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Nevada Spousal Credit Sharing May Conflict With Federal Law

By Jonice Gray Tucker, Kari Hall and Brendan Clegg (September 11, 2019)

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In just a few weeks, lenders may face a challenging circumstance in evaluating applications for credit from some Nevada borrowers. Can lenders comply with a new Nevada law that allows applicants with no credit history to use their spouse's credit history without violating the Equal Credit Opportunity Act and Regulation B, federal laws that generally prohibit consideration of marital status in evaluating creditworthiness?

And, in addition, in some circumstances, could compliance trigger violations of the Fair Credit Reporting Act which requires a permissible purpose to pull a credit report? There are strong arguments that the Nevada law is preempted, making this issue a prime candidate for federal regulatory intervention.

Nevada S.B. 311: Spousal Equality Beyond Dish Duty

On June 1, Nevada Governor Steve Sisolak signed into law S.B. 311, which provides that if a credit applicant (1) has no credit history, (2) was or is married, (3) requests that the creditor deem the applicant's credit history to be identical to the applicant's spouse's credit history established during the marriage, and (4) provides, upon request, evidence of the marriage's existence and the dates of the marriage and its end (if applicable), the creditor "must deem the credit history of the applicant to be identical to the credit history of the applicant's spouse" from the marriage period.[1] The creditor's failure to do so constitutes, by law, discrimination based on marital status under this new Nevada law. The Nevada law goes into effect on Oct. 1.

A review of S.B. 311's sparse legislative history reveals a relatively rapid path to enactment. First proposed in the state Senate in March, the bill was signed into law less than three months later. As originally introduced, S.B. 311 did not require creditors to allow applicants without credit history to rely on the credit history of their spouse or former spouse.[2] Rather, its history suggests the bill was intended to amend existing Nevada law to include additional personal characteristics — race, color, creed, religion, disability, national origin or ancestry, sexual orientation, and gender identity or expression — within Nevada's existing law prohibiting discrimination with respect to any aspect of a credit transaction. Previously, only sex and marital status were covered.[3]

The original bill was approved by the Senate and sent to the Assembly in April, before being referred to the Assembly's Committee on Commerce and Labor. Additional consideration in the Assembly committee led to an amended bill that included the language allowing married or divorced applicants without a credit history to request the use of their spouse's credit history during the period of the marriage.

While the legislative history supporting the amendment is very limited, the purpose of the new language appears to have been to address the situation of one spouse handling the couple's credit during marriage, to the extent that only that spouse has a credit history. In such cases, the spouse who did not handle the couple's credit during the marriage may not

be able to obtain credit, even though he or she contributed to the couple's credit history, because the couple's credit history is in the other spouse's name.[4]

S.B. 311's Potential Conflict with Federal Law

While the intent behind S.B. 311's shared credit history requirement appears to be expanding access to credit, the requirement itself appears to be at odds with the anti-discrimination provisions of the ECOA and Regulation B. This is because the new law potentially requires creditors to consider, when evaluating an applicant's creditworthiness, a broader swath of the applicant's former or current spouse's credit history than required by Regulation B,[5] request information about a spouse or former spouse outside the scope of permissible inquiries under Regulation B,[6] and may benefit married — or formerly married — applicants, while failing to benefit similarly-situated unmarried applicants.

As currently drafted, a creditor complying with S.B. 311 could be at risk of violating the ECOA and Regulation B, because Regulation B permits creditors to consider the available credit history of an account reported in the name of an applicant's spouse or former spouse, though not the entire credit history established during the marriage. Even then, however, the creditor can consider such account credit history only if the applicant can demonstrate that the account's history accurately reflects the applicant's creditworthiness.[7]

In addition, creditors complying with S.B. 311 could run afoul of the FCRA, in some circumstances, as the creditor may not have a permissible purpose to obtain the credit report of the applicant's former spouse.

The ECOA and Regulation B

The ECOA and Regulation B prohibit a creditor from discriminating against an applicant on a prohibited basis, which includes, among other things, marital status, regarding any aspect of a credit transaction.[8] Regulation B's official interpretations state that this general rule against discrimination covers criteria used to evaluate creditworthiness.[9]

S.B. 311 seems to conflict with the anti-discrimination provisions of the ECOA and Regulation B, as S.B. 311 requires creditors to engage in differential treatment on the basis of marital status. By requiring creditors to deem an applicant's credit history to be identical to that of his or her current or former spouse upon the applicant's request, S.B. 311 appears to require creditors to consider an applicant's marital status in its criteria for evaluating creditworthiness in a broad stroke that goes beyond the more nuanced permissive provisions of Regulation B that allow for such consideration under certain circumstances.

Specifically, S.B. 311's requirement to deem the credit history of applicants identical to the entire credit history of their spouses during a marriage incorporates a potentially far more extensive history than Regulation B's provisions, which require consideration of accounts that both spouses were permitted to use or for which both were contractually liable, or accounts in the name of current or former spouses that an applicant can demonstrate accurately reflects his or her creditworthiness.[10]

Further, S.B. 311 provides married individuals with a benefit that is otherwise unavailable to unmarried applicants. For instance, an unmarried applicant with no credit history is not permitted to have another individual's credit history deemed as his or her own when applying for credit, even if the applicant lived with that individual and that individual handled the credit for the household.

Because S.B. 311 states that a violation of the provision constitutes discrimination based on marital status, questions are raised about whether S.B. 311 and the ECOA and Regulation B can be harmonized. Specifically, it appears that lenders may have difficulty complying with S.B. 311 without violating the ECOA and Regulation B, and likewise, may face challenges complying with the ECOA and Regulation B without violating S.B. 311.

We note that the ECOA provides that "[consideration] or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this title."[11] In particular, the ECOA permits creditors to ask, under certain circumstances, for information concerning an applicant's spouse and about an applicant's marital status if the applicant resides in a community property state.[12] It also permits applicants to have creditors include spousal credit history as part of their consideration of an application if the applicant can demonstrate it accurately reflects the applicant's creditworthiness.[13]

At first glance this may appear to resolve the conflict between S.B. 311 and the ECOA, as Nevada is a community property state: Debts incurred during marriage are presumed to be community debts for which each spouse is liable.[14] However, S.B. 311 appears to go beyond what may be permitted under federal law.

Specifically, deeming an applicant's credit history to be identical to that of his or her spouse is different than merely inquiring about an applicant's marital status to assess assets or provide additional relevant credit history information for certain accounts meeting the criteria of Regulation B, or consider accounts for which an applicant has demonstrated accurately reflects his or her creditworthiness.[15]

It instead results in taking an applicant's marital status into account by essentially replacing an applicant's credit history with that of another without the necessary analysis to determine if that credit history is appropriate to assess or reflect the applicant's creditworthiness, a benefit unavailable to unmarried applicants under the law.

The FCRA

In addition to grappling with the ECOA and Regulation B compliance hurdles, lenders also may encounter challenges complying with the FCRA. In particular, the FCRA requires creditors to have a permissible purpose to obtain consumer credit reports, which in the loan application context includes only obtaining the report (1) for the extension of credit resulting from a consumer's application, or (2) as instructed by the consumer in writing.

While the Federal Trade Commission staff has interpreted the FCRA to give lenders a permissible purpose to obtain credit reports for nonapplicant spouses in community property states[16] such as Nevada, such extension does not appear to apply to nonapplicant former spouses that no longer have community property rights and liabilities.

Therefore, in order to permissibly obtain a credit report for a nonapplicant former spouse to be used by the applicant in accordance with S.B. 311, lenders will need to obtain written permission from the nonapplicant former spouse. Yet, there is no recognition of the necessity of this step in the new Nevada law.

While some marriages end amicably, many do not, which may make it very difficult, if not impossible, for a lender to obtain permission from nonapplicant former spouses to obtain their credit. In such instances, the lender may have to decide whether to refuse to use the

nonapplicant former spouse's credit history, which may violate S.B. 311, or obtain the nonapplicant former spouse's credit report without a permissible purpose, which may violate the FCRA.

Will it Make it to the Altar?

While there are portions of S.B. 311 that are not in controversy, there are significant questions about how lenders will comply with both federal and state law with respect to other portions of the statute. Short of Nevada amending or repealing portions of S.B. 311 prior to its Oct. 1 effective date, a potential solution could be on the horizon for lenders concerned about the likely conflicts they will face: Federal preemption.

Under the ECOA, state laws relating to credit discrimination are preempted to the extent they are inconsistent with the ECOA, to the extent of such inconsistency. Further, a preemption defense is available under the FCRA when state law conflicts with it, which may occur here in narrow cases relating to nonapplicant former spouses. While the conflicts between S.B. 311 and the ECOA and FCRA could be raised for a judicial determination, questions regarding the ripeness of the challenge may impact a court's decision if the issue is presented before Oct. 1.

The intervention of a federal agency presents an alternate path for greater clarity. The U.S. Consumer Financial Protection Bureau is authorized by the statute to determine whether such inconsistencies exist between the ECOA and a state law relating to credit decision.[17]

Whether, and when, the CFPB will evaluate the potential inconsistency between S.B. 311 and the ECOA is an open question. Given the approaching effective date, the CFPB should move quickly to provide lenders that make loans to Nevada borrowers with a clear path for ensuring both federal and state law compliance. In the meantime, lenders should carefully evaluate the risks of potentially violating federal law when deciding whether to say "I do" to S.B. 311.

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[1] 2019 Nevada Laws Ch. 280 (S.B. 311).

[2] 2019 Nevada Senate Bill No. 311, Nevada Eightieth Regular Session (Mar. 18, 2019).

[3] See Nev. Rev. Stat. 598B.100 ("It is unlawful for any creditor to discriminate against any applicant on the basis of the applicant's sex or marital status with respect to any aspect of a credit transaction.").

[4] Assembly Committee on Commerce and Labor Minutes (5/1/19).

[5] See 12 C.F.R. § 1002.6(b)(6).

[6] See id. § 1002.5(c)(2) (detailing the permissible inquiries for information concerning an applicant's spouse or former spouse).

[7] See id. § 1002.6(b)(6)(iii).

[8] 15 U.S.C. § 1691(a); 12 C.F.R. §§ 1002.2(z), 1002.4(a).

[9] 12 C.F.R. Part 1002 Supp. I, Section 1002.4 — General Rules, Paragraph 4(a), cmt. 1.

[10] See 12 C.F.R. §§ 1002.6(b)(6)(i), (iii).

[11] 15 U.S.C. § 1691d(b).

[12] 12 C.F.R. §§ 1002.5(c)(2)(iv), 1002.5(d)(1).

[13] Id. § 1002.6(b)(6)(iii).

[14] Morse v. USAA Fed. Sav. Bank, 2012 WL 6020090, at *3 (D. Nev. Dec. 3, 2012) (citing Dubler v. Moret, 2009 WL 3711883 (Nev. Nov. 3, 2009)).

[15] See 12 C.F.R. §§ 1002.6(b)(6)(i), (iii).

[16] Federal Trade Commission, "40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations," at 44 (July 2011), available at https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

[17] 15 U.S.C. § 1691d(f).