

## Client Alert



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### **FAIR CREDIT REPORTING ACT**

#### **Adverse Action Notice Requirements for Users of Credit Scores to Take Effect July 21, 2011**

Among the many changes enacted as a part of last year's Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-209) (Dodd-Frank) is an amendment to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et. seq., which will require any person (not only creditors) that uses a credit score to take an adverse action against a consumer to make additional disclosures to consumers as part of the adverse action notice already required by FCRA Section 615(a), 15 U.S.C. § 1681m(a).

This new requirement is scheduled to become effective on July 21, 2011, which has been established as the "designated transfer date" for the transfer of functions under various consumer protection laws, including the FCRA, to the new Consumer Financial Protection Bureau (CFPB). While the new requirement does not take effect until July, users of scores need to consider whether they have any obligations in advance so that any necessary changes can be made to adverse action notices and related processes by the effective date in July.

#### **Existing FCRA Adverse Action Notice Requirements**

FCRA Section 615(a) currently requires any person that uses information contained in a consumer report to take an adverse action against a consumer to provide the consumer with oral, written, or electronic notice of that adverse action, including information such as:

1. contact information for the consumer reporting agency that provided the consumer report;
2. a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer with the specific reasons for the action;
3. information about the consumer's right under the FCRA to obtain a free copy of their consumer report from the consumer reporting agency if they request it within 60 days of receiving the notice; and
4. the consumer's right to dispute the accuracy or completeness of information with the consumer reporting agency.

#### **The New Dodd-Frank Requirements**

Section 1100F of Dodd-Frank expands the above listed existing adverse action notice requirements to require any person that takes an adverse action

based in whole or in part on a numerical credit score to also provide written or electronic (unlike the current requirements, oral disclosure would be insufficient) disclosure of the credit score.

The following information about the credit score also would need to be disclosed to the consumer by the user of the consumer report (who may need to obtain it from a consumer reporting agency if that is the source of the credit score):

- The range of possible credit scores under the model used;
- The date on which the credit score was created;
- The name of the person or entity that provided the credit score or the credit file used to create the credit score; and
- The key factors, listed in order of importance, which adversely affected the score of the consumer in the model used.

## **The Score Must be a “Credit Score” to Trigger the Notice Requirements**

These new requirements only apply if a credit score is used in taking the adverse action. If no credit score is used, the new requirements do not apply. In addition, it is important to note that the new requirements only apply to “credit scores”, not other types of scores. “Credit Score” is defined in FCRA § 609(f)(2)(A) to mean: “a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges loans to predict the likelihood of certain credit behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a ‘risk predictor’ or ‘risk score’).”<sup>1</sup>

If the score used is derived from a tool or model that is not used by persons who make or arrange loans to predict the likelihood of credit behavior, those scores are outside the scope of the new adverse action notice requirement. For example, tenant screening scoring models and insurance scoring models, even if credit based, could be outside the scope of the requirement, provided that they are used only for these purposes and not also for lending decisions. Users of scores should consider with counsel whether the scoring models that they use produce “credit scores” subject to the new adverse action notice requirements. In cases where the score to be used is being obtained from a consumer reporting agency, it may be necessary to contact the consumer reporting agency to determine whether the scoring model that the scores are being derived from is used by lenders to predict “credit behavior.”

The new adverse action notice requirements apply to any user of a credit score that takes an FCRA adverse action, not only to creditors. For example, if a landlord takes an adverse action based on a “credit score” in connection with a consumer’s application for a typical apartment lease, the new credit-score adverse action notice disclosure requirements would apply even if the lease is not a credit transaction. Conversely, if the landlord used a customized score that was not used by lenders to predict credit behavior, the score disclosure requirements would not apply.

<sup>1</sup> There are limited exceptions for certain mortgage scores of automated underwriting systems that consider factors in addition to credit and for other elements of an underwriting process or decision. See FCRA § 609(f)(2)(ii).

## **New Model Notice Language Should be Considered by All Users that Take Adverse Actions Based on Credit Scores, Not Only Creditors**

On March 15, 2011, the Federal Reserve Board proposed amendments to its Regulation B model adverse action notices. While Regulation B pertains to creditor obligations under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 et. seq., the Federal Reserve model notices incorporate both ECOA and FCRA adverse action obligations in recognition of the fact that creditors often can have adverse action obligations under both statutes. The proposed model notice revisions include not only the statutorily required elements outlined above, but also some additional information such as what a credit score is and the fact that credit scores frequently can change. The Federal Reserve expects to finalize the model notices prior to July 21, so that they will be in place when the new adverse action notice requirements become effective.<sup>2</sup>

While the credit score language in the Federal Reserve's proposed model notices only applies to creditors, any credit score user that will have notice obligations under FCRA Section 615(a) should consider incorporating the relevant language from the Federal Reserve model notices, once they are finalized, into their adverse action notices. Staff from the Federal Trade Commission (FTC) have spoken favorably of the Federal Reserve's proposed model language and could view the model language as a useful benchmark in future enforcement actions against credit score users under FTC jurisdiction, such as landlords and those acting on their behalf. The new CFPB also could take a similar view. Thus, even credit score users that are not creditors could be well served by considering the model language for purposes of disclosure of credit scores.

<sup>2</sup> 76 Fed. Reg. 13896 (Mar. 15, 2011)

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