Fair Credit Reporting Act Update—2010

*By Andrew M. Smith and Peter Gilbert**

Introduction

This year, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Consumer Financial Protection Act ("CFPA")[1] revised the Fair Credit Reporting Act ("FCRA")[2] enforcement and rulemaking scheme, and imposed new obligations on businesses that use consumer reports. Meanwhile, as discussed below, agency rulemaking efforts under the Fair and Accurate Credit Transactions Act ("FACT Act")[3] continued, with amendments to the Free Credit Report Rule and the completion of the final major rule under the FACT Act, the Risk-Based Pricing Rule.

Legislative Developments: The CFPA

Credit Scoring Provisions

The CFPA amended the FCRA in a variety of ways. Most immediately, it amends the adverse action and risk-based pricing provisions in FCRA section 615 to require persons that use credit scores in connection with consumer transactions to include those scores in any adverse action or risk-based pricing notice provided to the consumer.[4] In addition, the person must disclose the following: the range of scores under the credit scoring model used; the date that the score was created and the person that provided the credit score or the credit file upon which the score is based; and the key factors that "adversely affected" the score.[5]

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1. Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010) [hereinafter CFPA].

2. Pub. L. No. 91-508, tit. VI, 84 Stat. 1114, 1128 (1970) (codified as amended at 15 U.S.C.A. §§ 1681–1681x (West 2009 & Supp. 2010)) [hereinafter FCRA].

3. Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified in scattered sections of 15 & 20 U.S.C.) [hereinafter FACT Act]; *see generally* Andrew M. Smith, Peter Gilbert & Scott Johnson, *Fair Credit Reporting Act Update—2009*, 65 Bus. Law. 595, 595–601 (2010) (in the 2010 *Annual Survey*).

4. CFPA, *supra* note 1, § 1100F, 124 Stat. at 2112 (amending 15 U.S.C. § 1681m); *see also infra* notes 59–100 and accompanying text (discussing risk-based pricing notices and the Risk-Based Pricing Rule).

5. CFPA, *supra* note 1, § 1100F, 124 Stat. at 2112 (amending 15 U.S.C. § 1681m(a)(2)(B)).

The term "credit score" means a value derived from a modeling system used by a person that makes or arranges a loan, and does not include a rating of an automated underwriting system that considers factors in addition to consumer report information such as loan-to-value ratio, the amount of down payment, or the financial assets of a consumer.[6] Thus, for example, a consumer report user would not be required to disclose a score developed for use by insurers, and would not be required to disclose a proprietary score that includes factors, such as loan-to-value ratio, that are not derived from a consumer report.

This provision of the CFPA will be effective on the date ("Transfer Date") designated by the Secretary of the Treasury for the transfer of functions under existing consumer credit laws to the new Consumer Financial Protection Bureau ("CFPB").[7]

The CFPA also requires the CFPB to study and report on the "nature, range, and size of variations between the credit scores sold to creditors and those sold to consumers" by the nationwide consumer reporting agencies.[8] The nationwide consumer reporting agencies are required to disclose to a consumer a credit score, upon the consumer's request, but are permitted to disclose an "educational" score, rather than a score actually used by lenders to make decisions about consumers.[9] This study is motivated by the apparent belief of some members of Congress that educational credit scores may be less valuable for consumers.[10]

Addition of Securities Regulators

The CFPA also corrects what may be a longstanding oversight by Congress: the omission of the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") from the FCRA. The CFPA adds enforcement authority for these two agencies with respect to persons subject to their respective jurisdictions.[11]

The CFPA also amends three provisions to add rulemaking authority for the SEC and CFTC. Specifically, the FCRA is amended to require the SEC and CFTC

6. *Id*. (amending 15 U.S.C. § 1681m(h)(5)(E)).

7. CFPA, *supra* note 1, § 1100H, 124 Stat. at 2113 (setting the effective date for § 1100F); *see also id*. § 1062, 124 Stat. at 2039–40 (to be codified at 12 U.S.C. § 5582) (explaining the designated transfer date); *id*. § 1061, 124 Stat. at 2035–39 (to be codified at 12 U.S.C. § 5581) (explaining the transfer of functions to the new Consumer Financial Protection Bureau). On September 20, 2010, United States Treasury Secretary Timothy Geithner announced that the designated transfer date is July 21, 2011. *See* Designated Transfer Date, 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010).

8. CFPA, *supra* note 1, § 1078, 124 Stat. at 2076. The nationwide consumer reporting agencies are Equifax Inc., Experian Information Solutions, Inc., and TransUnion LLC. *See, e.g.*, Free Annual File Disclosures, 75 Fed. Reg. 9726, 9726 n.2 (Mar. 3, 2010) (to be codified at 16 C.F.R. pt. 610).

9. 15 U.S.C. § 1681g(f)(7)(A) (2006) (permitting a consumer reporting agency to disclose "a credit score that assists the consumer in understanding the credit scoring assessment of the credit behavior of the consumer").

10. *What Borrowers Need to Know About Credit Scoring Models and Credit Scores: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 110th Cong. 24 (2008) (comments of Rep. Jackie Speier (D-Cal.) regarding "FAKO" scores).

11. CFPA, *supra* note 1, § 1088(a)(10)(B), 124 Stat. at 2089–90 (to be codified at 15 U.S.C. § 1681s(b)).

to make an "Identity Theft Red Flags Rule" for persons under the respective jurisdiction of the two agencies,[12] and to require the CFTC to issue rules regarding the secure disposal of consumer report information.[13] The FACT Act is amended to require the CFTC to make an "Affiliate Marketing Rule" for persons under its jurisdiction.[14] The CFPA does not specify a time period within which the SEC and CFTC are required to issue these rules.

Amendments to Administrative Enforcement Provisions

The CFPA overhauls the administrative enforcement scheme under the FCRA. As noted, the CFPA adds enforcement authority for the SEC and the CFTC.[15] The Federal Deposit Insurance Corporation, Federal Reserve Board, Office of the Comptroller of the Currency, Office of Thrift Supervision, and National Credit Union Administration (together, the "Banking Agencies") generally will retain their authority to enforce the FCRA against depository institutions, but the CFPB will have primary enforcement authority against banks and credit unions with assets in excess of ten billion dollars.[16] The Banking Agencies have enforcement authority over depository institutions with assets of ten billion dollars or less, but the CFPB can make enforcement recommendations.[17]

The CFPA also provides the CFPB with general enforcement power "with respect to any person subject to this title"—that is, any person subject to the FCRA, and the jurisdiction over which is not committed to another agency.[18] The FTC, however, continues to maintain its general enforcement jurisdiction under the FCRA, "subject to subtitle B of the [CFPA]."[19] Subtitle B of the CFPA sets forth the enforcement jurisdiction of the CFPB generally,[20] and provides that the CFPB shall have exclusive enforcement jurisdiction over non-depository "covered persons," which are defined to include certain participants in consumer credit markets, such as non-bank lenders, mortgage brokers, payday lenders, debt collectors, consumer reporting agencies, and the like.[21] The CFPB, however, is required to negotiate with the FTC "an agreement for coordinating with respect to enforcement actions by each agency regarding the offering or provision of consumer financial products or services by any covered person."[22] In addition, consumer reports that

12. *Id.* § 1088(a)(8), 124 Stat. at 2087–88 (amending 15 U.S.C. § 1681m(e)(1)).
13. *Id.* § 1088(a)(12), 124 Stat. at 2091–92 (amending 15 U.S.C. § 1681w(a)(1)).
14. *Id.* § 1088(b)(3), 124 Stat. at 2092 (to be codified at 15 U.S.C. § 1681s-3 note) (amending FACT Act § 214(b)).
15. *See supra* note 11 and accompanying text.
16. CFPA, *supra* note 1, § 1025(c), 124 Stat. at 1991 (to be codified at 12 U.S.C. § 5515(c)).
17. *Id.* § 1026(d), 124 Stat. at 1994 (to be codified at 12 U.S.C. § 5516(d)).
18. *Id.* § 1088(a)(10)(B), 124 Stat. at 2089–90 (amending 15 U.S.C. § 1681s(b)).
19. *Id.* § 1088(a)(10)(A), 124 Stat. at 2088 (amending 15 U.S.C. § 1681s(a)).
20. *Id.* §§ 1021–1029A, 124 Stat. at 1979–2004 (to be codified at 12 U.S.C. §§ 5511–5519).
21. *Id.* § 1024(c), 124 Stat. at 1989 (to be codified at 12 U.S.C. § 5514(c)) (authority over non-depository covered persons); *id.* § 1002(5), 1002(6) & 1002(15), 124 Stat. at 1956, 1957–60 (to be codified at 12 U.S.C. § 5481(5), (6) & (15)) (defining "consumer financial product or service," "covered person," and "financial product or service").
22. *Id.* § 1024(c)(3), 124 Stat. at 1989 (to be codified at 12 U.S.C. § 5514(c)(3)).

are not used in connection with offering "consumer financial products or services" are excluded from the CFPB's jurisdiction, meaning that the CFPB appears to have no authority over consumer reporting agencies that do not provide consumer reports in connection with consumer credit or deposit transactions, for example consumer reporting agencies that provide employment background reports, insurance underwriting reports, tenant screening reports, and reports used in connection with government licensing or benefits decisions.[23] Thus, as a practical matter, the CFPB and the FTC appear to share residual enforcement jurisdiction under the FCRA. Until the memorandum of understanding is negotiated between the two agencies, and perhaps even for some time afterward, it appears as though non-depository entities, the jurisdiction of which is not specifically committed to a specific federal regulator, will be subject to an uncertain enforcement scheme involving both the FTC and the CFPB.

In addition to rearranging the enforcement authority of federal agencies under the FCRA, the CFPA also restated the FTC's authority to obtain civil penalties in the amount of $2,500 "in the event of a knowing violation, which constitutes a pattern or practice of violations of this title."[24] The FTC had recently increased this amount to $3,500 per violation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990.[25] The effect of the CFPA amendment will be to reduce this amount back to $2,500.

Amendments to Rulemaking Authority

Existing rulemaking power, which is currently diffused among the Banking Agencies and FTC, will for the most part transfer to the CFPB on the Transfer Date. The CFPB will have general rulemaking authority under the FCRA, and its rules will apply to all persons subject to the FCRA, "notwithstanding the enforcement authorities granted to other agencies under" the FCRA.[26] This general authority is now held jointly by the Banking Agencies.

In addition, the CFPB will be solely responsible for prescribing many of the specific rules required by the FACT Act, including rules regarding the following: the provision of free credit reports to consumers;[27] the use of medical information by lenders and the sharing of medical information among affiliated companies;[28] the receipt of address discrepancy notices by users of consumer reports;[29] prescreen opt-out notifications;[30] the provision of risk-based pricing notices to

23. *Id.* § 1002(15)(A)(ix)(I)(cc), 124 Stat. at 1959 (to be codified at 12 U.S.C. § 5481(15)(A)(ix)(I)(cc)).

24. *Id.* § 1088(a)(10)(A), 124 Stat. at 2088 (amending 15 U.S.C. § 1681s(a)).

25. *See* 28 U.S.C. § 2461 note (2006); *see also* Federal Civil Penalties Inflation Adjustment Act, 74 Fed. Reg. 857, 858 (Jan. 9, 2009) (to be codified at 16 C.F.R. § 1.98(m)).

26. CFPA, *supra* note 1, § 1088(a)(10)(E), 124 Stat. at 2090 (amending 15 U.S.C. § 1681s(e)).

27. *Id.* § 1088(b)(2), 124 Stat. at 2092 (to be codified at 15 U.S.C. § 1681j note) (amending FACT Act § 211(d)).

28. *Id.* § 1088(a)(4), 124 Stat. at 2087 (amending 15 U.S.C. § 1681b(g)).

29. *Id.* § 1088(a)(5), 124 Stat. at 2087 (amending 15 U.S.C. § 1681c(h)(2)(A)).

30. *Id.* § 1088(a)(7), 124 Stat. at 2087 (amending 15 U.S.C. § 1681m(d)(2)(B)).

consumers;[31] the establishment of procedures regarding the furnishing of accurate information to consumer reporting agencies;[32] the receipt of disputes directly from consumers;[33] the provision of negative information to consumer reporting agencies;[34] and certain definitions relating to the rights of identity theft victims.[35] Rules regarding the receipt and use of information for marketing purposes by affiliated companies will be made by the CFPB in conjunction with the SEC and CFTC.[36] Importantly, however, the authority to make regulations to prevent and mitigate identity theft (the so-called "Identity Theft Red Flags Rule") and to require the proper disposal of consumer report information will remain with the FTC, SEC, CFTC, and the Banking Agencies.[37]

Free Annual File Disclosure Rule

The FTC initially promulgated the Free Annual File Disclosure Rule to establish procedures for consumers to obtain free annual file disclosures from consumer reporting agencies.[38] Section 205 of the Credit Card Accountability Responsibility and Disclosure Act ("CARD Act")[39] required the FTC to issue a rule to prevent deceptive marketing of free credit reports.[40] To fulfill that requirement, the FTC amended the Free Annual File Disclosure Rule.[41] These amendments became effective April 2, 2010, except with respect to disclosures specific to television and radio advertisement, which became effective September 1, 2010.[42] The amendments require disclosures in connection with offering free credit reports and limit the extent to which "nationwide consumer reporting agencies" may market products and services to consumers seeking their free annual disclosures.[43]

Communications Through Centralized Source

The original Free Annual File Disclosure Rule required nationwide consumer reporting agencies ("CRAs") to establish a "Centralized Source" from which con-

31. *Id.* § 1088(a)(9), 124 Stat. at 2088 (amending 15 U.S.C. § 1681m(h)(6)).
32. *Id.* § 1088(a)(11)(C), 124 Stat. at 2091 (amending 15 U.S.C. § 1681s-2(e)).
33. *Id.* § 1088(a)(11)(B), 124 Stat. at 2091 (amending 15 U.S.C. § 1681s-2(a)(8)).
34. *Id.* § 1088(a)(11)(A), 124 Stat. at 2090–91 (amending 15 U.S.C. § 1681s-2(a)(7)).
35. *Id.* § 1088(b)(1), 124 Stat. at 2092 (to be codified at 15 U.S.C. § 1681c-1 note) (amending FACT Act § 112(b)).
36. *Id.* § 1088(b)(3), 124 Stat. at 2092 (to be codified at 15 U.S.C. § 1681s-3 note) (amending FACT Act § 214(b)).
37. *Id.* § 1088(a)(2)(C), 124 Stat. at 2087 (amending the FCRA to substitute "Bureau" for "Commission," except in 15 U.S.C. §§ 1681m(e) and 1681w(a)(1)); *see also id.* § 1088(a)(10)(E), 124 Stat. at 2090 (amending 15 U.S.C. § 1681s(e)).
38. FACT Act, *supra* note 3, § 211, 117 Stat. at 1968–69 (codified as amended at 15 U.S.C.A. § 1681j(a) (West 2009 & Supp. 2010); Free Annual File Disclosures, 69 Fed. Reg. 35468 (June 24, 2004) (to be codified at 16 C.F.R. pts. 610 & 698) [hereinafter Original Free Reports Rule].
39. Pub. L. No. 111-24, 123 Stat. 1734 (2009).
40. *Id.* § 205(b), 123 Stat. at 1747 (to be codified at 15 U.S.C. § 1681j).
41. Free Annual File Disclosures, 75 Fed. Reg. 9726 (Mar. 3, 2010) (to be codified at 16 C.F.R. pt. 610) [hereinafter Amended Free Reports Rule].
42. *Id.* at 9746 (to be codified at 16 C.F.R. § 610.4(c)).
43. *Id.* at 9744–46 (to be codified at 16 C.F.R. §§ 610.2 & 610.4).

sumers could obtain a free annual file disclosure from each CRA on a single website.[44] The Amended Free Reports Rule prohibits CRAs from engaging in certain practices in connection with that website: CRAs may not (i) advertise products or services until after the consumer "has obtained his or her free annual disclosure";[45] (ii) display hyperlinks that would navigate the consumer away from the centralized source until after the consumer has obtained his or her free annual disclosure;[46] (iii) require that a consumer set up an account in connection with obtaining his or her file disclosure;[47] or (iv) ask or require a consumer to agree to terms or conditions in connection with obtaining his or her annual disclosure.[48]

Prevention of Deceptive Marketing of Free Reports

Congress enacted the CARD Act's new disclosure requirements out of a perceived need to dispel customer confusion caused by "free" credit report offers that are tied to an obligatory purchase and are not provided through the centralized source.[49]

Under the Amended Free Reports Rule, the offering or advertising of a "free credit report" triggers mandatory disclosures.[50] The Amended Free Reports Rule defines a "free credit report" as

> a file disclosure prepared by or obtained from, directly or indirectly, a nationwide consumer reporting agency . . . that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.[51]

The definition excludes free credit scores that will not trigger the required disclosures.[52] The FTC clarified that advertising of bundled products that promote a free credit report in addition to other products and services may trigger the disclosures.[53] Additionally, a free credit report offered in connection with a free trial offer of a product or service may trigger the rule.[54]

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44. Original Free Reports Rule, *supra* note 38, 69 Fed. Reg. at 35496 (to be codified at 16 C.F.R. § 610.2).

45. Amended Free Reports Rule, *supra* note 41, 75 Fed. Reg. at 9745 (to be codified at 16 C.F.R. § 610.2(g)(1)).

46. *Id*. (to be codified at 16 C.F.R. § 610.2(h)(1)).

47. *Id*. (to be codified at 16 C.F.R. § 610.2(h)(2)). The FTC clarified that a CRA may request that the consumer set up an account but cannot require it, and cannot make any such request until after the consumer has obtained the file disclosure. *Id*. at 9731, 9745 (to be codified at 16 C.F.R. § 610.2(g)(1)).

48. *Id*. at 9745 (to be codified at 16 C.F.R. § 610.2(h)(3)).

49. *Id*. at 9726–27.

50. *Id*. at 9746 (to be codified at 16 C.F.R. § 610.4(b)).

51. *Id*. at 9745 (to be codified at 16 C.F.R. § 610.4(a)(2)). A "file disclosure" is defined as "a disclosure by a consumer reporting agency pursuant to section 609 of the Fair Credit Reporting Act, 15 U.S.C. [§] 1681g." 16 C.F.R. § 610.1(b)(7) (2010).

52. Amended Free Reports Rule, *supra* note 41, 75 Fed. Reg. at 9732.

53. *Id*. at 9733.

54. *Id*. at 9732–33.

The Amended Free Reports Rule requires different disclosures based on the medium (television, radio, print, internet, or telemarketing) through which the free credit report is being marketed. For example, television and radio advertisements are required to disclose that "[t]his is not the free credit report provided for by Federal law,"[55] while telemarketers must state: "You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the only authorized source under federal law."[56] These disclosures generally must be made in close proximity to the first mention of the free credit report,[57] and the rule sets forth other detailed requirements on the form of the disclosures, including prominence, language, readability, format, visibility, font size, color, and white space for disclosures.[58]

Risk-Based Pricing

The FACT Act added a provision to the FCRA directing the FTC and the Federal Reserve Board (the "Agencies") to issue joint rules requiring notice whenever a lender grants credit "on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person."[59] The final rule, entitled the Fair Credit Reporting Risk-Based Pricing Regulations, was effective on January 1, 2011.[60] Generally, the final rule requires a risk-based pricing notice whenever a lender approves an applicant for credit subject to a higher interest rate than is offered to a substantial proportion of its borrowers for the same product type.[61]

The final rule adopts several key interpretations and clarifies the scope of application. For example, the notice requirements apply only in connection with consumer—not business or commercial—credit,[62] and the final rule limits the definition of "material terms"—those that trigger the disclosure—to the annual percentage rate ("APR"), excluding temporary initial rates and penalty rates.[63] The Agencies also clarified that the notice requirement falls to the person to whom an obligation is initially payable rather than an assignee or purchaser of credit.[64]

Determining Who Gets the Notice

The final rule permits lenders to determine who should receive the notice by directly comparing consumer loans on a case-by-case basis to determine whether

55. *Id.* at 9746 (to be codified at 16 C.F.R. § 610.4(b)(1) & (2)).
56. *Id.* (to be codified at 16 C.F.R. § 610.4(b)(6)).
57. *See, e.g., id.*
58. *Id.* at 9745–46 (to be codified at 16 C.F.R. § 610.4(a)).
59. FACT Act § 311(a), 15 U.S.C. § 1681m(h) (2006).
60. Fair Credit Reporting Risk-Based Pricing Regulations, 75 Fed. Reg. 2724, 2724 (Jan. 15, 2010) (to be codified at 12 C.F.R. pt. 222) [hereinafter Risk-Based Pricing Rule].
61. *Id.* at 2769 (to be codified at 16 C.F.R. § 640.3(a)).
62. *Id.* (to be codified at 16 C.F.R. § 640.1(a)(2)).
63. *Id.* (to be codified at 16 C.F.R. § 640.2(n)).
64. *Id.* at 2775 (to be codified at 16 C.F.R. § 640.6(b)).

a particular consumer has received an interest rate that is materially less favorable than the rate provided to a substantial proportion of the lender's other customers.[65] Recognizing that the direct comparison method will not be practical for most lenders, the final rule sets forth several alternate methods. Lenders are free to adopt different methods but must be consistent within a given product type, which is defined as "one or more credit products with similar features that are designed for similar purposes" such as secured credit cards, unsecured credit cards, student loans, new auto loans, used auto loans, fixed rate mortgage loans, and variable rate loans.[66]

Under the credit score proxy method, a lender complies with the rule by establishing a "cutoff credit score" and providing a notice to approved applicants whose score is less than the cutoff score.[67] A lender sets the cutoff score by analyzing a representative sample of its applicants to determine the score above which 40 percent of its applicants have higher scores and below which 60 percent have lower scores.[68] Where a lender uses the credit score proxy method and no score is available, the lender is required to provide a notice.[69]

Another method to determine who must receive the risk-based pricing notice is available to lenders who assign approved applicants to one of a discrete number of APR pricing tiers.[70] Under the tiered pricing method, the lender may provide the risk-based pricing notice to each consumer who is not assigned to the top pricing tier or tiers.[71] Lenders that offer four or fewer tiers must provide a notice to each approved consumer who does not qualify for the top, or lowest price, tier.[72] Lenders who offer five or more tiers must provide a notice to all approved applicants who are not assigned to those tiers that make up the top, or lowest priced, 30 percent to 40 percent of the total tiers.[73]

The final rule also provides a special method for credit card issuers to determine who must receive the risk-based pricing notice.[74] Under this provision, a card issuer may provide a notice to every applicant for a multiple rate offer who, based in whole or in part on the applicant's credit report, is granted credit for an APR that is higher than the lowest APR available for that offer.[75] Where the solicitation offers a single APR and the applicant is granted that APR, no notice is required.[76]

The final rule requires delivery of a notice not only at the outset of the relationship but also in connection with account reviews during the life of the account.[77]

65. *Id*. at 2771 (to be codified at 16 C.F.R. § 640.3(d)).
66. *Id*. at 2732, 2769–70 (to be codified at 16 C.F.R. § 640.3(b)).
67. *Id*. at 2770 (to be codified at 16 C.F.R. § 640.3(b)(1)).
68. *Id*. (to be codified at 16 C.F.R. § 640.3(b)(1)(iii)(A)).
69. *Id*. (to be codified at 16 C.F.R. § 640.3(b)(1)(iv)).
70. *Id*. at 2771 (to be codified at 16 C.F.R. § 640.3(b)(2)).
71. *Id*.
72. *Id*. (to be codified at 16 C.F.R. § 640.3(b)(2)(ii)).
73. *Id*. (to be codified at 16 C.F.R. § 640.3(b)(2)(iii)).
74. *Id*. (to be codified at 16 C.F.R. § 640.3(c)).
75. *Id*. (to be codified at 16 C.F.R. § 640.3(c)(1)).
76. *Id*. (to be codified at 16 C.F.R. § 640.3(c)(2)).
77. *Id*. (to be codified at 16 C.F.R. § 640.3(d)).

If a lender increases an existing customer's APR based in whole or in part on a review of the consumer's credit report and does not otherwise issue an adverse action notice, then the lender must provide the customer with a risk-based pricing notice.[78]

Content, Form, and Timing of the Notice

The central message of the risk-based pricing notice is that the terms offered "may be less favorable than the terms offered to consumers with better credit histories."[79] (For account reviews, the lender is required to notify the customer that his or her APR was increased "as a result" of a review of his or her account using information from a consumer report.[80]) Risk-based pricing notices must describe the type of information generally contained in credit reports, and must state that the lender set the terms based on a credit report and the consumer has a right to obtain a free report within sixty days of the notice.[81] The final rule requires that risk-based pricing notices be clear and conspicuous and provided to the consumer in oral, written, or electronic form.[82] The agencies have provided model forms, the use of which will provide lenders with a safe harbor.[83]

For closed-end credit, lenders must provide the notice before consummation of the transaction, but after communicating the approval to the consumer.[84] For open-end credit plans, lenders must provide the notice to the consumer before the first transaction under the plan, but after communicating the approval decision.[85] For account reviews, lenders must provide the notice at the time that the lender communicates the decision to increase the APR or, if no such notice is required by law, no later than five days after the effective date of the change in the APR.[86]

The agencies recognized that in-store credit presents special timing challenges. As such, the final rule provides that when open-end credit is granted "in person or by telephone for the purpose of financing the contemporaneous purchase of goods or services," any risk-based pricing notice or credit score disclosure notice (discussed below) may be provided upon the first mailing to the consumer after the approval, or within thirty days, whichever is sooner.[87]

Exceptions

No notice is required when a consumer applies for and receives specific material terms[88] or if the lender otherwise provides an adverse action notice.[89] The

78. *Id*.
79. *Id*. at 2772 (to be codified at 16 C.F.R. § 640.4(a)(1)(iii)).
80. *Id*. (to be codified at 16 C.F.R. § 640.4(a)(2)(iii)).
81. *Id*. at 2771–72 (to be codified at 16 C.F.R. § 640.4(a)(1) & (2)).
82. *Id*. at 2772 (to be codified at 16 C.F.R. § 640.4(b)(1)).
83. *Id*. (to be codified at 16 C.F.R. § 640.4(b)(2)).
84. *Id*. (to be codified at 16 C.F.R. § 640.4(c)(1)(i)).
85. *Id*. (to be codified at 16 C.F.R. § 640.4(c)(1)(ii)).
86. *Id*. (to be codified at 16 C.F.R. § 640.4(c)(1)(iii)).
87. *Id*. (to be codified at 16 C.F.R. § 640.4(c)(3)).
88. *Id*. at 2773 (to be codified at 16 C.F.R. § 640.5(a)).
89. *Id*. (to be codified at 16 C.F.R. § 640.5(b)).

Agencies have also used their statutory grant of authority to establish a number of exceptions.[90] For example, the final rule provides that lenders may provide all approved applicants with a notice that includes the applicant's credit score and certain additional information.[91] The rule refers to these as "credit score disclosure exception notices."[92] A lender using the credit score disclosure exception must give a notice to every consumer requesting credit for a given product for which the lender uses risk-based pricing, even those who would not otherwise receive a risk-based pricing notice.[93] Creditors, however, do not need to provide a credit score disclosure notice to a consumer if one of the other exceptions applies. For example, consumers who apply for and receive a specific rate or who receive an adverse action notice are not entitled to a notice.[94]

Generally, the credit score disclosure exception notice must disclose the score, basic information about credit scores and credit reports, the distribution of scores for consumers scored under the same model, and information about the consumer's right to obtain a free consumer report once during any twelve-month period.[95] Because these are not risk-based pricing notices, they do not give rise to an independent right to a free consumer report.[96] Like risk-based pricing notices, these notices must be clear and conspicuous,[97] and the agencies have made model forms available, appropriate use of which will provide safe harbor.[98] Unlike risk-based pricing notices, however, these notices must be provided in writing and must be "segregated" from other notices, except that they may be provided with the notice required by section 609(g) of the FCRA.[99] Generally, credit score disclosure notices must be provided to the consumer as soon as reasonably practicable after the credit score has been obtained but, in any event, at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.[100]

90. *Id*. at 2726; *see* 15 U.S.C. § 1681m(h)(6)(iii) (2006).

91. Risk-Based Pricing Rule, *supra* note 60, 75 Fed. Reg. at 2773–74 (to be codified at 16 C.F.R. § 640.5(d) & (e)).

92. *Id*. at 2727.

93. *Id*. at 2774–75 (to be codified at 16 C.F.R. § 640.5(d)(ii) & (e)(ii)); *see also id*. at 2732. Read literally, the final rule would suggest that a lender that uses the exception notice for "other credit" must do so universally for all credit product types offered. This, however, would be inconsistent with the Agencies' statement in connection with proxy methods in which they "recognize that the feasibility of these methods may vary for different types of credit products, and creditors may use different methods for different types of credit products." *Id*. at 2732.

94. *Id*. at 2743.

95. *Id*. at 2773–75 (to be codified at 16 C.F.R. § 640.5(d), (e) & (f)).

96. *Id*. at 2742.

97. *Id*. at 2773–75 (to be codified at 16 C.F.R. § 640.5(d)(2), (e)(2) & (f)(3)).

98. *Id*. at 2774–75 (to be codified at 16 C.F.R. § 640.5(d)(5), (e)(5) & (f)(5)).

99. *Id*. at 2773–75 (to be codified at 16 C.F.R. § 640.5(d)(2)(iii) & (iv), (e)(2)(ii) & (iii), and (f)(3)(ii) & (iii)).

100. *Id*. (to be codified at 16 C.F.R. § 640.5(d)(3), (e)(3) & (f)(4)).