The California Consumer Reporting Agencies Act: A Proposed Improvement on the Fair Credit Reporting Act

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THE CALIFORNIA CONSUMER REPORTING AGENCIES ACT: A PROPOSED IMPROVEMENT ON THE FAIR CREDIT REPORTING ACT

One measure of a truly free society is the vigor with which it protects the liberties of its individual citizens. As technology has advanced in America, it has increasingly encroached on one of those liberties what I term the right of personal privacy. Modern information systems, data banks, credit records, mailing list abuses, electronic snooping, the collection of personal data for one purpose that may be used for another—all these have left millions of Americans deeply concerned by the privacy they cherish.

And the time has come, therefore, for a major initiative to define the nature and extent of the basic rights of privacy and to erect new safeguards to insure that those rights are respected.

I shall launch such an effort this year at the highest levels of the Administration, and I look forward again to working with this Congress and establishing a new set of standards that respect the legitimate needs of society but that also recognize personal privacy as a cardinal principle of American liberty.

Richard M. Nixon
1974 State of the Union Message

President Nixon was unable to keep his promise. His statement, however, illustrates the general recognition of the danger which the existence of extensive public and private information systems pose to the personal privacy of all Americans. The danger is real and growing. In the area of consumer information, the twenty-one hundred members of Associated Credit Bureaus, Inc., together have more than 100 million files on American consumers. The Retail Credit Company, the largest single entity in the consumer information field, has

2. A 1974 Louis Harris poll on American attitudes toward personal information credit companies showed that, "a majority of 69% said they did not believe that their right to privacy had been violated by credit bureaus, but 28% thought that they had been victims of misleading, damaging or incorrect information stored in credit bureau files." L.A. Times, July 21, 1974, § 5, at 6, col. 1.
46 million files.\(^5\) And the Credit Division of TRW, Inc., a recent but fast growing entrant in the consumer information industry, has files on more than 35 million consumers.\(^6\) No doubt these files are often duplicated, but the total of just these three—over 180 million files—is nonetheless impressive. It is highly probable, if not certain, that anyone who has ever applied for credit, a loan, or insurance has a file someplace.

The information contained in consumers’ files can include such items as current and former addresses, places of employment, records of loan and credit payments, bank balances, lists of credit cards, lists of credit accounts at stores, marriages, divorces, property owned, traffic violations, criminal records, and medical history, as well as comments by employers, neighbors, friends, associates, and investigators on personal habits and lifestyle.\(^7\) From such information, a rather complete picture of a consumer’s life can be constructed.

For a small fee,\(^8\) and the demonstration or allegation\(^9\) of a legitimate business need, a report containing this kind of information will be provided to a person or company. Generally such reports are requested in connection with the extension of credit, the underwriting of insurance, or an application for employment. Occasionally, however, these reports are requested and received for illegitimate purposes.\(^10\)

This note is designed to analyze proposed California legislation which would strengthen existing legal controls over the consumer information industry and which would provide for more and better prote-

\(^5\) S. 2360 Hearings, supra note 3, at 61 (testimony of W. Lee Burge, President, Retail Credit Co.).

\(^6\) Id. at 126 (testimony of Ray W. Ybaben, Vice President and Director of Systems, TRW Credit Data).


\(^8\) In 1973 the standard report for an insurance company in the Chicago area cost $5.25. Foer, The Personal Information Market: An Examination of the Scope and Impact of the Fair Credit Reporting Act, uncorrected galley proof reprinted in S. 2360 Hearings, supra note 3, at 695, 740 [hereinafter cited as Foer].

\(^9\) CBS News tested the difficulty of getting information from consumer reporting agencies by setting up a fictitious business and having it request credit reports on certain individuals from 20 credit bureaus in different parts of the country. Ten of the 20 contacted supplied the requested credit reports, several offered to do so if a contract was signed, and only two referred the applicant to a local credit bureau, the procedure ostensibly required by the industry code. Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 59-61 (1970).

\(^10\) For example, in August, 1974, Mel Morgan, Idaho Democratic Party Treasurer, admitted having obtained a credit report on Republican congressional candidate George Hansen through his Pocatello jewelry business. Twin Falls Times-News, Aug. 29, 1974, at 1, col. 8.
tion of consumers against abuses by this industry. In order to understand fully this proposed legislation, it will first be necessary to discuss briefly the concepts underlying the issues involved in, as well as the historical background of, the proposed legislation. These introductory sections will be followed by the main section of the note which will compare and contrast the proposed California legislation with the primary existing law in this area, the federal Fair Credit Reporting Act.\textsuperscript{11} The note will conclude with some additional proposals which would provide further consumer protections and which might be considered for inclusion in the proposed California legislation.

**Underlying Concepts**

Both the interest of the individual consumer in his privacy and the interest of the creditor, insurance underwriter, and employer in receiving information about the consumer are legitimate, and the policy disputes surrounding reporting systems are a reflection of the balancing of these interests.

Due to the mobility of the population and the large size of many institutions with which consumers deal, credit granting, insurance underwriting, and hiring are often depersonalized. A consumer information system is needed, therefore, to permit these institutions to differentiate between good and bad credit risks, safe and unsafe drivers, and reliable and unreliable potential employees. Without such a system, the decision to extend credit or to underwrite an insurance policy would have to be made in a vacuum. As a result, the costs of credit and insurance would inevitably rise to cover the increased losses from bad credit risks and unsafe drivers. Thus, a good consumer information system benefits the good credit risk, the safe driver, and the reliable employee by keeping the costs of credit and insurance lower and by making more jobs available for such persons while increasing the costs or denying these opportunities to poor credit risks, unsafe drivers and unreliable employees. Inevitably, each additional item of information collected impinges on the subjects' personal privacy, and this costs the consumer as well, although in ways that cannot be easily calculated or quantified. In the words of a 1973 report of the Department of Health, Education and Welfare, "[t]here is a widespread belief that personal privacy is essential to our well-being—physically, psychologically, socially, and morally."\textsuperscript{12} The interests calling for more information and for more privacy are thus competitive, and the one can be advanced only at the expense of the other.

Consumer information is only valuable if it is accurate. Indeed, inaccurate information is worse than no information, and the advantages of an information system to the consumer in the form of lower costs for credit and insurance are lost if the information is inaccurate. However, obtaining 100 percent accurate information would be very expensive, if not impossible. As the costs of collecting consumer information are included in the cost of credit and insurance, the consumer has a financial interest in keeping down the cost of collecting this information. But the lower the cost of obtaining information, the higher the error rate, and it is when errors occur that individual consumers are damaged or at least inconvenienced. Again, then, there are competing interests: on the one hand, there is the interest of collectors and users of information and consumers in general in keeping down the cost of information collection; on the other, there is each individual consumer's interest in having accurate information reported.

In addition to these various competing interests consideration must be given to an individual's minimum rights, regardless of economic cost, vis-à-vis entities which collect and disseminate information about him. The HEW Secretary's Advisory Committee on Automated Personal Data Systems recommended in its 1973 Report the enactment into law of a "Code of Fair Information Practice" consisting of the following five basic principles:

1. There must be no personal data record-keeping systems whose very existence is secret.
2. There must be a way for an individual to find out what information about him is in a record and how it is used.
3. There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.
4. There must be a way for an individual to correct or amend a record of identifiable information about him.
5. Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data.

These three underlying concepts—the competition between the right of privacy and the need for information, the competition between the cost of collecting the information and the need for accuracy, and the minimum rights of each individual consumer—form the nucleus of the debate of whether to expand consumer protection against the consumer information industry.

13. This is a logical proposition. Insuring accurate information requires checking information and sources carefully and more than once. The more the information is checked and verified, the more expensive the operation will be in employee time.
14. HEW REPORT, supra note 12, at xx-xxi.
Historical Background

Prior to 1971, the consumer information industry was largely unregulated. The only legal tools available to the abused consumer were common law suits in negligence, defamation, and invasion of privacy. Congressional interest in the consumer information industry and the whole subject of personal information systems was aroused by a proposal in 1965 to centralize the extensive United States government files into a single Federal Data Bank. In light of this congressional interest, the consumer information industry recognized that some sort of government regulation was inevitable. It therefore decided to cooperate with, rather than to resist, the government, in the hope of getting a relatively favorable bill passed. The prime mover in the Congress was Senator William Proxmire, and the legislation which resulted was a product of bargaining between the senator and his staff on one side and the consumer information industry on the other. The resultant legislation is known as the Fair Credit Reporting Act (FCRA). It became effective on April 25, 1971.

Numerous articles were written on the FCRA following its enactment, and the reception was generally favorable. It could not have been otherwise, for the FCRA gave consumers protections which they had never had before. Yet, the inadequacies of the act did not go unrecognized, and many commentators suggested improvements. The general consensus was that the act was an important first step.

As the consumer information industry participated in the preparation of this legislation, it was willing and prepared to live with it. One commentator summarized his informal survey of consumer reporting agencies and users of consumer data as follows:

For the most part, the representatives of business, banks, and credit bureaus with whom the author has spoken have dismissed the im-

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16. Id. at 72-73.
18. Id.
pact of the FCRA on their operations as being negligible. While businesses regulated by the FCRA have initiated procedures to insure their compliance with the Act, these businesses did not experience any rise in costs that could be directly attributed to the FCRA. They ascribe the negligible impact of the FCRA to a minimal percentage of complaints based on alleged errors in credit reports.23

The FCRA was a compromise bill, and it was inevitable that those interested in stronger legal control of the consumer information industry and more protection for consumers would eventually attempt to strengthen the FCRA by amendment. This was the intent of Senator Proxmire when he introduced Senate Bill 2360 (a bill to amend the FCRA) on August 3, 1973.24 The Federal Trade Commission staff, after two years of responsibility for enforcing the FCRA,25 agreed that the act needed to be strengthened.26

Senator Proxmire, as Chairman of the Consumer Credit Subcommittee of the Senate Committee on Banking, Housing and Urban Affairs, held five days of hearings on the proposed amendments in October of 1973 and developed an extensive record in favor of and in opposition to the amendments.27 Nevertheless, the subcommittee decided to table any further consideration of the amendments on November 27, 1973, by a vote of four to two.28 Despite this unfavorable action, Senator Proxmire held one additional day of hearings on the FCRA on February 5, 1974.29

At the same time that the Proxmire bill to amend the FCRA was being tabled in committee, the California legislature was considering bills to increase consumer protection in the credit reporting area at the state level.30 Interest centered initially on Assembly Bill 800, which was introduced on March 15, 1973, by Democratic Assemblyman

27. S. 2360 Hearings, supra note 3.
Harvey Johnson and which passed the assembly on September 10, 1973, by a vote of seventy to zero.\textsuperscript{31} This bill had most of its pro-consumer aspects deleted in committee, and the form in which it passed the assembly was acceptable to the consumer information industry.\textsuperscript{32} It was not acceptable, however, to the State Department of Consumer Affairs, the principal advocate in Sacramento for pro-consumer legislation. The staff of the Consumer Affairs Department proposed twenty-three amendments to A.B. 800, only five of which were eventually accepted by the consumer information industry.\textsuperscript{33} As negotiations through the spring of 1974 did not result in a compromise on A.B. 800\textsuperscript{34} (which eventually was defeated in the Senate Judiciary Committee on August 20, 1974\textsuperscript{35}), the Consumer Affairs Department drafted its own bill, which Republican Assemblyman Jerry Lewis introduced on June 20, 1974, as A.B. 4494.\textsuperscript{36} This bill, which is known as the Consumer Reporting Agencies Act (CRAA) and which is strongly pro-consumer, was approved by the Assembly Finance Committee on August 15, 1974, by a vote of twelve to three and passed the assembly on August 19, 1974 by a majority of sixty-five to two.\textsuperscript{37} The bill was tabled in the Senate Committee on Business and Professions on August 21, 1974,\textsuperscript{38} as there was insufficient time to consider it before the session ended on August 30.\textsuperscript{39}

The CRAA has been reintroduced into the current session of the legislature with essentially the same wording as A.B. 4494.\textsuperscript{40} As it goes through the legislative process, modifications, deletions and additions will undoubtedly be made. Nevertheless, it is worthwhile to consider the provisions of the proposed act as they appeared in A.B. 4494: since these provisions were approved by one branch of the legislature, they can serve both as a useful guide to the upcoming legislative debate and as a preview of what is likely to be, at least in part, the new law of California in the area of consumer information reporting.

\textsuperscript{32} L.A. Times, Sept. 1, 1974, § V, at 1, col. 1, & at 5, col. 1.
\textsuperscript{33} Id. at 5, col. 3.
\textsuperscript{34} Id.
\textsuperscript{36} Id., pt. 6, at 1429.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Interview with Cristina L. Rose, Deputy Chief, Division of Consumer Services, Cal. Dept of Consumer Affairs, in Sacramento, Oct. 18, 1974.
\textsuperscript{40} The CRAA has been divided into two parts and presented to the California Legislature's 1975-1976 Regular Session as A.B. 600 and A.B. 601. This was presumably done in the interest of clarity, for A.B. 600 covers consumer credit reports and A.B. 601 investigative consumer reports. For an explanation of these terms, see text accompanying notes 46, 48 infra.
The Proposed Consumer Reporting Agencies Act

It is impossible to understand the meaning and significance of the proposed Consumer Reporting Agencies Act without being aware of the provisions of the Fair Credit Reporting Act. The CRAA builds upon the FCRA, and many of its provisions are the same as those of the Federal Act, particularly as regards its scope and application. Furthermore, the FCRA is the law now in force in California, and the CRAA would change the law to the extent that its provisions go beyond those of the FCRA. Therefore, much of the discussion which follows will involve a description of FCRA provisions in order to show how the CRAA differs. Also, the genesis of many of the CRAA's proposed changes is Senator Proxmire's proposed 1973 amendments to the FCRA. Consequently, the record developed by the hearings on that legislation will often be used as a source of reasons for and against the various changes.

The analysis of the CRAA is divided into five main sections: (1) purpose of the CRAA, (2) scope and application of the act, (3) additional consumer rights which it would provide, (4) additional consumer remedies which it would provide, and (5) expanded control of consumer reporting agencies which it would accomplish. The analysis concludes with a brief discussion of federal supremacy as it relates to the CRAA. It should be noted at the outset, however, that it was not the intent of Congress to discourage state action in this area by making federal law preemptive and that federal law only takes precedence over state law when the two are inconsistent. As the proposed CRAA is in no way inconsistent with the FCRA, federal supremacy is not a problem.

Purpose

Both the FCRA and the proposed CRAA have the same purpose and they use the same language to describe it:

It is the purpose of [this Act] to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper

42. S. 2360 Hearings, supra note 3.
44. See text accompanying notes 166-69 infra.
utilization of such information in accordance with the requirements of this [Act].\textsuperscript{45}

In broad terms, this purpose is accomplished by requiring that a consumer be notified when a report has been made on him that has resulted in an adverse decision on a credit, insurance, or employment application; that the consumer be told the name and address of the consumer reporting agency which made the report; that he have a right to learn the contents of the file which the agency has on him; that he have a right to challenge and correct that information; and that he have a remedy against the consumer reporting agency and/or user of the report when he has been injured unjustly by the report.

Scope and Application

The scope and application of the proposed CRAA and the FCRA are also very similar. Both acts use the same definitions to limit their applicability, and, with one exception, both contain the same requirements for notifying a consumer that a report was requested and used in making the decision on his application for credit, insurance, or employment.

A consumer report is defined as one made by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under [this Act].\textsuperscript{46}

It should be noted that any report made in connection with an application for credit or insurance which is not to be used primarily for personal, family, or household purposes is not covered by either act. For example, a report that was obtained by an insurance company on an executive in connection with an application made by his employer for "key man" life insurance, is not covered by the FCRA.\textsuperscript{47}

An investigative consumer report is a consumer report where the information is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom

\textsuperscript{45} 15 U.S.C. § 1681(b) (1970); A.B. 4494 § 1 (1974), as amended Aug. 5, 1974 (proposed CAL. BUS. & PROF. CODE § 9998(e)) [hereinafter cited as A.B. 4494 followed by proposed CAL. BUS. & PROF. CODE section(s)].

\textsuperscript{46} 15 U.S.C. § 1681a(d) (1970); see A.B. 4494, supra note 45, proposed § 9998.2(e).

\textsuperscript{47} Fernandez v. Retail Credit Co., 349 F. Supp. 652 (E.D. La. 1972).
he is acquainted or who may have knowledge [about the consumer].

**A consumer reporting agency**

means any person, which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties...

It should be noted that these acts only cover information-gathering activity when it is done by someone other than the person or company using the information. In other words, information which is gathered by a user's own investigators is not covered under the above definitions.

Since it is rare for a consumer to know of the existence of his credit file, the notification provisions of the FCRA and the proposed CRAA are of critical importance. Both acts provide that whenever credit, insurance, or employment is denied, or the charge for credit or insurance is increased, wholly or in part because of information contained in a consumer report, the user of the consumer report must so inform the consumer and supply him with the name and address of the consumer reporting agency which did the report.

Both acts also provide that a user must inform the consumer if he has used information about the consumer received from a source other than a consumer reporting agency. Such sources include financial institutions, insurance companies, and employers which supply information to others about their own dealings with a particular consumer; the acts are structured to permit them to report on their own dealings with consumers without becoming consumer reporting agencies.

The notification provisions governing information from a source other than a consumer reporting agency are broader in the CRAA than in the FCRA. Under the FCRA, if a user of consumer data denies credit or increases the charge for credit based on information from a source other than a consumer reporting agency and if the consumer makes a written request for an explanation within sixty days of learning of any adverse action, the user must disclose to the consumer within a reasonable period of time the nature of the information. The CRAA

48. 15 U.S.C. § 1681a(e) (1970); see A.B. 4494, supra note 45, proposed § 9998.2(d).

49. 15 U.S.C. § 1681a(f) (1970); see A.B. 4494, supra note 45, proposed § 9998.2(e).

50. 15 U.S.C. § 1681m(a) (1970); see A.B. 4494, supra note 45, proposed § 9998.40(a).

51. 15 U.S.C. § 1681m(b) (1970); see A.B. 4494, supra note 45, proposed § 9998.2(c).

52. 15 U.S.C. § 1681a(d) (1970); see A.B. 4494, supra note 45, proposed § 9998.2(c).

broadens this provision in two ways. First it extends the above notification requirement to insurance companies which deny insurance or increase insurance costs based on information from a source other than a consumer reporting agency. Thus, under the CRAA if a user denies credit or insurance or increases the cost for either based on information from a source other than a consumer reporting agency, the user must make disclosure within a reasonable period of time if asked to do so in writing by the consumer within sixty days of learning of an adverse action. Secondly, the CRAA broadens the disclosure which must be made, for under its wording the user must disclose to the consumer the substance as well as the nature of the information received from this other source.

Apart from these differences, the scope and application of the two acts are the same.

Additional Consumer Rights

The FCRA and the proposed CRAA give the consumer certain rights to learn the contents of his file kept by a consumer reporting agency and to learn to whom the agency has sent reports about him. The proposed CRAA expands those rights over those provided by the FCRA.

The FCRA requires a consumer reporting agency to inform a properly identified consumer who inquires in person or by telephone about the nature and substance of the information it has on the consumer in its files. The agency need not, however, disclose any medical information that it may have on the consumer. It must also inform the consumer of the sources of the information, except for the sources of investigative reports, and to whom it has sent reports within the last two years for employment purposes and within the last six months for any other purpose. The consumer reporting agency may charge a reasonable fee for disclosing this information unless the consumer has been denied credit, insurance, or employment within the last thirty days. The consumer has no right to see his file or to handle it.

54. A.B. 4494, supra note 45, proposed § 9998.40(b).
55. Id.
57. Id.
58. An "investigative consumer report" is one "obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted." Id. § 1681a(e).
59. Id. § 1681g(a)(3).
60. Id. § 1681j.
The proposed CRAA not only makes it easier for the consumer to find out what is in his file, but it also deletes the exception for the nondisclosure of medical information contained in the FCRA. The CRAA permits a consumer to inspect his file visually, to receive a copy of it in person or by mail along with a written explanation of the codes used in the file, and to do both of these without fee except for mailing and copying charges. Additionally, the CRAA limits the amount of identification a consumer must produce before he can inspect or procure a copy of his file.

In the opinion of FTC Chairman Engman, "[T]he most complained of feature of the FCRA is the disclosure (or lack thereof) by the consumer reporting agency." The FTC ran a test to determine the completeness of the disclosures to consumers and, found that there is often wholesale withholding of information concerning character, reputation, or 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.

In the words of another FTC official,
The consumer is limited to the passive role of listener. Thus, a form of "legislatively imposed trust" is the heart of this law. The adequacy of the disclosure is entirely dependent upon the patience, honesty and candor of the particular individual employed by the consumer reporting agency visited by the inquiring consumer. Without being able actually to see his file, a consumer can never be sure that he has learned everything, and even if the consumer reporting agency does tell the consumer everything, an element of doubt will remain with all but the most credulous.

The consumer information industry generally opposes visual inspection with the argument that if consumers are allowed to handle their files, an occasional one might try to seize or destroy his file. Given the criminal remedies against such a volatile consumer, this seems a rather weak argument. It is interesting to note that on its own

62. A.B. 4494, supra note 45, proposed § 9998.10.
63. Id., proposed §§ 9998.10, .22(b).
64. Id., proposed § 9998.22(b)(2).
65. Id., proposed § 9998.22(e).
66. Id., proposed § 9998.22(b).
67. Id., proposed § 9998.22(c).
68. S. 2360 Hearings, supra note 3, at 658 (statement of Lewis A. Engman, Chairman, FTC).
69. Id. at 659.
71. S. 2360 Hearings, supra note 3, at 20 (testimony of Robert K. Pinger, President, Credit Bureau of Greater Houston, Inc.).
initiative, the Retail Credit Company decided to start permitting consumers to inspect their files visually on June 1, 1974.\textsuperscript{72}

The CRAA provision permitting a consumer to receive by mail a copy of his file along with an explanation of the codes used in it is designed to solve a typical problem faced by a consumer who has moved from one city to another and is denied credit. Since the file upon which the credit denial is made is located in the city of his former residence, if a copy by mail were unavailable, the consumer would either have to make a trip to this city or to request disclosure by telephone, incurring charges for long distance calls.\textsuperscript{73} Faced with these options, many consumers would simply not pursue the issue further. Permitting a consumer to get a copy of his file by mail would thus be of great benefit to consumers. Once a copy of the file is sent by mail, then an accompanying disclosure of the codes used in the file is essential to make the file understandable to the consumer.

The consumer information industry raises three objections to this proposal: (1) the file may be lost in the mail, resulting in unauthorized disclosures;\textsuperscript{74} (2) the consumer may use his copy of the file to get credit, thus denying legitimate business to the consumer reporting agency;\textsuperscript{75} and (3) the revelation of subscriber codes to consumers could lead to unauthorized requests for consumer reports.\textsuperscript{76}

The CRAA deals with the first objection by relieving the consumer reporting agency of any liability from unauthorized disclosures due to a consumer report's being lost in the mail.\textsuperscript{77} The second objection seems somewhat farfetched. It presupposes that someone granting credit will accept a copy of a consumer's credit rating from the consumer himself, with the attendant risk of tampering, rather than paying the minimal charge for getting one directly from an agency.\textsuperscript{78} One commentator recognized the third objection as having merit and recommended that consumer reporting agencies whose information is coded, primarily credit bureaus, be exempted from a similar provision in the proposed Proxmire amendments.\textsuperscript{79} The problem, however, is one only of subscriber codes, for no one should particularly care about the codes used to describe the information in the file. It would seem that the subscriber codes could easily be deleted from the file copy mailed to the consumer and that the information on users who have recently re-

\textsuperscript{72} N.Y. Times, Apr. 25, 1974, at 58, col. 2.
\textsuperscript{73} Feldman, supra note 26, at 470-71.
\textsuperscript{74} S. 2360 Hearings, supra note 3, at 92 (testimony of W. Lee Burge).
\textsuperscript{75} Id. at 68; Foer, supra note 8, at 720.
\textsuperscript{76} Id. at 40 (testimony of John L. Spafford).
\textsuperscript{77} A.B. 4494, supra note 45, proposed § 9998.22(b)(2).
\textsuperscript{78} Foer, supra note 8, at 720.
\textsuperscript{79} Id. at 720-21.
quested the file could be supplied to the consumer in a covering letter or in a manner other than by code.

The argument in favor of deleting the disclosure fee provision of the FCRA is essentially one of fairness. In the words of an FTC official, "By any reasonable standard of fairness, the consumer has a right to know exactly what information is being collected and sold about him." This provision was not included in Senator Proxmire's amendments, and so the industry spokesman at those hearings did not testify directly on this point. The objection would certainly be one of cost, however, for, as was pointed out at the congressional hearings, many credit bureaus are small and operate on small profit margins. It is no doubt true that disclosures without fee (except for copying, mailing, and telephone charges) would add slightly to the operating costs of consumer reporting agencies, but the amount is likely to be small. This conclusion is based on the assumption that few consumers request disclosure now without first having been denied credit, insurance, or employment, in which case the disclosure must now be without fee under the FCRA.

Furthermore, the value of a file is in part a function of its accuracy, and a consumer-inspected file, which the consumer certifies as accurate, must be more valuable than an uninspected one. Since a consumer reporting agency can note in the file that such an inspection was made, it would seem to be getting something of value out of the transaction. Moreover, a consumer who has inspected his file would seem to be precluded from later asserting that the inspected information was inaccurate.

The purpose of delineating and limiting, within the CRAA, the type of identification that a consumer must produce to see his file is to prevent a consumer reporting agency from using the request for disclosure to procure additional information on the consumer. One commentator described the extended questionnaire which he was required to answer for identification purposes after he had requested disclosure under the FCRA. In addition to requesting a rather detailed personal history, the form concluded with an authorization whereby the consumer was to give permission to the agency to procure any records on the consumer from any business, organization, or professional person. The use of such a form must intimidate most consumers and clearly violates the spirit of the FCRA. This practice would not be possible under the CRAA.

80. Feldman, supra note 26, at 475 (emphasis in original).
82. Id. at 675-76 (testimony of Albert A. Foer). The form is reprinted in id. at 693-94.
83. Id.
The exclusion of medical information from the disclosure required by the FCRA was added by the House-Senate Conference out of fear that a consumer reporting agency might disclose to a consumer medical information of a traumatic nature of which the consumer was unaware.\textsuperscript{84} The consumer information industry wishes to retain this exclusion out of concern that physicians will no longer be candid in reporting medical information if the confidentiality of the medical reports cannot be assured, \textit{i.e.}, if it is possible the consumer may see the report.\textsuperscript{85} Advocates of disclosure argue that since medical information is often the most personal and potentially the most damaging in the report, it should therefore be available for verification by the consumer.\textsuperscript{86} The HEW report on personal data systems found this exclusion disturbing and recommended its deletion.\textsuperscript{87} It seems incongruous for consumer reporting agencies, finance companies, insurance companies, and potential employers to be able to see information of a highly personal nature about a consumer which the consumer is unable to see or to verify and of whose very existence he may be unaware.

The Proxmire amendments to the FCRA would have permitted disclosure to a licensed physician of the consumer's choice.\textsuperscript{88} The CRAA goes one step beyond this by simply deleting any reference to medical information, with the result that any such information in the consumer's file must be disclosed directly to him.\textsuperscript{89} The argument for the intermediary step proposed by the Proxmire amendments is that there are rare instances when a consumer's physician does not wish the consumer to know some traumatic information. However, this approach puts an unnecessary financial burden on the vast majority of consumers not in this situation, for they must pay to have a physician receive and read the report. On balance, the California solution seems more equitable.

\paragraph*{Additional Consumer Remedies}

There are three types of remedies available to a consumer who discovers inaccurate or erroneous information in his file or who learns that the file of someone else has been provided to a user inadvertently. They are (1) preliminary remedies short of filing suit, (2) civil causes of action legislatively created, and (3) common law causes of action in defamation and invasion of privacy. In all three areas, the proposed CRAA would expand the available consumer remedies.

\begin{itemize}
\item \textsuperscript{84} Id. at 672.
\item \textsuperscript{85} Id. at 89 (testimony of W. Lee Burge).
\item \textsuperscript{86} Id. at 432-33 (testimony of Sen. Edward M. Kennedy, Massachusetts).
\item \textsuperscript{87} HEW REPORT, supra note 12, at 70.
\item \textsuperscript{88} S. 2360, 93d Cong., 1st Sess. \$ 4(2), reprinted in S. 2360 Hearings, supra note 3, at 5.
\item \textsuperscript{89} A.B. 4494, supra note 45, proposed \$ 9998.10(a).
\end{itemize}
In order to put into better focus the additional remedies contained in the CRAA, it is worthwhile to consider first what appears to be the central issue in the debate between the consumer information industry and consumer advocates, namely, the degree of accuracy of the information now collected and distributed by consumer reporting agencies. Apart from the question of fairness, the need for additional legal remedies against consumer reporting agencies must reflect the error rate in consumer reports. If errors are infrequent, then the need for additional consumer remedies is less pressing.

At the present time there is little conclusive data on the number of errors in consumer reports. On March 9, 1973, the FTC filed a complaint against Retail Credit alleging numerous violations of the FCRA, and the record developed by this proceeding should provide much data on this point. The one item of hard information of which the author is aware is an admission made by Ray Ybaben of TRW Credit Data at the National Computer Conference held in Chicago in May 1974. Participating in a panel on privacy, Mr. Ybaben said that consumer inquiries at TRW Credit Data jumped from 2,000 to 200,000 per year after the passage of the FCRA, but estimated that even at that high figure only 5 percent of the consumers denied credit contacted TRW to find out why. The most interesting statement of Mr. Ybaben, however, was his claim that of the 200,000 annual inquiries, “only one third” resulted in the correction of an error. This is a rather startling admission.

The consumer information industry points to the small number of consumer complaints as indicative of the high level of accuracy of consumer reports and of full compliance with the FCRA. FTC records indicate a total of about 21,000 telephone and written complaints under the FCRA between 1971 and August 1974, not a large number nationwide.

On the other side, consumer advocates point to the data collection methods of consumer reporting agencies as an indication that the error rate must be significant. The two elements of these methods which,

91. The case is in the advanced pretrial stage and the judge has issued a broad protective order, so there is little as yet on the public record. Telephone conversation with Gerald Wright, FTC Office Region IX, San Francisco, Cal., Jan. 16, 1975.
92. COMPUTERWORLD (NEWSWEEKLY FOR THE COMPUTER COMMUNITY), May 15, 1974, at 6, col. 1.
93. Id. (quotation marks in original).
95. Letter from Sheldon Feldman, Ass't Director for Special Statutes, FTC, to Christine D. Rose, Deputy Chief, Consumer Services Division, Cal. Dep't of Consumer Affairs, Aug. 23, 1974.
it is alleged, lead to high error rates are the number of consumer re-
ports which an agency employee must complete each working day and
the strong expectation by his superiors that he discover a certain per-
centage of adverse information.

An investigator for a consumer reporting agency must complete
anywhere from eighteen to twenty reports a day, for he is generally
paid on a piecework basis and this number is necessary for him to make
an adequate living. The economics of the consumer information industry
are such that a large daily output by each employee is necessary since
the charge per report is generally low. For example, the fee for each
report requested by insurance companies in the Chicago area is only
$5.25. As a result of this time and money pressure, former employ-
ees of Retail Credit alleged that it is a common practice for investigators
to "zing" reports by fabricating sources, not verifying adverse informa-
tion from two sources, and basing reports on previous ones.

The pressure to come up with adverse information is undis-
puted. Consumer advocates call this a quota system, and the con-
sumer information industry terms it quality control. Elaborate records
are maintained by Retail Credit on the amount of "declinable" and "protective" information generated. The former is information
which will result in a denial of credit, insurance, or employment, and
the latter is information which will result in higher rates for credit or
insurance. Retail Credit labels this recordkeeping practice quality con-
trol, rather than a quota system. The following interchange between
Senator Proxmire and W. Lee Burge, President of Retail Credit, illustrates the differing viewpoints.

Mr. Burge. We have never had a quota system for protective
information, Senator, and we have rather patiently and deliberately
explained this fact time and again both to this committee and the
committee in the House.

We know from our experience that if a man does a satisfactory
job of investigation a certain amount of information will be
developed from his investigations, and we are able on the basis of
our experience, to determine what the parameters of satisfactory
performance are, but we have never had a quote [sic] system.

96. FCRA Hearings, supra note 29, at 4 (testimony of William F. Boaz).
97. Id.; id. at 6 (testimony of Dick Riley).
98. Foer, supra note 8, at 740.
99. FCRA Hearings, supra note 29, at 6 (testimony of Dick Riley); id. at 10
(testimony of Mark S. Brodie); id. at 12-13 (testimony of Len O. Holloway).
100. See text accompanying note 102 infra.
101. FCRA Hearings, supra note 29, at 5 (testimony of Dick Riley).
Senator Proxmire. One of the criteria by which your inspectors are judged is the statement in your manual in which you say in part, "A large number of CNL, incomplete underwriting information consistently low, protective, and declinable information," and so forth.

In other words, a consistently low protective and declinable information suggests at least an implicit quota.

Mr. Burge. No, sir; it does not; and it is rather explicitly detailed to all our people that we do not have a quota system.

Senator Proxmire. Let me read from a letter of November 1, 1971, this is from the Northern California Retail Credit Co., signed by the regional vice president. It says that, in the marketing meeting to discuss the, "State Farm's need to develop more declinable information in the Northern California region." We also discussed what would be declinable, and I know we received considerable information, and so on.

Mr. Burge. You note the absence of any specific figures there, Senator.

Senator Proxmire. That is right.

Mr. Burge. Therefore, if we had a specific quota, obviously there would have been quotas in terms of specifics discussed.

May I respond?

Senator Proxmire. Yes; indeed.

Mr. Burge. We actually know from our experience that people who do a satisfactory investigative job will develop a certain percentage of information. There are approximately 9 million alcoholics in the United States. There are approximately 1 million people who are addicted to drugs. There are 55,000 people a year who are killed on the highways as a result of accidents. Approximately half of those were driving under the influence. And if we sent 5,000 people into the field every day who developed no information, then it would be startling indeed that we had a lack of performance to that degree.

Senator Proxmire. Yes; but you go a little further than that. I have a letter dated December 15 in which you conclude—it is written by a regional vice president—saying that: "I said it before and I will say it again: You have done a monumental job in placing in the upper third grouping in both declinable and protective," and so forth.

Mr. Burge. Yes, sir. They show they have developed the information that is there.\(^\text{102}\)

One man's quota is another man's quality control.

Preliminary Remedies

Under the FCRA, if a consumer disputes the completeness or accuracy of any item in his file, and the consumer reporting agency, on

\(^{102}\) S. 2360 Hearings, supra note 3, at 63 (testimony of W. Lee Burge). Testimony at congressional hearings is not always punctuated properly. The cited portions are as they appear in the report of the hearings.
reasonable grounds, decides that this dispute is neither frivolous nor irrelevant, the agency must reinvestigate the item of information.\textsuperscript{103} If upon reinvestigation the information is found to be inaccurate or can no longer be verified, the agency must correct or delete the item.\textsuperscript{104} If the reinvestigation does not resolve the dispute, the consumer has the right to place a statement in his file detailing his side of the dispute.\textsuperscript{106} The consumer's statement or a summary of it must then be included in any subsequent report.\textsuperscript{108} The consumer can also request notification to any potential employer who received a report within the past two years or to anyone else who received a report within the past six months of the deletion, change, or statement of dispute.\textsuperscript{107} However, if the consumer reporting agency decides that the dispute is frivolous or irrelevant, then the consumer's preliminary remedies are at an end.

The proposed CRAA retains the same general procedures as the FCRA, but closes the loophole in that act by giving the consumer the right to file a statement to be included in his file even if the consumer reporting agency determines that the dispute is frivolous or irrelevant and refuses to reinvestigate.\textsuperscript{108} According to an internal memorandum of the Consumer Affairs Department, this provision was included in the CRAA

to prevent consumer reporting agencies from simply ignoring disputes . . . . By requiring at least some response to the consumer and eliminating the possibility of simply ignoring him, it is hoped that consumer reporting agencies will, when presented with a consumer dispute, more seriously consider the alternative of re-checking the item of information.\textsuperscript{109}

\textit{Civil Remedies Under the FCRA and CRAA}

Little litigation has been generated by the FCRA. The author has been unable to find a single reported case where a consumer has collected damages from a consumer reporting agency or a user for either negligent or willful noncompliance with the FCRA,\textsuperscript{110} although there have been some out of court settlements.\textsuperscript{111}

\textsuperscript{104} Id.
\textsuperscript{105} Id. § 1681i(b).
\textsuperscript{106} Id. § 1681i(c).
\textsuperscript{107} Id. § 1611i(d).
\textsuperscript{108} A.B. 4494, \textit{supra} note 45, proposed § 9998.24.
\textsuperscript{109} Cal. Dept of Consumer Affairs, Internal Memorandum from Thomas J. MacBride, Jr., to Tim Comstock, Deputy Dir., July 18, 1974, at 4.
\textsuperscript{110} John H. F. Shattuck of the ACLU also knew of no civil damages awarded under the FCRA. \textit{S. 2360 Hearings, supra} note 3, at 643.
\textsuperscript{111} See id. at 23-24.
In contemplating a suit under the civil liability provisions of the FCRA, the consumer is faced with two problems. First, the FCRA establishes as its standard of compliance that consumer reporting agencies and users adopt and "maintain reasonable procedures." Civil damages are then available to the consumer if he can prove that there was either willful or negligent noncompliance with the act. Thus, in the more likely case of negligence, the consumer is faced with what may be described as a double negligence standard of proof. He must show that the consumer reporting agency not only failed to comply with the FCRA in not maintaining reasonable procedures, but that it negligently failed to do so. Furthermore, as one commentator has suggested, the wording of the FCRA may preclude holding a consumer reporting agency vicariously liable for the negligence of its employees; the burden of defense on a consumer reporting agency would be simply to prove that its corporate procedures were reasonable, regardless of the observance or nonobservance of these by individual employees.

The second and more difficult problem which a consumer faces under the FCRA is that he must be prepared to prove actual damages, and his recovery will be determined by that proof. Since in most cases it is difficult to establish actual damages from a denial of credit or insurance, civil suits are not often a viable alternative. In a 1972 case in the District of Columbia, the court was forced to dismiss the complaint with prejudice, even though it had found that the consumer reporting agency had acted negligently, because the consumer could not show any damages from having been denied a credit card.

The proposed CRAA makes civil suits by consumers much easier. First, it eliminates the double negligence standard of proof. Compliance with the CRAA by consumer reporting agencies and users is still measured by their maintenance of reasonable procedures, but they are held liable for straight noncompliance with the act. Thus if a consumer can point to a specific error made by a consumer reporting agency or user in apparent violation of the act, he would then have

113. Id. §§ 1681(b) (adopt), 1681d(c), 1681e, 1681m(c) (maintain).
114. Id. § 1681n.
115. Id. § 1681o.
117. Id. at 1101-03.
120. A.B. 4494, supra note 45, proposed § 9998.20.
121. Id., proposed § 9998.50(a).
a prima facie case for recovery and the burden would be on the consumer reporting agency or user to defend on the grounds that they maintained reasonable procedures and that the error was a bona fide one. To require, as the FCRA does now, that the consumer prove negligent noncompliance with the act seems to put an unfair burden on the consumer, especially since it is the consumer reporting agency and user who have all the information on their compliance procedures.

Second, the CRAA makes consumer suits easier by providing for recovery of either actual damages or $300, whichever is greater, if noncompliance with the act can be shown. In addition, as is now provided by the FCRA, punitive damages are available if it can be shown that the noncompliance was repeated or willful. If a consumer's suit is successful, he may also be awarded costs and reasonable attorney fees. These costs can also be awarded under the FCRA. The consumer is permitted no recovery if the noncompliance resulted in a more favorable report than would have been the case had the agency complied with the act. The minimum $300 recovery is not available to plaintiffs in a class action. Thus, actual damages to the class must be proven.

The minimum $300 recovery would make civil suits attractive to consumers which, in turn, would create a strong incentive for consumer reporting agencies and users to maintain the required reasonable procedures. An FTC official recommended that such a minimum recovery provision be added to the FCRA and credited an analogous provision in the Truth-In-Lending Act with "promoting a relatively high degree of compliance [with the Act] and a substantial amount of private civil activity."

The issue is whether one believes that additional incentives are necessary. The consumer information industry strenuously objects to such provisions, pointing out that it would be a license to litigate, that they would incur great expense defending such suits, and that the current law is fair to everyone, for a consumer can recover compensation to the extent that he has been damaged.

There is no doubt, however, that this minimum recovery feature would be a strong incentive for compliance with the act, for the con-

122. Id., proposed § 9998.50(a)(1).
123. Id., proposed § 9998.50(b).
124. Id., proposed § 9998.50(a)(2).
126. A.B. 4494, supra note 45, proposed § 9998.50(c).
127. Id., proposed § 9998.50(a)(1).
128. Feldman, supra note 26, at 484.
129. S. 2360 Hearings, supra note 3, at 48 (testimony of John L. Spafford).
130. Id. at 119 (testimony of W. Lee Burge).
sumer reporting agencies could no longer rely upon the difficulty of establishing actual damages as a protection against civil suits.

Common Law Remedies

The FRCA provides that

no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to [this Act], except as to false information furnished with malice or willful intent to injure such consumer.\textsuperscript{131}

This provision effectively makes consumer reporting agencies, users of consumer reports, and the sources of the information contained in the consumer reports immune from common law suits, since malice is difficult to prove. The CRAA contains no similar immunity provision.\textsuperscript{132}

A vast majority of the states have given the reports of consumer reporting agencies a qualified privilege.\textsuperscript{133} This qualified privilege means that a consumer reporting agency can communicate defamatory information about a consumer without being liable to the consumer if the information is false, as long as the communication was a part of its regular business operation and was made in good faith and without malice.\textsuperscript{134} The result is that malice is an essential element of a cause of action for defamation in these jurisdictions. Because of this, a Washington attorney for the Retail Credit Company has argued, "as a practical matter, since a consumer is free to sue despite [the immunity..."

\textsuperscript{132} A.B. 4494,\textit{ supra} note 45, proposed § 9998.52.
\textsuperscript{133} Annot., 30 A.L.R.2d 776, 777 (1953). Georgia and Idaho are two exceptions to this general rule.\textit{ See} Johnson v. Bradstreet Co., 77 Ga. 172 (1886); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914). Neither of these old cases has been overruled. A federal district court in Georgia recently held that if a Georgia court were to rule now on the issue of granting a qualified privilege to credit reporting agencies it would reverse the holding in \textit{Johnson v. Bradstreet Co.} Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170 (N.D. Ga. 1971). The circuit court of appeals reversed, holding that a Georgia court would reaffirm the \textit{Johnson} decision. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973),\textit{ cert. denied}, 94 S. Ct. 1580 (1974).

The Idaho Supreme Court justified its holding in \textit{Pacific Packing Co.} as follows: "The only safe and just rule, either in law or morals, is the one that exacts truthfulness in business as well as elsewhere and places a penalty upon falsehood, making it dangerous for a mercantile, commercial or any other agency to sell and traffic falsehood and misrepresentation about the standing and credit of men or corporations. The company that goes into the business of selling news or reports about others should assume the responsibility for its acts and must be sure that it is peddling the truth." 25 Idaho 696, 704, 139 P. 1007, 1010 (1914).

if he can demonstrate that false information was furnished with malice, the existence of [the immunity] has done nothing to alter the consumer's rights under common law." This statement is not quite accurate. If it were, the consumer information industry would probably not have objected so strongly to the proposed deletion of this immunity in the Proxmire amendments to the FCRA.  

The immunity does take away common law rights of consumers. First of all, it takes away the very real right of consumers in Idaho and Georgia to sue consumer reporting agencies for defamation without having to prove malice, for these jurisdictions did not extend a qualified privilege to consumer reporting agencies. Moreover, it denies to the other jurisdictions the right to reverse their earlier common law rulings that consumer reporting agencies are entitled to a qualified privilege.

More importantly, a cause of action for invasion of privacy has never had a requirement for malice, except in those cases where publicity is an element of the cause of action and a privilege may exist. Thus, the FCRA immunity establishes a general precondition for this tort which never existed previously. This is particularly significant, for nowhere in the FCRA is any limitation placed on the kind of information that can be collected about a consumer or on the manner in which such information can be collected. A consumer about whom highly personal information was collected or about whom such information was collected in a highly obnoxious manner might well have a cause of action against the consumer reporting agency or the source of the information for invasion of privacy, an intrusion upon his physical and mental solitude. Yet, under current law, a consumer could not maintain such an action without proving malice if he found out about the intrusion under the disclosure provisions of the FCRA.

Finally, neither the FCRA nor the proposed CRAA create any alternative civil liability for those who are the sources of information contained in consumer reports. Both acts, of course, do have civil liability provisions for consumer reporting agencies and users who violate the acts. Therefore, a consumer's only remedies against those

135. *FCRA Hearings*, supra note 29, at 50 (memorandum of Francis M. Gregory, Jr.) (emphasis in original).
137. See note 133 *supra*.
138. See generally W. Prosser, *Law of Torts*, § 117 (4th ed. 1971). This section deals with the tort of invasion of privacy, and Prosser does not mention malice once. He does point out in the succeeding chapter on the First Amendment privilege that that privilege applies to invasion of privacy actions involving publicity, as well as to defamation. *Id.* § 118, at 823.
139. This is one of the four kinds of invasion of privacy. *Id.* at 807-09. See generally Comment, *Fair Credit Reporting Act: Constitutional Defects of the Limitation of Liability Clause*, 11 *Houston L. Rev.* 424, 431-39 (1974).
who report false and defamatory information about him to consumer reporting agencies are those he has at common law. Under the FCRA, the immunity provision effectively blocks the use of these common law remedies, though such would not be the case under the proposed CRAA.

The consumer information industry supports the retention of the immunity from common law actions because it permits a free and open dialogue between consumers and consumer reporting agencies and because it is thought to be unfair to compel consumer reporting agencies to disclose the information in their files and then to subject them to common law suits based on the disclosed information.\textsuperscript{140} On the other hand, it can be considered at least as unfair to take away a consumer's common law remedies against consumer reporting agencies, users, and sources of information simply because a consumer exercises his legitimate right to learn what information about him is being collected and distributed.

Expanded Control of Consumer Reporting Agencies

The previous two subsections described the major changes which the CRAA would make in the FCRA. In addition to these, there are a number of other changes of lesser importance contained in the act. In general, these additional changes would expand the legal controls governing the uses of consumer reports and the type of information which can be included in them.

1. Distribution of Consumer Reports. The FCRA limits the permissible purposes of consumer reports and says one can be provided only (1) in response to a court order, (2) in accordance with the written instructions of the consumer, or (3) to a person who it is believed intends to use the information in a credit transaction, for employment purposes, in connection with the underwriting of insurance involving the consumer, or for a government license for the consumer, or to a person who "otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."\textsuperscript{141} In addition, a consumer reporting agency may disclose addresses and places of employment of consumers to a governmental agency, but not a full consumer report.\textsuperscript{142}

The CRAA incorporates all of these and adds one more. It says that a consumer report may be furnished in response to a lawful subpoena of a governmental agency charged with enforcing the act.\textsuperscript{143}

\textsuperscript{140} S. 2360 Hearings, supra note 3, at 92-95 (testimony of W. Lee Burge).
\textsuperscript{142} Id. § 1681f.
\textsuperscript{143} A.B. 4494, supra note 45, proposed § 9998.12(b).
This provision was prompted by an adverse ruling of a federal district court that under the FCRA a consumer reporting agency need not furnish the FTC with subpoenaed files without a court order.\textsuperscript{144} However, since the CRAA does not create an agency to enforce it (apart from the state attorney general), this provision would have no effect until an agency was given this responsibility.

2. Market Research Not A Legitimate Business Purpose. The CRAA specifically says that the furnishing of consumer reports for market research or other marketing purposes is not a legitimate business purpose for which a consumer report can be requested or furnished.\textsuperscript{145} This provision incorporates into the proposed California law an interpretation to this effect of the FCRA by the FTC staff.\textsuperscript{146}

3. Definition and Use of Obsolete Information. Under the FCRA certain information, defined as obsolete, cannot be reported in a consumer report except when it is for credit or insurance of $50,000 or more or for employment when the annual salary is $20,000 or more.\textsuperscript{147} Obsolete information includes bankruptcies older than fourteen years, paid tax liens older than seven years, suits and judgments older than seven years (or older than the governing statute of limitations whichever is longer), accounts placed for collection or written off older than seven years, criminal justice records older than seven years, and any other adverse information older than seven years.\textsuperscript{148}

The proposed CRAA duplicates this section of the FCRA with four modifications. First, the CRAA specifies ten years as the reportable time period for unpaid judgments, as this is the statute of limitations in California.\textsuperscript{149} Second, the CRAA mandates that certain criminal justice records, in addition to being obsolete after seven years, can 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 case of an arrest, indictment, information, or misdemeanor complaint a conviction did not result."\textsuperscript{150} This is an important addition, designed to inhibit the use of criminal records as adverse information against a consumer when the consumer’s presumption of innocence has not been overcome. Third, to reflect inflationary increases the proposed CRAA raises the threshold level for the reporting of obsolete information to $100,000

145. A.B. 4494, supra note 45, proposed § 9998.12(e)(1).
146. DIVISION OF CONSUMER CREDIT AND SPECIAL PROGRAMS, FTC, COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT 5 (2d ed. 1973).
148. Id. § 1681c(a).
149. A.B. 4494, supra note 45, proposed § 9998.16(a)(3).
150. Id., proposed § 9998.16(a)(6).
or more for insurance and $30,000 or more as the salary for employment.\textsuperscript{151} Fourth, the CRAA requires a consumer reporting agency to keep the obsolete information in a separate file to insure that it is not reported accidentally when the transaction does not merit it.\textsuperscript{162}

4. \textit{Special Controls on Public Information}. The FCRA places special controls on the dissemination of public record information (e.g., criminal records, suits, judgments) which may have an adverse impact on a consumer's opportunity for employment. When such is the case, a consumer reporting agency must either inform the consumer before the report is given to the potential employer so he can verify the information \textit{or} maintain strict procedures to insure that the information is up to date, meaning that the current status of the information is reported.\textsuperscript{153}

The proposed CRAA modifies this section in four ways.\textsuperscript{154} First, it eliminates the option of informing the consumer before sending the consumer report and simply mandates that strict procedures be maintained to insure that the information is current. In practice, this is what the consumer reporting agencies have done under the FCRA. Second, the CRAA makes these strict procedures applicable to all consumer reports, not just to consumer reports used for employment purposes. Third, it requires the identification of the court (if any) in which the matter was determined or is pending. And fourth, the CRAA specifies that the public information is current if it has been checked by the consumer reporting agency within the past three months.

The purpose of these modifications is to extend the safeguard of strict procedures on this potentially damaging information to all consumer reports and to make more explicit what "current information" is. The requirement that the court be identified is needed so that, for example, a consumer whose report says simply that he has an unpaid judgment outstanding will have some way to begin investigating the matter. It should also be noted that the three month checking requirement will insure that a consumer reporting agency will recheck criminal records frequently to determine whether a consumer has been pardoned or not convicted in order to make sure that the criminal data on that consumer is still reportable.\textsuperscript{155}

5. \textit{Further Controls on Investigative Consumer Reports}. Investigative consumer reports, where the consumer reporting agency conducts personal interviews with neighbors and associates to gather information, are at the center of much of the controversy in the consumer informa-

\begin{itemize}
\item \textsuperscript{151} \textit{Id.}, proposed § 9998.16(b).
\item \textsuperscript{152} \textit{Id.}, proposed § 9998.16(c).
\item \textsuperscript{154} A.B. 4494, \textit{supra} note 45, proposed § 9998.28.
\item \textsuperscript{155} See text accompanying note 150 \textit{supra}.
\end{itemize}
tion field. It is here that questions about the relevancy and accuracy of the information reported are most often raised. Investigative consumer reports also raise serious privacy issues.

The FCRA places some special conditions on investigative consumer reports. The user of such a report must disclose to the consumer before or shortly after requesting one that such a report may be done. The one exception to this rule is if the report is requested in connection with employment for which the consumer has not specifically applied. The exception thus protects employers who do not wish an employee to know he is being considered for a promotion. The user must also inform the consumer of his right to additional disclosures and upon request, the user must disclose the nature and scope of the investigation.

The proposed CRAA makes two changes in the current practice. First, it limits investigative reports to those made for insurance, employment, or a business or professional license granted by a governmental agency. Investigative consumer reports would thus not be permitted for a credit transaction. Second, disclosure to the consumer that an investigative report may be prepared would have to be made in all cases, the only exception being an investigation of an employee for possible criminal activity for which the employer may be liable. Thus if an employee is being considered for a promotion, an employer would have to inform him if an investigative report might be prepared.

The purpose of these changes is to restrict the use of investigative reports to those areas where they are absolutely necessary. Possibilities of error and privacy considerations are much greater with investigative reports than with normal consumer reports. While it is possible to see the relevancy of lifestyle information to a potential employer or to an insurance underwriter, this is much less true for a financial institution making a loan. Furthermore, it is only fair that a consumer be informed beforehand that such a report may be done so that he can weigh the advantages of a job or insurance coverage against his privacy. No doubt most consumers will agree to an investigative report as a precondition, but nonetheless they should have the choice.

6. Maintaining List of Uses for Consumer Reports. The proposed CRAA requires consumer reporting agencies to maintain a list of uses

157. Id. § 1681d(a)(1).
158. Id. § 1681d(b).
159. A.B. 4494, supra note 45, proposed § 9998.18(a).
160. Id., proposed §§ 9998.18(c), (d).
which each user of the agency's consumer reports says are its purposes for requesting the reports. There is no such provision in the FCRA. However, this requirement, by insuring that only persons with a legitimate purpose receive consumer reports, will aid in the enforcement of the FCRA's criminal sanctions against illegal requests for or disclosures of consumer reports.

7. Exclusion of Department of Motor Vehicles from Category of Consumer Reporting Agencies. The FTC staff has determined that, under the provisions of the FCRA, a state motor vehicle department is a consumer reporting agency if it makes its records available to the general public. For the purposes of the proposed CRAA, however, the California Department of Motor Vehicles is excluded from the definition of a consumer reporting agency. This exclusion was no doubt made to avoid creating a major institutional opponent to the legislation and to permit the proponents of the bill to be able to say that the bill has no fiscal implications for the state budget.

Federal Supremacy

The final section of the FCRA states:

[This Act] does not annul, alter, affect or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

Thus it was the intent of Congress in passing the FCRA not to preempt state law in this area.

Since the CRAA simply goes further than the FCRA in placing requirements on consumer reporting agencies and users of consumer reports and in providing for more disclosure and more remedies for consumers, the provisions of the CRAA are supplemental to and not inconsistent with the FCRA. The exclusion of the Department of Motor Vehicles from the category of consumer reporting agencies means simply that the department will not be subject to the more stringent provisions of the CRAA but will remain a consumer reporting agency as far as the FCRA is concerned. The federal grant of immunity to consumer reporting agencies, users, and sources of information from common law suits for negligence, defamation, and invasion

162. A.B. 4494, supra note 45, proposed § 9998.20(a).
165. A.B. 4494, supra note 45, proposed § 9998.2(e).
of privacy might have been a problem except that the provision of the FCRA specifically grants the immunity only when the consumer learns of the information by means of the disclosure provisions of the FCRA.\textsuperscript{167} Even now a consumer's common law remedies can be preserved if he files a common law suit against the consumer reporting agency first and then obtains disclosure of the information in his file by means of discovery procedures.\textsuperscript{168} If the CRAA becomes law and a California consumer has his file disclosed under the provisions of that act, then the federal grant of immunity would have no application to him.

Recognizing that an expanding amount of state legislation in this field could greatly complicate compliance procedures for the consumer information industry, the industry spokesmen at the Proxmire hearings in 1973 made a strong plea to have federal legislation preempt the states in this area.\textsuperscript{169} Since the bill with the proposed amendments to the FCRA was tabled by the subcommittee, this request was never acted upon.

**Conclusion and Additional Proposals**

The proposed CRAA is a valuable piece of legislation which, in the author's opinion, creates a better and fairer balance between the interests of the consumer and those of the consumer information industry. The CRAA closes many of the loopholes in the FCRA, provides for more complete disclosure to the consumer of the information about him being collected and sold, and, most importantly, creates genuine remedies for the consumer about whom misinformation has been reported. These remedies are important, for they would permit effective private enforcement of the CRAA and would create strong incentives for consumer reporting agencies and users to comply with the act. The passage of this legislation would put California in the forefront of consumer protection legislation in this area.

In some ways, however, the CRAA does not go far enough in protecting the consumer. Discussed briefly below are six areas where additional legislative proposals might be considered.

1. **Only Relevant Information Collected.** As noted earlier,\textsuperscript{170} there is no provision in the FCRA nor in the proposed CRAA which

\begin{itemize}
  \item \textsuperscript{167} Id. § 1681h(e).
  \item \textsuperscript{168} See S. 2360 Hearings, supra note 3, at 622 (testimony of Arthur R. Miller). It is extremely unlikely, of course, that a consumer would follow this elaborate procedure unless he were very familiar with the FCRA and had a strong suspicion that there was defamatory information in his file.
  \item \textsuperscript{169} Id. at 53 (testimony of John L. Spafford).
  \item \textsuperscript{170} See text accompanying notes 138-39 supra.
\end{itemize}
places any restriction on the kind of information which can be collected and sold by a consumer reporting agency. Thus, the most personal kind of information about a consumer can be collected and passed out in consumer reports, even if the information is not relevant to the particular transaction. Some limitation on the information which can be collected and reported, and thus some protection for the privacy of consumers, would be afforded if there were a requirement that the information be reasonably relevant to the purpose of the user. Such a relevance test would force consumer reporting agencies and the users of the reports to consider at least the purpose for which the information is being collected. Furthermore, such a requirement of relevance would permit the eventual development of common law standards of what information is relevant to making decisions on different types of transactions. In this way limits could be placed on the scope of the information which can be collected on a consumer without the legislature needing to consider specific situations. As it stands, the consumer information industry can collect virtually any kind of information it wishes.

2. Additional Requirements on Users of Consumer Reports.

When a consumer is denied credit or insurance and is then referred to a consumer reporting agency by the finance or insurance company, it is not infrequent that the consumer learns there is no adverse information in his file. A consumer in this situation can feel quite frustrated and confused. This problem would be solved if finance and insurance companies, the primary users of consumer reports, were required to tell the consumer what it was in the consumer's application, the report from the consumer reporting agency, or other information from a different source (or lack of information) that was the cause of the denial of credit or insurance. Compliance with a requirement like this would not be difficult, for the consumer must be notified anyway that his application has been denied, and adding the reason would not be a great additional burden. It can be argued that financing and underwriting decisions are the private business of these companies and that an individual applicant has no right to know the details of the decision. But when these companies rely strongly on the decisions of each other in evaluating an application and are actively exchanging this information with each other through the medium of consumer reporting agencies, perhaps it is only fair that the consumer be told specifically the reasons for the denial.

3. Advance Copy of Consumer Report for Employment. The effect of errors in a consumer report will differ greatly if the report has been requested in connection with an application for employment rather

171. Feldman, supra note 26, at 472.
than an application for credit or insurance. In the latter instances, the user of the consumer report wants to do business with the consumer and, generally, if misinformation is reported and later clarified, the consumer may then be granted his application. But when a consumer has been turned down for employment because of an erroneous report, there is little likelihood that the job will still be available when the misinformation is corrected. Moreover, the impact of a lost job is much greater on a consumer than the denial of credit or insurance. Consequently, it has been recommended that consumer reports which are to be used for employment purposes be first sent to the consumer for verification before they are seen by his potential employer. Imposing this requirement, despite the increased costs and complications it would entail, would give recognition to the importance of employment and to the need for maximum accuracy in consumer reports for this purpose.

4. Notification and Disclosure of In-House Investigative Reports. It is possible for a consumer to learn that an investigative consumer report has been made and to discover the contents of that report only if the investigation was done by a consumer reporting agency. The definitions in the FCRA and the proposed CRAA operate to exclude investigations done by in-house staffs from the notification and disclosure requirements of these acts. Consequently, if a large financial institution or insurance company maintains its own staff of investigators, the consumers who are the subjects of the investigations are afforded no legal protections by these acts. As financial institutions and insurance companies are already covered by the acts as users, it would be relatively simple, and worthwhile from the consumer's standpoint, to extend the protections of these acts to in-house investigations.

5. Credit Denials for Insufficient Information. Although the New York statute covering consumer reporting agencies provides few protections for consumers, it does contain one interesting provision which is worthy of consideration. This provision prohibits a consumer reporting agency from issuing a consumer report, which lists a person as having been denied credit if the sole reason for such denial is lack of sufficient information to grant credit unless the report states that the denial was for such reason.

Thus, a consumer who is denied credit because of a meager credit history will not have his future credit opportunities impaired by a record of credit denials which lack this explanation. A similar provision would

172. Id. at 478; Note, The Fair Credit Reporting Act, 56 Minn. L. Rev. 819, 840 (1972).
174. Id. § 372a.
make a valuable addition to the CRAA. Its implementation could be
difficult, however, for the consumer reporting agencies and financial
institutions in California would need to modify their information
exchange system in order to distinguish denials of credit for insufficient
information from denials for other reasons. Since this is already a re-
quirement in New York, the procedures must exist and would only
need to be adapted to California.

6. Total Prohibition on Reporting Obsolete Information. Both
the FCRA and the proposed CRAA permit the reporting of old and
obsolete information for transactions involving certain minimum
amounts of money. There are two reasons why consideration should
be given to placing a total prohibition on the reporting of obsolete infor-
mation. First, it seems unfair that the moderately affluent cannot also
escape the impact of old adverse information on their search for credit,
insurance, or employment. They too should have the right to have
their pasts buried at some point. Second, the trend among consumer
reporting agencies is to computerize their operations. Unlike the tradi-
tional system of storing information on paper, where storage is inexpen-
sive but retrieval is costly, with computers the retrieval of information
is inexpensive but it is costly to store information. Consequently,
consumer reporting agencies which have computerized their operations
might well welcome a general restriction on reporting any obsolete in-
formation. If such a restriction were imposed then the size of their
files could be reduced and savings made without the fear of providing
a less complete information service than their competitors.

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175. See text accompanying notes 147-52 supra.
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