ABA Staff Analysis: Final Rule on Credit Score Notices
August 2011
(Additions to July 2011 analysis are in bold.)

On July 6, 2011, the Federal Reserve Board and the Federal Trade Commission’s (Agencies) released final regulations to implement the Fair Credit Reporting Act (FCRA) to incorporate new requirements to provide credit scores and credit score information with risk-based pricing notices and FCRA adverse action notices. In addition, the Federal Reserve Board adopted model Regulation B adverse action notices to incorporate the new requirement to provide credit scores and credit score information with FCRA adverse action notices.

The regulations are pursuant to section 1100F of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which requires disclosure of credit scores and information related to credit scores in:

1. Risk-based pricing notices if a credit score is used in setting the material terms of credit; and
2. FCRA adverse action notices if a credit score is used in making the decision.

The Agencies had proposed comments March 15, 2011. Comments were due April 14, 2011.

**Effective dates:**

- **Adverse action notices**: July 21, 2011. The Agencies note that statutory provisions are self-effectuating and must be “implemented” by the date specified in the Dodd-Frank Act (the designated transfer date, which is July 21, 2011,) whether there are new rules or new model forms. ¹ However, for reasons of procedure, the new Regulation B model forms become “effective” later, on August 15, 2011. While this is confusing, the bottom line is that adverse action notices must comply by July 21, 2011.

**BACKGROUND AND STATUTE**

Section 1100F of the Dodd-Frank Act requires that FCRA adverse action notices and risk-based pricing notices include “credit scores” as defined in FCRA along with other information related to credit scores.

However, while FCRA provides specific rulemaking authority with regard to the risk-based pricing provisions, it does not do so for the FCRA adverse action provision. Accordingly, the Agencies have not adopted regulatory language to incorporate the requirements related to FCRA adverse action notice. Separately, to assist in compliance, the Board has adopted model adverse action notices in the appendix of Regulation B (Equal Credit Opportunity Act). However, Regulation B adverse action model notices are designed for credit, and FCRA adverse action notices are required for any adverse action (e.g. deposit account opening, employment) based on a consumer report or credit score, not just credit decisions.

**RISK-BASED PRICING NOTICE**

On January 15, 2010, the Agencies published final rules to implement the requirement that risk-based pricing notices include credit scores. Under those FCRA regulations, generally, a creditor must provide a risk-based pricing notice to a consumer when the creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. There are several

¹ See 76 Federal Register 41597. “Section 1100F of the Dodd-Frank Act is self-effectuating and will become effective on July 21, 2011, even if there are no implementing rules or model forms.”

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exceptions to this requirement. For example, creditors are not required to provide a risk-based pricing notice if they provide a credit score exception notice to all borrowers.

Under the final regulation, the risk-based pricing notice must include certain credit score information:

1. A statement that a credit score is a number that takes into account information in a consumer report, that the consumer’s credit score was used to set the terms of credit offered, and that a credit score can change over time to reflect changes in the consumer’s credit history;
2. The credit score used in making the credit decision;
3. The range of possible credit scores under the model used to generate the credit score;
4. All of the key factors that adversely affected the credit score, which shall not exceed four factors, except that if one of the key factors is the number of inquiries made with respect to the consumer report, the number of key factors shall not exceed five;
5. The date on which the credit score was created; and
6. The name of the consumer reporting agency or other person that provided the credit score.

This list reflects an addition to the proposed notice. Lenders must now also disclose, “We used your credit score to set the terms of credit we are offering you,” in the “What you should know about your credit score box” on the model forms.

1. *Is this risk-based pricing credit score notice different from the credit score exception notice creditors may provide in lieu of a risk-based pricing notice?*

Yes, for example, the credit score notice that must be provided with the risk-based pricing notice must include the key factors that affected the score. The credit score exception notice does not have to include those key factors.

2. *Does a creditor who currently provides a credit score exception notice have to make any changes or add credit score information to that notice?*

No. The final rule retains the exception notice in lieu of the general risk-based pricing notice. Thus, creditors choosing to provide the risk-based exception notice may continue to use the same notice and need not provide the key factors affecting the credit score. The Agencies in the Supplementary Information note that given the potential compliance costs and that the rulemaking authority will be transferred to the Bureau on July 21, 2011, the Agencies did not believe that “it is appropriate to make a substantial and fundamental change to the rules at this time.” (Emphasis added.)

3. *If the credit score was not used in the decision, does the creditor have to provide the credit score?*

No. The notice need only be provided if a credit score was used in setting the material terms of credit. However, examiners may question why a bank pulls credit scores if it is not for purposes of determining the price. In addition, even if the credit score was not a significant factor in setting the material terms of credit but was a factor, the creditor must provide the credit score notice.

4. *Must guarantors and co-signers receive the risk-based pricing notice with the credit score (or the credit score exception notice)?*

No. Lenders are not required to provide guarantors or co-signers either the risk-based pricing notice (or credit score exception notice) or the adverse action notice.

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5. **Should the lender provide the credit score of one applicant to another applicant, co-sponsor, or guarantor?**

No. Under the final rule, as under the proposal, while lenders may use the credit score of a guarantor or co-sponsor in making a decision, they should not provide the credit score of one person (e.g., the guarantor) to another (e.g., the applicant). Thus, even if the guarantor’s score was a factor in the decision, the applicant should not receive the guarantor’s score.

6. **If the applicant and any co-applicant reside at the same address, may the lender provide both credit scores in the same notice?**

No. Whether the consumers have the same address or not, the lender must provide a separate notice to each consumer if a notice includes a credit score. Each separate notice that contains a credit score must contain only the credit score of the consumer to whom the notice is provided and not the credit score of the other consumer. The reason is privacy. If the notice does not include a credit score, separate envelopes are not necessary for co-applicants residing at the same address.

7. **May the separate notices of joint applicants be inserted into a single envelope?**

There is nothing in the final rule that prohibits a lender from inserting notices to each applicant into separate envelopes and then inserting those envelopes into a single envelope addressed to one address. The “insert” envelopes containing the notices should be addressed to the appropriate recipient.

8. **What if the creditor uses more than one credit score?**

As proposed, under the final rule, if the lender pulls two or more credit scores and uses one of them, e.g., the middle score, it should disclose that score. If it obtains two or more credit scores and uses multiple credit scores in setting the material terms of credit, e.g., by computing the average of all the credit scores, it must include one of these scores. The notice may, at the creditor’s option, disclose all the credit scores used.

9. **Does a bank have to provide a score if the bank used a proprietary score?**

Generally no, but it depends. Under the final rule:

- If any information that is not included in a consumer report is used to calculate the proprietary score is (even if the score is also based in part on information from a consumer report), the lender does not have to provide any score (either a proprietary score or a score from a consumer reporting agency) because it is not a “credit score” as defined in FCRA Section 609 (f) (2)(A).
- If the proprietary score is based solely on information from a consumer report, then the lender must provide a credit score.
- If a creditor uses a credit score from a consumer reporting agency as an input to a proprietary score, but that proprietary score itself is not a credit score, the creditor must disclose the credit score from the consumer reporting agency.
- If the creditor uses both a proprietary score that meets the definition of a credit score and a credit score from a consumer reporting agency in setting the material terms of credit or reviewing the account, the creditor has the option to choose which credit score to disclose.

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10. Are scores that do not used to predict the likelihood of certain credit behaviors “credit scores”?

No. Scores such as insurance scores or scores used to predict the likelihood of false identify are not credit scores by definition. Both the statute and the Supplementary Information to the final rules make it clear that “insurance scores” are not credit scores. Section 609 (f)(2) of FCRA provides that “credit score” means “a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors. . . “Insurance scores” are not used to determine whether to make a loan or are they designed to predict credit behaviors. In addition, the Supplementary Information to Regulation V specifically states that they are excluded from the definition of credit score. (See page 41594 of Federal Register from July 15, 2011.) under “Proprietary scores” heading. If someone is calling what is really a credit score an “insurance score” that is of course a separate matter. Also, if a credit score is used in making an insurance decision, then the credit score must be provided with the adverse action notice is required. (See question and answer 12.)

11. What must the bank disclose if the borrower has no credit score?

If a credit score is unavailable, the bank does not have to provide any credit score information, though there is nothing that prevents the bank from explaining that no credit score was available. http://www.gpo.gov/fdsys/pkg/FR-2011-07-15/pdf/2011-17585.pdf

12. How many “key factors” must lenders disclose if “number of inquiries” was a factor?

It depends. If “number of inquiries” was one of the top four key factors, then the lender discloses four factors. If it was not one of the top four factors, but was a factor, then the lender discloses five key factors. Lenders should rely on the information provided by the credit score provider.

ADVERSE ACTION NOTICES

As noted, the Agencies do not have specific authority to adopt regulations related to the adverse action provisions of FCRA. However, the risk-based pricing credit score notice provisions of final Regulation V can reasonably be used as guidance on how to interpret the provisions related to the adverse action notices. Accordingly, we expect banks to look to the final regulations applicable to risk-based pricing notices in determining how to comply with the adverse action requirements. See discussion above as some questions and answers will also apply to the adverse action notices.

In addition, the Board has adopted model adverse action notices under Regulation B to provide guidance for credit decisions based on consumer reports. While not adopted officially in Regulation B or its Commentary, the Supplementary Information to the Regulation B model forms offers additional guidance to the adverse action notice requirements, including guidance on requirements and options related to proprietary scores, multiple scores, and multiple applicants and to limitations on the transmittal of credit scores to the person to whom they are related that parallel the approach taken in the risk-based pricing credit score notice as explained above.

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13. Does the credit score disclosure for adverse action notice have to be provided when a score is pulled for a reason other than credit, e.g., for purposes related to checking account opening, employment, or insurance?

Yes. The provision applies to any adverse action based in whole or in part on a credit score based on a consumer report. It is not limited to credit decisions. The question isn’t the purpose for which the credit score is used for a particular transaction, but whether it is used by others in making credit decisions. Credit scores are used in making credit decisions, even though they are also used for other purposes. In other words, if a score that fits under the definition of credit score is used – regardless of the type of product, an adverse action notice is required. However, as explained in question and answer 9 above, scores not used to make credit decisions, such as insurance scores or scores used to predict the likelihood of false identity are not credit scores by definition.

Given that the model Regulation B notice will only apply to credit decisions, it is not appropriate for non-credit adverse action notices. However, the Dodd-Frank Act only requires the information described above in the risk-based pricing credit score notices (that is, the information listed in 1-6 under the Risk Based Pricing introduction above, except for the statement that the consumer’s credit score was used to set the terms of credit). In addition, the Board added optional language to the model forms that creditors may use to direct the consumer to the entity that provided the credit score for any questions about the credit score.

14. Must banks provide a Qualifile score provided by ChexSystems if they use that score for purposes of deposit account opening?

Banks should check with ChexSystems. Arguably, even if these scores are “used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors” (e.g., overdraft protection or overdraft lines of credit) they may fall within the exception to the credit score rule that excludes underwriting systems that consider more than just “credit information.”

15. Must adverse action notice and credit score information be provided to consumers applying for business credit?

Yes. The FCRA adverse action and credit score notices must be provided whether the consumer has applied for consumer or business credit if the adverse action was due in whole or part to the consumer’s credit score.

16. If the loan applicant is a business, must the consumer who is a co-signer or guarantor receive an adverse action notice with the credit score information if that credit score was used in evaluating the business’s loan application?

No. Lenders are not required to provide FCRA or ECOA adverse action notices to guarantors or co-signers.

17. If the loan applicant is a business, must the lender provide the FCRA adverse action notice and credit score information?

No, but if it is not clear whether the applicant is a business or consumer (e.g., in the case of a sole proprietorship, the lender should provide the notice to avoid potential violations. In addition, the lender may have to provide a notice under ECOA.

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18. **May a guarantor or co-signer’s credit score be disclosed in an applicant’s adverse action notice?**

No. As with the risk-based pricing credit score notice, the Board believes that only the person to whom the credit score relates should receive the credit score. Thus, while an applicant must receive an adverse action notice but a guarantor or co-signer need not, the applicant should not receive the credit score of guarantors or cosigners even if their score was a factor in the adverse action.

19. **Must the lender provide the Regulation B reasons for adverse action notice as well as the credit score information and key factors adversely affecting the credit score?**

Lenders must still provide the Regulation B reasons for adverse action notices unless the lender is choosing instead to provide information about how to obtain the reasons for adverse action.

20. **For purposes of disclosing the reasons for adverse action, may the lender refer to the credit score’s key factors if those are the reasons for the adverse action?**

No. While it was suggested that the Board allow creditors to cross-reference the adverse action reasons and the key credit score factors if they were identical, the Board declined. Accordingly, the notice should contain separate lists of the reasons for the adverse action and the key factors of the credit score even if they are repetitive. Lenders who provide information about how to obtain the reasons for the adverse action notice must still include the credit score and key factors in the adverse action notice.

21. **May the lender disclose the credit score information on a separate document?**

No. The Board determined that providing a form with credit score information separately from an adverse action does not appear to be consistent with the legislation.

22. **May lenders have to provide two credit score notices?**

Yes. In the Supplementary Information, the Board states that it does not believe a creditor would comply with the FCRA adverse action notice by providing a risk-based pricing credit score exception notice or a Section 609(g) credit score notice provided to mortgage applicants on the basis that the notices provide different information and have different timing requirements than the adverse action notice. Both the Section 609(g) and the risk-based pricing credit score exception notices must be provided “as soon as reasonably practicable” (currently presumed to be within three days of application). The new provision requires that credit scores be provided with adverse action notices, which may not be sent until much later.

23. **May the lender provide combined Section 609(g) and FCRA adverse action notices?**

No. The Supplementary Information states that the Board does not believe a creditor would comply with the FCRA adverse action notice provisions by combining the section 609(g) notice with an adverse action notice. However, it appears that separate envelopes are not necessary so long as the timing requirements of each notice are met.

Questions? Contact Nessa Feddis for more information.

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