actual damages are required to prove a case in libel,[249] an innocent credit agency which receives such information could be held liable even though they later discarded it without ever including it in their file. The argument for the consumer is that the qualified privilege of common interest[250] has served to prevent him from litigating real grievances in this area. Consumer advocates also argue that most instances of defamation occur in the gathering of investigative information and are in the form of slander and would therefore not be actionable in the absence of a showing of actual damages.[251] If such a showing can be made the cause of action should rightfully lie.

Perhaps a provision giving a cause of action against the actual disseminator of the defamatory information would give the consumer an action where one should lie. Such a provision would certainly help solve the problem of gathering inaccurate information.

(7) Credit reporter's would have been prohibited from providing information to any entity not having a "legitimate business need" for it.[252] This provision was not unique. However, AB 800 went further by providing examples of what a "legitimate business need" did *not* include: (1) market research or marketing; (2) investigations by or for private detectives; and (3) legal matters, unless the attorney's client is the consumer who is the subject of the file and agrees in writing to the furnishing of such report to the attorney.[253]

(8) A consumer would be able to bring an action against any person who, by means of false pretenses, obtains information about the consumer from a reporter.[254] At present, there are criminal penalties for "knowingly and willfully" obtaining information under false pretenses.[255] Under AB 800, the consumer would be able to bring an action for both actual and punitive damages, as well as for attorney's fees if successful, without having to prove the difficult elements of scienter and willful intent.

249. W. PROSSER, LAW OF TORTS 789-796 (4th ed. 1971).

250. *Id.*, at 789-790.

251. *See* note 248, *supra.*

252. AB 800, 1973 Regular Session, § 9998.13(c).

253. *Id.*

254. AB 800, 1973 Regular Session, § 9998.52.

255. 15 U.S.C. § 1681c (1970).

(9) A reporter must *discard* obsolete information from its files.[256] Under current requirements, a reporter is prohibited from reporting such information subject to three specific exceptions.[257] However, the reporter is not required to examine its files on a periodic basis to purge them of such information, and in fact, as long as the exceptions remain, it cannot be required to do so. There are no exceptions under AB 800. A reporter would therefore be required to continually investigate its files in order to purge them of the prohibited information.

In addition to the above "novel" suggestions, two provisions included in past bills were included in the original draft of AB 800.

The first of these concerns obsolete information and would have shortened from seven years to three years the length of time reporters may include in credit reports information concerning accounts placed for collection, accounts written off as bad debts, "any other adverse data not otherwise specified. . ." and records of arrests, indictments and convictions. In addition, it would have prohibited information concerning arrests, indictments or convictions from being reported where the arrest or indictment did not result in a conviction or where the conviction was set aside by a full pardon.[258] These provisions were deleted in the first amendment.[259]

In some respects, AB 800 is similar to its predecessor AB 271. Both were redrafted in the amendment process so as to be almost identical to the FCRA. In both cases, the sole difference between the State Acts and the FCRA was the provision enabling enforcement by local law enforcement agencies. In this form AB 800 passed the Assembly and was sent to the Senate.[260] It is expected to be passed by the Senate and sent to the Governor during the 1973-74 Regular Session.[261] Since the bill now provides for the exemption of government agencies maintaining records for law enforcement, traffic safety or licensing, and therefore does not cover Motor Vehicle Reports,[262] it is expected that the Governor will sign the bill into law.

256. AB 800, 1973 Regular Session, § 9998.16.

257. 15 U.S.C. § 1681c (1970).

258. AB 800, 1973 Regular Session, § 9998.16(c)(4)(5) and (6).

259. Amended in Assembly May 17, 1973.

260. Amended in Assembly Sept. 6, 1973. Amended in Senate Sept. 14, 1973.

261. Burns, *supra* note 30.

262. AB 800, 1973 Regular Session, § 9998.2(e). It was the opinion of Mr. Burns that the Governor vetoed AB 271 because it did not contain an exclusion for DMV reports.

## IV. A MODEL CREDIT REPORTING ACT

The following Model Act is suggested for the purpose of providing a comprehensive solution to the problems of consumer credit reporting, which would be accepatble to both consumers and the credit reporting industry.

### *A. Notice*

1. The term "notice" or "notice requirements" as used in this chapter, means a written communication to the consumer which includes *all* of the following information:

(a) The name, address and phone number of the person requesting or causing the procurement of a consumer credit or investigative report.

(b) The name, address and phone number of the consumer credit or investigative reporting agency.

(c) Every right granted to the consumer under this Act (including but not limited to the consumer's right to disclosure, correction and/or deletion of information contained in his master file, and means of legal redress).

(d) A full and complete copy of the provisions of the Act.

(e) The name, address and phone number of the local law enforcement agency charged with enforcement of the provisions of this Act.

2. No person shall procure or cause to be procured a consumer credit or investigative report unless such report be first expressly authorized in writing by the consumer. The authorization form shall include a statement, directly above the signature line and in distinctive bold face type, informing the consumer that such written approval will authorize the subscriber or user to have such report performed. A copy of the authorization form shall be included with the required notice sent to the consumer.

3. No person may procure or cause to be prepared an investigative consumer report on any consumer unless as to such consumer, the requirements in item 2 above have been complied with *and* a written disclosure of the *methods* and scope of the investigation is supplied. Such disclosure shall include:

(a) the nature and substance of the questions to be asked in the investigation; and

(b) a blank copy of any standard questionnaire or other similar form to be used in the investigation.

4. Whenever credit or insurance for personal, family or household purposes, or employment is denied, or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, or from any person, the user of the consumer report shall so advise, in writing, the consumer against whom such adverse action has been taken, and supply such consumer with the notice required by this Act.

5. Whenever in the course of preparing a consumer report a consumer reporting agency gathers information from public records which is adverse to a consumer, such reporting agency shall within three (3) days send written notice to that consumer. The notice shall include the exact details of the adverse information gathered.

6. Every consumer reporting agency shall post the following notice in a conspicuous place so that consumers coming to such agency may read it:

> YOU HAVE A RIGHT BY LAW TO REQUEST AND OBTAIN A PHYSICAL INSPECTION OF THE CONTENTS OF YOUR MASTER FILE, AND TO RECEIVE A TRUE COPY OF THE CONTENTS OF YOUR FILE. IF YOU BELIEVE THAT ANY ITEM IN YOUR FILE IS INCORRECT OR INCOMPLETE, TELL US AND WE WILL PERFORM A COMPLETE AND FULL REINVESTIGATION AT NO CHARGE TO YOU.
>
> IF YOUR REINVESTIGATION DOES NOT PROVE YOU TO BE CORRECT, YOU MAY SUBMIT A STATEMENT OF DISPUTE IN ORDER TO TELL YOUR SIDE OF THE STORY.
>
> DEPENDING UPON THE OUTCOME OF OUR REINVESTIGATION. WE WILL SEND A COPY OF NOTIFICATION OF THE CORRECTION OR YOUR STATEMENT OF DISPUTE TO ANY PERSON YOU REQUEST WHO WAS SENT A REPORT IN THE LAST YEAR.

YOU MAY REPORT ANY GRIEVANCES NOT SATISFIED BY US TO ANY OR ALL OF THE FOLLOWING AGENCIES:
(Name, address and phone number of the local law enforcement agency responsible for compliance, the Division of Consumer Services of The State Department of Consumer Affairs and the FTC).

*B. Disclosure*

1. Every consumer reporting agency shall, upon request and proper identification of any consumer;

(a) Allow the consumer to physically inspect the contents of his/her master file, except that where the file contains an investigative report, the reporter may provide the consumer with a true copy of such report from which the sources of the information have been deleted.

(b) Provide the consumer with a true copy of all the contents of his/her file.

*C. Correction of Errors*

1. If the completeness or accuracy of any item of information contained in his/her file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall, within 30 days, reinvestigate and record the current status of that information. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall immediately delete such information from the consumer file.

If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The reporting agency may limit such statements to not more than 200 words if it provides the consumer with assistance in writing a clear summary of the dispute.

Whenever a statement of a dispute is filed, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide the consumer's statement.

2. Following the deletion of any information which is found to be inaccurate or the accuracy of which can no longer be verified,

or the inclusion of any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or that a statement has been included to any person specifically designated by the consumer who has within one year prior thereto received a consumer report.

3. Reinvestigation procedures shall include but not be limited to the following steps:

(a) Whenever possible, investigate alternative and additional soures of information. This must be followed whenever such additional sources are provided by the consumer.

(b) Indicate to the original sources that their statement has been disputed, and ask them if they would repeat it, qualify it or accept the consumer's explanation.

(c) Recheck the basis of the original sources' information and where such basis is a report by a third party, investigate such third party as if they were an original source of the information.

(d) Prepare a complete report of such reinvestigation, including the sources reinvestigated, the questions asked each such source and the answers received.

(e) Supply a true copy of such report in (d) above to the consumer except that in the case of investigative reports, the identity of the sources may be deleted.

*D. Elimination of Irrelevant Information*

1. No consumer agency shall report the following information after the period specified:

(a) Bankruptcies—ten years from adjudication of most recent bankruptcy;

(b) Accounts placed for collection, and records of accounts placed for profit or loss—three years;

(c) Suits and judgment—three years from date of entry;

(d) Tax liens—three years;

(e) Records of arrest, indictment, or conviction of crimes —three years from the date of release or parole with the additional requirement that such items shall no longer be reported if at any time it is learned that in the case of a conviction a full pardon has

been granted, or in the cause of an arrest or indictment, a conviction did not result;

(f) Any other adverse data—three years.

2. A consumer reporting organization shall establish and maintain strict procedures to insure that information is deleted from a consumer's file within 30 days of the date after which such information is no longer to be reported.

3. Consumer reporting agencies shall be allowed six (6) months from the effective date of this Act to comply with the provisions of item number 1. above as to information contained in the agencies' files as of that date.

*E. Confidentiality*

1. Consumer reporting agencies shall adopt and maintain strict procedures to maintain the confidentiality of the information contained in their files. Such procedures shall include, but not be limited to:

(a) Allowing access to the information contained in the files to a limited number of employees; and

(b) Maintaining initial and ongoing training programs for employees to teach the need for confidentiality and the means to attain it.

2. Requiring that a person requesting a consumer report for legitimate business needs shall certify the purposes for which the information is sought and certify that the information will be used for no other purposes.

3. Making a reasonable effort to verify the identity of a person who is a new customer and the uses certified by such person prior to furnishing such person with a consumer report. A reasonable effort to obtain such information shall entail but not be limited to: (1) on site inspection of the business premises of the new customer, (2) investigation of references supplied by the customer, and (3) investigation of the customer by independent means customary to the trade.

4. No credit reporting agency shall furnish a report to a person if the agency has reasonable grounds for believing that the report will not be used for a legitimate business need.

(a) For the purposes of this chapter, "legitimate business need" includes:

(i) Determining a consumer's eligiblity for credit.

(ii) Determining a consumer's eligiblity for insurance.

(iii) Determining a consumer's eligibility for employment, promotion, reassignment or retention.

(iv) Determining a consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status.

(b) For the purposes of this chapter, "legitimate business need" does not include:

(i) Furnishing information for market research or marketing purposes.

(ii) Furnishing information to a private detective or a private detective agency for use in investigations conducted or to be conducted by such detective agency.

(iii) Furnishing information to an attorney for use in a legal matter unless the consumer who is the subject of the report is a client of the attorney and agrees in writing to the furnishing of such report.

(iv) Furnishing information to a governmental organization for any purpose not described in 4(a) above, unless such governmental agency is charged by statute with administration and/or regulation of this Act.

5. No consumer credit reporting organization shall gather or maintain *ethnic, racial, religious,* or *political* information concerning consumers.

6. No consumer credit reporting organization shall release to any person any list consisting of the name, addresses or telephone numbers of consumers. Any violation of this prohibition shall be deemed willful and the license of the consumer credit reporting organization shall be revoked.

*F. Compliance*

1. Civil Enforcement.

(a) Every consumer reporting agency and user of informa-

tion shall maintain strict procedures to insure compliance with all of the provisions of this Act.

(b) Any credit reporting agency or user of information which willfully fails to comply with the above requirements imposed under this chapter with respect to any consumer is liable to that consumer in any amount equal to the sum of:

(1) Any actual damages sustained by the consumer as a result of the failure;
(2) Such amount of punitive damages as the court may allow; and
(3) In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(c) Any consumer reporting agency or user of information which is negligent in failing to comply with the requirement in 1(a) above imposed under this chapter with respect to any consumer is liable to that consumer in an amount equal to the sum of:

(1) Any actual damages sustained by the consumer as a result of such failure, except that each such failure shall be deemed to have resulted in a minimun of $100.00 actual damages; and
(2) In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(d) Any person who obtains information on a consumer from a credit reporting agency under false pretenses is liable to that consumer in an amount equal to the sum of:

(1) Any actual damages sustained by the consumer as a result of the failure;
(2) Such amount of punitive damages as the court may allow; and
(3) In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(e) Notwithstanding any law to the contrary, the standard in

any action against a consumer reporting agency or any informant of a consumer reporting agency for communicating defamatory information shall be the ordinary standard of due care, and the defense of qualified privilege shall not be available to either the agency or its informant.

(f) Any action brought under the above provisions may be brought in any court of competent jurisdiction, within five years from the date of the occurrence of the violation.

2. Criminal Penalties.

(a) Any person who knowingly and willfully obtains information on a consumer from a credit reporting agency under false pretenses shall be fined not more than five thousand dollars ($5,000) or imprisoned in the county jail for not more than one year or both.

(b) Any officer or employee of a credit reporting agency who knowingly and willfully provides information on a consumer from the agency's files to a person not authorized to receive that information shall be fined not more than five thousand dollars ($5,000) or imprisoned in the county jail for not more than one year, or both.

(c) Any person who willfully misrepresents any item of information contained in a consumer or investigative report shall be fined not more than five thousand dollars ($5,000) or imprisoned in the county jail for not more than one year, or both.

(d) Any consumer reporting agency which willfully fails to comply with the provisions of 2(a) above shall be guilty of a misdemeanor and shall be fined not less than one thousand dollars ($1,000).

(e) The provisions of 2(a) through 2(d) shall be enforced by the Attorney General or by a District Attorney, upon their own motion or upon complaint of a consumer.

## CONCLUSION

Since 1970, the problems arising from the 100 billion dollar credit reporting industry in the United States have received widespread attention. Nationally, Congress has held hearings, passed a Federal Credit Reporting Act (FCRA) and is at present considering an even tougher successor to that Act. In California, the Governor assigned a twelve person Task Force to investigate the industry. Following the report of the Task Force; the California legis-

lature from 1970 through 1973, proposed no less than six major bills aimed at attacking problems related to Credit reporting. Three of these bills were passed, one was vetoed, and one is pending in the current 1973-74 Regular Session. In addition, the FTC, the Credit Reporting Industry and consumer advocates, have exerted pressure at the federal level to obtain credit reporting legislation sympathetic to their interests.

Despite these efforts, the major problems that have developed as a result of the massive growth of the credit reporting industry largely persist to the present. The FCRA and the California Credit Reporting Act have not been effective in substantially reducing the flow of inaccurate and misleading information or in preventing the collection of irrelevant or confidential information.

Numerous solutions have been proposed by legislators, the FTC, and consumer advocates, to resolve these problems. Some of these attempt to impose regulatory controls on the credit reporting industry at the federal or state level, while others merely attempt to strengthen and tighten present controls. For the most part, a well-organized and effective lobbying effort by the industry has succeeded in preventing any of these attempts from being successful.

Thus far, the efforts to enact more stringent credit reporting legislation have not aroused substantial interest from the general public. Moreover, state and national consumer organizations have not appeared willing to invest very much of their energies in this direction (only the ACLU and the FTC appeared before the Senate to argue for tougher credit reporting legislation at the recent hearings on S2360). Without such support, and in the face of the combined forces of both banking and industry, it is unlikely that legislators will be willing to undertake any major reforms of the present system.

On the other hand, the enactment of the FCRA and the California Credit Reporting Act, along with the various attempts to strengthen them, indicates that there is a nucleus of legislators and consumer advocates interested in change. Furthermore, the experiences of AB 2367 indicate that there may be a substantial body of legislators willing to enact stronger legislation should the public ask for it. The proposed Model Act is suggested as a guideline and starting point for legislators and advocates who are interested in making further efforts in this direction.