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[C O N S U M E R L E N D I N G U P D A T E]

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HUD PROPOSES FAIR HOUSING DISPARATE IMPACT STANDARD

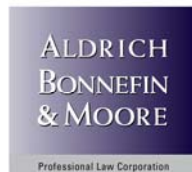
HUD recently issued a proposed rule that would establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act (FHA). 76 FR 70921.

The FHA prohibits discrimination in the sale, rental or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. HUD has long taken the position that the FHA is directed to consequences of housing practices, not simply the purpose. As such, HUD has concluded that the FHA provides for liability based on disparate impact without the need for a finding of intentional discrimination. HUD proposes to add a new subpart G, "Prohibiting Discriminatory Effects," to its FHA regulations at 24 CFR part 100. The proposed rule would establish a uniform standard of liability for facially neutral housing practices that have a discriminatory effect. Under the proposed rule, a person alleging discrimination would first bear the burden of proving its prima facie case of either disparate impact or perpetuation of segregation, after which the burden then shifts to the defendant to

prove that the challenged practice has a necessary relationship to its legitimate, nondiscriminatory interests. If the defendant satisfies its burden, the plaintiff could still establish liability by demonstrating that these legitimate nondiscriminatory interests could be served by a policy or decision that produces a less discriminatory effect. HUD is soliciting comments on its proposal until January 17, 2012.

IMPACT OF QUALIFILE SCORES ON FCRA ADVERSE ACTION NOTICES

During the October 2011 BCG Monthly Telephone Briefing on "Using Consumer Reports in Credit and Deposit Transactions" (Handout 11-10A), one of our savvy clients asked whether a QualiFile score is a credit score for purposes of the new adverse action notice disclosure requirement under the Fair Credit Reporting Act (FCRA). The new adverse action disclosure requirement in FCRA Section 615 (a)(2) mandates that users of consumer reports disclose a credit score used when taking adverse action based on information in a consumer report. Thus, where a financial institution uses a QualiFile score solely to determine whether it will open a deposit or share account ("checking account" for ease of reference) for a consumer, the question is whether the "score" and related information must be included



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as part of the adverse action notice if the institution takes adverse action in connection with a checking account (such as refusing a consumer's request to open a checking account).

Regulation B Section 202.2(c) limits the definition of "adverse action" to decisions regarding credit. The FCRA, however, does not include such a limitation. The FCRA therefore applies not only to adverse decisions related to credit, but also decisions regarding, for example, checking accounts, insurance products and employment. For example, it has long been recognized that adverse action notices must be given in the non-credit context when the action is based all or in part on a consumer report, such as a ChexSystems report used to deny a consumer's checking account application.

An open question currently bedeviling some members of the industry is whether a "QualiFile" score is a "credit score" that must be disclosed. A QualiFile score is issued by ChexSystems and is used by some depository institutions to help them decide whether to open consumer checking accounts. It is clear from the discussion above that the FCRA requirement to provide an adverse action notice extends to the deposit-taking side of the institution, not just the lending side. The issue, however, is whether a QualiFile score is a "credit score" at all – if it is, the credit score and related information would have to be provided as part of the adverse action notice under new Section 615(a)(2). If it isn't, then institutions would not be required to disclose the QualiFile score and related information when turning down a request to open a checking account (or taking other adverse action in connection with deposit and share accounts).

In a 2011 issuance, Fidelity National Information Services, Inc., the proprietor of ChexSystems, indicated that a QualiFile score is a credit score because it can be used to make credit decisions. While helpful, that position does not address the question.

The definition of a credit score in the FCRA is a "numerical score . . . used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors . . ." FCRA Section 609(f)(2)(A)(i). New Section 615(a)(2), which specifies the duty to provide a credit score in connection with adverse action, incorporates by reference this definition of "credit score." The words "used by," "loan" and "credit" in the definition indicate that a score used solely for non-credit purposes is not a credit score. The fact that the score can potentially be used for credit purposes would seem to be beside the point for a user who uses it only for non-credit purposes, such as opening a checking account. The answer to the question, "does the QualiFile score and related information have to be disclosed on the adverse action notice if the institution takes adverse action in connection with a checking account?," thus boils down to whether the QualiFile score will be used in connection with loans and other credit requests. If an institution uses a QualiFile score solely in connection with deposit transactions, the institution is not required to disclose the score.

Institutions who use QualiFile scores or similar scores may want to contact the particular vendor.

While a user is always allowed to disclose the credit score to the subject consumer (see FCRA Section 609(g)(2)), erring on the side of "over-disclosure" of scores may seem to be the easier option. However, not all institutions have the systems capability to do so on an automated basis and therefore it becomes important to understand the FCRA definition of what constitutes a "credit score."

Clients wishing to discuss this issue as it pertains to their specific institution may contact us directly at 800-742-3600.