

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 37 CS Security of Consumer Report Information
SPONSOR(S): Adams and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 656

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Economic Development, Trade & Banking Committee</u>	<u>13 Y, 0 N, w/CS</u>	<u>Sheheane</u>	<u>Carlson</u>
2) <u>Agriculture Committee</u>	<u>10 Y, 0 N, w/CS</u>	<u>Reese</u>	<u>Reese</u>
3) <u>Civil Justice Committee</u>	<u></u>	<u>Shaddock</u>	<u>Bond</u>
4) <u>Commerce Council</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

The bill defines the term "security freeze" and allows a consumer to place such a freeze on his or her consumer report. A security freeze prohibits a consumer reporting agency from releasing the consumer's report or any information contained within the report without consent of the consumer. A security freeze remains in place until the consumer requests that it be removed or temporarily lifted.

The bill permits a consumer reporting agency to charge a reasonable fee, not to exceed \$10, to a consumer who elects to place, remove, or temporarily lift a security freeze on his or her consumer report. However, a consumer reporting agency is prohibited from charging any fee to a victim of identity theft seeking a security freeze.

The bill creates a new cause of action for a person who is aggrieved by a violation of the provisions of the bill.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty -- The bill allows a consumer to protect his or her personal information by placing a security freeze on his or her consumer report and to remove or temporarily lift the security freeze at his or her discretion.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

There is currently no Florida legislation that provides for a security freeze or block on consumer information. There are however, twelve states that offer varying forms of credit freezes.¹ Additionally, the Fair Credit Reporting Act² (FCRA) enacted by Congress provides two types of fraud alerts that consumers may use to protect themselves against identity theft.³

Effect of the Bill

The bill permits a consumer to place a security freeze ("freeze") on his or her consumer report by making a request in writing by certified mail to a consumer reporting agency ("agency").⁴ The freeze prohibits the consumer reporting agency from releasing the consumer's report or any information contained within the report without the authorized consent of the consumer.⁵ The freeze remains active until the consumer requests it be thawed.⁶ The bill does not prohibit a consumer reporting agency from informing a third party that a particular consumer report has been placed under a freeze.⁷

Once a consumer requests a freeze, the agency must place a freeze on a consumer's report no later than five business days after receiving the written request.⁸ When the freeze has been initiated, the agency must send the consumer a written confirmation of the freeze within five business days.⁹ In that written confirmation, the agency must provide the consumer with a personal identification number or password to be used by the consumer should the consumer wish to provide a limited release of his or her credit report for a designated period of time during the freeze.¹⁰

If the consumer wishes to allow access to the report for a designated period of time while a freeze is in effect, the consumer must contact the agency and request the freeze be temporarily lifted. In addition, the consumer must provide: proper identification as determined by the consumer reporting agency; the personal identification number or password provided by the agency; and information regarding the specified period of time during which the report will be temporarily available.¹¹

¹ California, Colorado, Connecticut, Illinois, Louisiana, Maine, New Jersey, Nevada, North Carolina, Texas, Vermont, and Washington offer consumers the right to freeze their credit reports. Illinois, Texas, Vermont, and Washington only offer the option of a credit freeze to those consumers affected by identity theft.

² 15 U.S.C. ss. 1681 et seq.

³ There are four bills currently filed in the United States Senate and three bills filed in the House of Representatives relating to the protection of consumer information.

⁴ Section 501.005(2).

⁵ Section 501.005(1).

⁶ Section 501.005(11).

⁷ Section 501.005(1).

⁸ Section 501.005(3).

⁹ Section 501.005(4).

¹⁰ *Id.*

¹¹ Section 501.005(5).

Once an agency has received a request for the complete removal of a freeze from the consumer, the agency must remove the freeze within three business days.¹² The same timeframe is applicable for a consumer's request for a temporary lift of a freeze.¹³ To process requests by consumers for temporary access to the frozen report, an agency must develop either a telephone system or other form of secure electronic media to process consumer requests.¹⁴

An agency may temporarily lift or remove a freeze only upon the consumer's request¹⁵ or if the consumer report was frozen due to a material misrepresentation of the fact by the consumer.¹⁶ Should the freeze be lifted based upon a material misrepresentation, the agency must notify the consumer in writing before removing the freeze.¹⁷ A third party who requests access to a consumer report may treat the application as incomplete if the consumer has not authorized a temporary lifting of the freeze for the period of time in which the request is made.¹⁸

Exemptions

The bill provides the following exemptions for use of a credit report by certain entities regardless of a freeze being placed on a consumer's report:

- Any person to whom the consumer owes a financial obligation under certain circumstances;¹⁹
- A subsidiary, affiliate, agent, assignee of a person to whom access has been granted for purposes of facilitating the extension of credit or other permissible use;²⁰
- Any state agency acting within its lawful investigative or regulatory authority;²¹
- A state or local law enforcement agency acting to investigate a crime or conducting a criminal background check;²²
- Any person administering a credit file monitoring subscription service to which the consumer has subscribed;²³
- Any person for the purpose of providing a consumer with a copy of the consumer's report upon the consumer's request;²⁴
- Pursuant to a court order lawfully entered;²⁵ or
- The use of credit information for the purposes of prescreening as provided for by the FCRA.²⁶

In addition, check services companies and demand deposit account information services companies are not required to place a freeze on a consumer's report.²⁷ Fraud prevention services companies

¹² Section 501.005(11).

¹³ Section 501.005(6).

¹⁴ Section 501.005(7).

¹⁵ Section 501.005(8)(a).

¹⁶ Section 501.005(8)(b).

¹⁷ *Id.*

¹⁸ Section 501.005(9).

¹⁹ Section 501.005(12)(a).

²⁰ Section 501.005(12)(b).

²¹ Section 501.005(12)(c).

²² Section 501.005(12)(d).

²³ Section 501.005(12)(e).

²⁴ Section 501.005(12)(f).

²⁵ Section 501.005(12)(g).

²⁶ Section 501.005(12)(h).

issuing reports to prevent or investigate fraud are also exempt.²⁸ Resellers of consumer information are also exempt, however, they must honor a freeze placed on a consumer report.²⁹

Fees

An agency may not charge a fee to a victim of identity theft who has submitted, at the time the freeze is requested, a copy of a valid investigative or incident report or complaint with a law enforcement agency concerning the unlawful use of the victim's identifying information by another.³⁰ The bill, however, allows an agency to charge a fee, not to exceed \$10, when a consumer elects to place, remove, or temporarily lift a security freeze on his or her consumer report.³¹ Additionally, a consumer may be charged a fee, not to exceed \$10, if the consumer forgets or misplaces the identification number or password provided by the agency and the agency must reissue the information or provide new information to the consumer.³²

Consumer Information

An agency may not change a consumer's official information in a consumer report when a freeze is in effect without sending a written confirmation of the change to the consumer within 30 days of making the change.³³ "Official information" includes the consumer's name, address, date of birth, and social security number.³⁴ In the case of an address change, the written confirmation must be sent to both the new and former addresses of the consumer.³⁵ Nevertheless, a written confirmation is not required for technical modifications to a consumer's official information, this information can include name and street abbreviations, complete spellings, or transposition of numbers or letters.³⁶

Cause of Action

The bill creates a new cause of action for any person who is aggrieved by a violation of the provisions of the bill.³⁷ The provisions for a civil action are:

- Any person who willfully fails to comply with any requirement of the bill with respect to any consumer is liable to that consumer for actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000;³⁸
- Any individual who obtains a consumer report under false pretenses or knowingly without a permissible purpose is liable to the consumer for actual damages sustained by the consumer as

²⁷ Section 501.005(15)(a). The bill provides that a check services company "issues authorizations for the purpose of approving or processing negotiable instruments, electronic funds transfers, or similar methods of payment." *Id.* A demand deposit account information service company "issues reports regarding account closures due to fraud, substantial overdrafts, automatic teller machine abuse, or similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a demand deposit account at the inquiring bank or financial institution, as defined in s. 655.005(1)(g) or (h), or in federal law." Section 501.005(15)(b).

²⁸ Section 501.005(15)(b).

²⁹ Section 501.005(15)(c). Specifically, the bill provides that the provisions of the bill do not apply to "[a] consumer reporting agency that acts only as a reseller of credit information by assembling and merging information contained in the database of another consumer reporting agency or multiple consumer reporting agencies and does not maintain a permanent database of credit information from which new consumer reports are produced. However, a consumer reporting agency shall honor any security freeze placed on a consumer report by another consumer reporting agency." *Id.*

³⁰ Section 501.005(13).

³¹ *Id.*

³² *Id.*

³³ Section 501.005(14).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Section 501.005(16).

³⁸ Section 501.005(16)(a).

a result of the failure or damages of not less than \$100 and not more than \$1,000, whichever is greater. Any person who obtains a consumer report from an agency under false pretenses or knowingly without a permissible purpose is liable to the agency for actual damages sustained by the agency or \$1,000, whichever is greater;³⁹

- Punitive damages may be assessed for willful violations of the bill;⁴⁰
- Any person who is negligent in failing to comply with any requirement imposed by the bill with respect to any consumer is liable to that consumer for any actual damages sustained by the consumer as a result of the failure, plus the costs of the action together with reasonable attorney's fees;⁴¹ and
- If a court determines an unsuccessful pleading, motion, or other paper filed in connection with an action under this bill was filed in bad faith or for purposes of harassment, the court must award to the prevailing party reasonable attorney's fees in relation to the work performed in responding to that pleading, motion, or other paper.⁴²

Disclosure

An agency must include a written summary of all rights under the bill to a consumer when sending the consumer a written disclosure. The bill details the information that must be included in the written summary of consumer rights, including the right to civil action. Agencies which maintain consumer reports on a nationwide basis must provide a toll free telephone number for the consumer to use to communicate with the agency.⁴³

³⁹ Section 501.005(16)(b).

⁴⁰ Section 501.005(16)(c).

⁴¹ Section 501.005(16)(d).

⁴² Section 501.005(16)(e).

⁴³ Specifically, the bill provides in s. 501.005(17) what a written disclosure must consist of:

Any written disclosure by a consumer reporting agency to any consumer, pursuant to 15 U.S.C. s. 1681g, shall include a written summary of all rights the consumer has under this section, and, in the case of a consumer reporting agency which compiles and maintains consumer reports on a nationwide basis, a toll-free telephone number which the consumer can use to communicate with the consumer reporting agency. The information set forth in paragraph (b) of the written summary of rights must be in at least 14-point boldface type in capital letters. The written summary of rights required under this section is sufficient if it is substantially in the following form:

(a) You have a right to place a "security freeze" on your consumer report, which will prohibit a consumer reporting agency from releasing any information in your consumer report without your express authorization. A security freeze must be requested in writing by certified mail to a consumer reporting agency. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent.

(b) YOU SHOULD BE AWARE THAT USING A SECURITY FREEZE TO CONTROL ACCESS TO THE PERSONAL AND FINANCIAL INFORMATION IN YOUR CONSUMER REPORT MAY DELAY, INTERFERE WITH, OR PROHIBIT THE TIMELY APPROVAL OF ANY SUBSEQUENT REQUEST OR APPLICATION YOU MAKE REGARDING A NEW LOAN, CREDIT, MORTGAGE, INSURANCE, GOVERNMENT SERVICES OR PAYMENTS, RENTAL HOUSING, EMPLOYMENT, INVESTMENT, LICENSE, CELLULAR PHONE, UTILITIES, DIGITAL SIGNATURE, INTERNET CREDIT CARD TRANSACTION, OR OTHER SERVICES, INCLUDING AN EXTENSION OF CREDIT AT POINT OF SALE.

(c) When you place a security freeze on your consumer report, you will be provided a personal identification number or password to use if you choose to remove the freeze on your consumer report or authorize the release of your consumer report for a designated period of time after the security freeze is

C. SECTION DIRECTORY:

Section 1 creates s. 501.005, F.S., providing for a credit freeze by a consumer.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill permits a consumer reporting agency to charge a reasonable fee, not to exceed \$10, to a consumer who elects to place, remove, or temporarily lift a security freeze on his or her consumer report, with the exception of a victim of identity theft.

D. FISCAL COMMENTS:

None.

in place. To provide that authorization, you must contact the consumer reporting agency and provide all of the following:

1. The personal identification number or password.

2. Proper identification to verify your identity.

3. Information specifying the period of time for which the report shall be made available. (d) A consumer reporting agency must authorize the release of your consumer report no later than 3 business days after receiving the above information.

(e) A security freeze does not apply to a person or entity, or its affiliates, or collection agencies acting on behalf of the person or entity, with which you have an existing account, that requests information in your consumer report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements.

(f) You have the right to bring a civil action against anyone, including a consumer reporting agency, who fails to comply with the provisions of s. 501.005, Florida Statutes, which governs the placing of a consumer report security freeze on your consumer report.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The United States Constitution, Art. 1, s. 8, cl. 3, provides that Congress has the power to regulate commerce "among the several States." Despite the specific language of that clause, "it is well settled that it [the clause] has a 'dormant' aspect as well, namely, one that serves as 'a substantive restriction on permissible state regulation on interstate commerce.'"⁴⁴ The commerce clause "prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."⁴⁵ The commerce clause, further, "requires that some aspects of trade generally must remain free from interference by the States. When a State ventures excessively into the regulation of these aspects of commerce, it 'trespasses upon national interests' and the courts will hold the state regulation invalid under the Clause [commerce clause] alone."⁴⁶

To determine if a statute violates the dormant commerce clause, courts "employ two tiers of analysis."⁴⁷

If the scheme directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. Only if such a regulation is shown to advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives will it be upheld. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. Though the two tiers of analysis are not clearly distinguishable, in either situation, the critical consideration is the overall effect of the statute on both local and interstate activity.⁴⁸

In other words:

The Constitution, when conferring upon Congress the power to regulate commerce, never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, even though the legislation may indirectly affect the commerce of the country; legislation may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. Where a statute has only indirect effects on interstate commerce and regulates evenhandedly, the court examines whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

⁴⁴ *Bainbridge v. Turner*, 311 F.3d 1104, 1108 (11th Cir. 2002)(citing *Dennis v. Higgins*, 498 U.S. 439, 447 (1991)).

⁴⁵ *Bainbridge*, 311 F.3d at 1108 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

⁴⁶ *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981)(quoting *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366, 373 (1976)).

⁴⁷ *Bainbridge*, 311 F.3d at 1108.

⁴⁸ *Bainbridge*, 311 F.3d at 1109 (internal citations and quotations omitted).

Factors to be considered include:

- the putative benefits of the challenged enactment
- the nature of the interest involved
- the burdens on interstate commerce caused by the enactment
- whether the burdens are clearly excessive in relation to the benefits
- whether the state's interests could be promoted as well with a lesser burden on interstate commerce.⁴⁹

Several sections of the bill would need to be considered in light of the dormant commerce clause restrictions. Section 501.005(7) requires consumer reporting agencies, not solely those contained within this state, to develop telephonic communication or any form of secure electronic media to receive and process requests from consumers so that security freezes could be temporarily lifted. Section 501.005(13), authorizes a consumer reporting agency to charge a fee to place, remove, or temporarily lift a security freeze, however the section imposes a cap on that fee above which the consumer reporting agency may not exceed. That cap is irrespective of the costs that may be associated with compliance with the bill. Finally, s. 501.005(17), requires that a written disclosure by a consumer reporting agencies to any consumer, pursuant to 15 U.S.C. s. 1681g⁵⁰, must include a written summary of all rights the consumer has under this bill. Further, s. 501.005(17), requires "in the case of a consumer reporting agency which compiles and maintains consumer reports on a nationwide basis, a toll-free telephone number which the consumer can use to communicate with the consumer reporting agency."

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On October 18, 2005, the Economic Development, Trade and Banking Committee adopted a strike-all amendment to the bill. The amendment does the following:

- Decreases the time in which a consumer reporting agency must send a written confirmation of the security freeze to a consumer from 10 days to 5 days.
- Provides that a consumer credit reporting agency must strive to process within 15 minutes a request from a consumer to temporarily lift his or her security freeze.
- Clarifies the entities that are exempt from a security freeze and may access a credit report to include state agencies, local or state law enforcement and other appropriate persons.
- Provides that a consumer credit reporting agency may not charge a consumer to place a security freeze on his or her credit report, but may impose a fee, of not more than \$5, for the consumer to temporarily lift or remove a security freeze from his or her credit report.

⁴⁹ 15A Am. Jur. 2d, Commerce, s. 34.

⁵⁰ This portion of the U.S. Code provides that "[u]pon request and identification, the reporting agency is required to divulge the information in its files concerning the interested consumer." *Hovater v. Equifax, Inc.*, 823 F.2d 413, 417(11th Cir. 1987).

- Provides that a consumer credit reporting agency may charge a fee, not more than \$5, if a consumer fails to retain the original personal identification number or password provided by the consumer credit reporting agency and the agency must reissue the information to the consumer.
- Clarifies that a civil action may be brought for the knowing or willful violation of the bill's provisions.
- Provides that a consumer wishing to place a security freeze on his or her credit report must do so in writing by certified mail to a consumer credit reporting agency.
- Clarifies that the temporary lifting of a security freeze is for a specific period of time, not for a specific recipient.

On January 11, 2006, the Agriculture Committee adopted a strike-all amendment to the bill. The amendment:

- Provides definitions for the term “consumer report security freeze” or “security freeze”.
- Changes the terms “consumer credit reporting agencies” to “consumer reporting agencies” and “credit reports” to “consumer reports” for uniformity with the federal Fair Credit Reporting Act.
- Allows for a reasonable fee, not to exceed \$10, to place, temporarily lift or permanently remove a freeze, or to receive a new PIN.
- Provides that documented victims of identity theft may place a freeze at no charge.
- Adopts the civil liability language of the Fair Credit Reporting Act.
- Includes penalties for both willful and negligent violations of the security freeze. The liability includes those entities who fail to comply, willfully or negligently, with the freeze, as well as those individuals who knowingly obtain a consumer report under false pretenses or knowingly without a permissible purpose.
- Allows for attorney’s fees for actions filed in bad faith or for the purposes of harassment.
- Eliminates the 15 minute “goal” for removing the freeze.
- Requires the portion of the “written summary of rights” relating to items that could be impacted by the credit freeze, to be in at least 14 point, boldface, capital letters.