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The Dodd-Frank Fair Credit Reporting Act and Utilities and Telecommunications Companies

Everybody knows that the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), which was passed by Congress July 21, 2010, greatly impacts banks and other financial institutions. But few thought it may affect utilities and telecommunications companies as well – until now, that is. The issue: disclosure of credit scores.

Section 1100F of the Act amends Section 615(h) of the Fair Credit Reporting Act ("FCRA") and is a self-executing provision that becomes effective July 21, 2011. On July 7, 2011, the Federal Reserve Board and the Federal Trade Commission ("FTC"), issued a final rule implementing Section 1100F (the "Rule").

Existing Section 615(h) of FCRA requires a person to provide a "risk-based pricing notice" to a consumer when the person uses a consumer report in connection with an extension of credit and, based in whole or in part on the consumer report, extends credit to the consumer on terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers.

For the first time, as a result of the adoption of Section 1100F, persons who issue risk-based pricing notices must include the applicant's credit score in the notice. This new requirement has significant implications for businesses that are subject to it.

The Rule includes sample model forms to be used to provide the notice under FCRA and to comply with the adverse action notice requirement under the Equal Credit Opportunity Act ("ECOA"). Section 1100F did not amend ECOA. The model forms define a credit report as "a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors."

"Credit score" is defined in FCRA as "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, including default." (Emphasis supplied.) The definition does not include any mortgage score or rating of an automated underwriting system that considers one or more factors in addition to credit information, including the loan-to-value ratio, the amount of downpayment, or the financial assets of a consumer.

Public utilities (including telecommunications companies) often use proprietary or specialty scores in evaluating applicants for service, as opposed to standard credit scores from the major credit reporting agencies ("CRAs"), such as FICO scores. The scores used by public utilities are generally based upon the applicant's history of paying utility bills, not on the applicant's general credit behavior as defined in the model forms. In addition, public utilities do not use the scores to "make or arrange a loan," as provided in FCRA.

Nevertheless, despite strong arguments to the contrary, the FTC appears to be taking the position that utilities are subject to the Rule. The regulatory analysis of the Rule includes a discussion of "proprietary scores." The analysis states that if a creditor uses both a proprietary score and a credit score from a CRA, in setting the material terms of credit or reviewing an account, the creditor must disclose the credit score from the CRA. The disclosure of the score from the CRA is also required when a creditor uses a credit score from a CRA as input to a proprietary score that is not a credit score. If a creditor uses a proprietary score that includes information only from a CRA in setting the material terms of credit or reviewing an account, the proprietary score would be a credit score and have to be disclosed.

Utilities need to become familiar with the Rule, decide whether it applies to them, and, if they determine that they are subject to it, determine what actions they need to take to comply with it, bearing in mind that the Rule may affect risk-based pricing notices that are mailed to applicants, the recorded messages on interactive voice response units, and the scripts used by call centers that talk to individuals who are applying for service.

The FCRA provides for both administrative and civil liability. In cases where a "knowing" violation occurs, administrative penalties can be as much as $2,500 per violation. Firms may also be liable for actual and punitive damages in civil cases.

We are available to assist utility and telecommunications clients in determining their compliance obligations under the Rule, and how to implement any necessary changes to their procedures.

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