



## Legislative Update

June 2008

### Federal

#### Rulemaking by Federal Banking Agencies

Federal regulatory authorities have recently published two very significant Proposed Rules:

##### **1. *Proposed Rule on Risk-Based Pricing Notices***

On May 19<sup>th</sup>, the Board of Governors of the Federal Reserve (“the Board”) and the Federal Trade Commission (“the Commission”) jointly published a Proposed Rule issued under Section 311 of the FACT Act of 2003<sup>1</sup>, concerning risk-based pricing notices. The Proposed Rule was published for a period of public comment that expires August 18, 2008.

“Risk-based pricing” refers to the practice of many creditors to vary the interest rate or other terms and conditions of credit being extended based in whole or in part upon the credit history as contained in a consumer report. Section 311 of the FACT Act requires the implementing rules issued by the Board and Commission to address the form, content, timing and manner of delivery of notices generated under the rule, and to define certain terms, such as when credit terms are “materially less favorable”, and to provide a Model Notice.

In general, the Proposed Rule requires a credit grantor to provide a Risk-Based Pricing Notice (“RBPN”) if it uses a consumer report in connection with an application for credit and, based on information in that report, it offers credit to that consumer on terms that are materially less favorable than the most favorable terms that are offered by that credit grantor to most of its consumer customers. Following this simple statement, the Proposed Rule gets very complicated.

In summary, the determination by the credit grantor of whether an RBPN is required can be made in one of three ways: 1) by a direct comparison of the terms offered to that of what has been offered to its other consumer customers; 2) by using the consumer’s credit score as a proxy—and then provide a RBPN to the lower 60% of the credit grantor’s population; or 3) by using a “tiered pricing” method, in which consumers not in the lowest-priced tier (or in the case of five or more tiers, in the lowest-priced two tiers) must receive a RBPN. RBPNs must also be provided by credit card issuers when a consumer applies for a card program and receives less than the most favorable APR for that program. RBPNs must also be provided when the terms of an account are negatively changed due to an Account Review.

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<sup>1</sup> The Fair and Accurate Credit Transactions Act (FACT Act), amending the Fair Credit Reporting Act, 15 U.S.C. §1681 et seq. (“FCRA”) was signed into law on December 4, 2003.

Model forms are provided containing the specific statements which must be contained in the RBPNs, which must be clear and conspicuous and may be provided in oral, written or electronic form.

In general, the Proposed Rule provides six exceptions in which an RBPN is not required to be given: 1) When the credit is extended under the specific material terms for which the consumer applied; 2) When an Adverse Action Notice is provided, under Section 615(a) of the FCRA; 3) When a firm offer of credit is made using a prescreened list; 4) When the loan is secured by residential property of 4 units or less and a stipulated exception notice is provided; 5) When a credit score, and other information as stipulated, is provided to the entire population of persons applying for credit (other than those applying for residential property loans); or 6) When a credit score is not available. The Proposed Rule provides Model Forms for making disclosures in conditions (4), (5) and (6). The Model Forms used in conditions (4) and (5) require disclosure of a credit score and other related information. If the score used by the creditor in his or her decision process is based on a proprietary model, a generic model may be used to generate the score disclosed to the consumer. As with the RBPNs, the notices provided under the exceptions provision of the Proposed Rule must be clear and conspicuous—but although the RBPNs may be provided orally, in writing or electronically, the Proposed Rule would allow only a written form for the exception notices.

We expect a Final Rule to be published by the end of 2008, and therefore an effective date perhaps as early as mid-2009, but certainly no later than the end of 2009.

*As noted above, the public comment period on this Proposed Rule closes on August 18, 2008. We strongly urge all of our credit-granting customers to consider filing a public comment—directly or through their trade associations—for issues of concern to them. For example, we believe that the Final Rule should allow for all notices, including the score disclosures, to be made in electronic form under certain circumstances.*

## **2. Proposed Rules on Credit Card Billing Practices.**

Spurred in part by the “credit crisis” and also driven by long-simmering concerns over credit card billing practices, expressed in both the Senate and the House, on May 2 the Board, together with the National Credit Union Administration (“NCUA”) and the Office of Thrift Supervision (“OTS”), announced a Proposed Rule addressing unfair and deceptive practices. The Proposed Rules, published in *the Federal Register* on May 19, contain provisions very similar to those found in two Congressional bills that have the support of the Financial Services Committee Chairman Barney Frank (D, MA) and 137 other (mostly Democratic) cosponsors.

The Proposed Rules published by the Board, the NCUA and the OTS include these provisions:

- Creditors would be required to provide consumers a reasonable amount of time to make payments before they are considered late;
- As a general rule, for accounts having multiple interest rates for different balances, creditors would be prohibited from maximizing interest charges by applying payments exceeding the minimum to the lowest rate balance first.
- Creditors would no longer be permitted to increase the interest rate on existing account balances at any time for any reason. Instead, card issuers could only apply a higher rate to the existing balance under limited circumstances, such as when a consumer has been delinquent for 30 days. Of course, creditors could still increase the rate on new transactions, and could offer variable rate cards where the rate on existing balances adjusts based on changes to an index.
- Creditors could no longer accrue finance charges using the two-cycle balance computation method; and

- The rules also address a practice associated with some subprime credit cards, by prohibiting the issuance of cards where most of the credit limit is used up before the consumer receives the card, due to security deposits and high fees imposed at account opening.<sup>2</sup>

*The period for public comment on these proposed rules closes on August 4, 2008. As with the RBPN proposed rule, we encourage our customers to consider these rule proposals carefully and to comment, either directly or through appropriate trade associations.*

### **Continuing Examination of Credit Scoring Practices**

In the House of Representatives, the Oversight and Investigations ("O&I") Subcommittee of the Financial Services Committee continued to examine the use of credit reports and credit scores by property and casualty insurers for the purpose of underwriting insurance risk. On May 21<sup>st</sup>, O&I Subcommittee Chairman Melvin L. Watt (D-NC) conducted a hearing entitled "The Impact of Credit-Based Insurance on the Availability and Affordability of Insurance."

Although the hearing was not focused on any particular piece of legislation, Members who have introduced bills which would effectively ban the use of credit reports in connection with property and casualty insurance used the hearing to highlight their efforts. Rep. Maxine Waters (D-CA) and Rep. Luis Gutierrez (D-IL) each spoke in support of their respective bills. Industry representatives, including Stuart Pratt, President of the Consumer Data Industry Association ("CDIA") defended the fairness and accuracy of the practice. Consumer advocates attacked both.

A second hearing on the subject in O&I is being considered for late July. No legislation is expected to move on this issue in the current Congress, but it is expected to be in play and a focus for reform in 2009, in particular if there is a Democratic Congress and Presidency.

### **Canada**

In April 2008, the Nova Scotia government tabled an omnibus Bill containing provisions on consumer reporting. The Bill did not provide much insight into the government's strategy as all the details would be contained in the "yet to be drafted" regulations; we understand that the government's intention was to require that consumer reporting agencies with the ability to provide credit reports to consumers online do so for free every quarter. After consultation with industry, of which TransUnion was part of, the government decided to remove the sections of the Bill dealing with consumer reporting so that greater research and development could be done, as well as further consultation. While TransUnion does not provide consumers online access to credit reports directly, TransUnion continues to work with the government in order to seek a solution which will provide consumer access to this service without increasing costs to the industry. Online reports are currently available to consumers, for a fee, everywhere in Canada from consumer resellers, except in Nova Scotia. The regulators in that province took a different regulatory interpretation in the early 2000's thereby effectively preventing consumer resellers from doing business in that province. TransUnion is working with the government to find a "win-win" solution for both consumers and industry; the optimal solution we proposed is one which replicates the existing framework everywhere else in Canada for maximum efficiency.

### **In the States**

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<sup>2</sup> Board of Governors of the Federal Reserve, Statement of Governor Randall S. Kroszner, May 2, 2008

## **Security Freezing and Identity Theft**

With the addition of recent enactments in Alaska, Georgia, Iowa, Missouri, and Ohio there are now forty-eight states and Puerto Rico with security freeze laws. 2008 continues to be another robust year for security freeze bills, with a total of eighty-eight bills considered in twenty-two states. The freeze issue is largely bipartisan, with a virtual split between Democrat and Republican bill sponsors. There is tremendous pressure to reduce the already low administrative fees we are allowed to charge, reducing the timeframes to place, lift and remove a freeze and increasing the avenues to manage freezes. Despite all of this, we have been successful in creating a mostly uniform landscape of freeze laws across the country.

- ***Alaska Enacts Omnibus Identity Theft Bill***

After years of debate, the Alaska legislature enacted an omnibus identity theft bill in June that focuses on security freezing, security breach notices, and Social Security number restrictions. While the freeze section applies solely to extensions of credit and contains standard exemptions and timeframes for placing and lifting a freeze, it also allows CRAs to charge only \$5 to place, \$2 lift and nothing to remove a freeze, and up to \$5 for replacement PINs, and contains a stringent right of private action. HB 65 is effective July 1, 2009.

- ***California Freeze Fees Under Attack***

AB 372, which passed the Assembly in March, continues to receive favorable attention and is expected to pass through the Senate this summer. The bill, which lowers to \$10 the fees for temporarily lifting a freeze for a specific party, and also reduces to \$5 the fees CRAs may charge consumers ages sixty-five and older, would be effective January 1, 2009.

- ***Georgia Enacts Security Freeze Bill***

In May Georgia enacted a security freeze bill, SB 130, which makes available to consumers an Internet based method of requesting a security freeze and a toll-free telephone number for consumers to use to place a security freeze, temporarily lift a security freeze, or completely remove a security freeze. The law also contains fifteen-minute temporary lift provision, while allowing only \$3 for placing, lifting and removing freeze and up to \$5 to replace PIN, with free placement of freeze for ages sixty-five and older. SB 130 goes into effect August 1, 2008.

- ***Iowa Enacts Security Freeze Bill***

SF 2277, which is as close to a model freeze law as we could have hoped for, was signed into law in April. Effective August 15, 2008 the law applies solely to extensions of credit, contains a fifteen-minute temporary lift requirement, and allows CRAs to charge up to \$10 to place and remove a freeze and to replace a PIN, and up to \$12 to temporarily lift a freeze.

- ***Michigan ID Theft Bills Stalled***

A package of bills aimed at identity theft, including competing security freeze bills in the Senate and House, have been stalled and are not expected to gather much momentum this summer as Michigan grapples with budget, health care, insurance, and housing issues and a vigorous fall election schedule.

- ***Missouri Security Freeze Bill Enacted***

On the last day of this year's legislative session, the House passed the Senate version of HB 1384, a security freeze bill that is also limited to extensions of credit. HB 1384 allows CRAs to charge up to \$5 for the first request by a consumer to place a security freeze, and up to \$10 for any subsequent request to place a security freeze made by the same consumer, and up to \$5 to temporarily lift a freeze. The Governor signed the bill on June 30 and it is effective ninety days afterward.

- ***New York Security Freeze Bills Advance***

SB 5543 continues to receive favorable attention and we expect it to be enacted this year. The bill gives victims of domestic violence freezes at no charge. Given the political dynamics surrounding the issue, it has been hard to oppose this bill, but we have been able to have the bill amended so that CRAs may be reimbursed for freezes from the person convicted of abuse in court.

In addition, SB 8376, a security freeze bill that was introduced on behalf of Governor Paterson, has now been referred to him for his signature. This bill opens up freeze requests to be made by email or a website and also requires CRAs to have a website and a dedicated toll-free number to offer information, to process requests and deliver services related to security freezes. The bill also requires that by Jan. 1, 2010, freezes are to be placed by CRAs within one business day, and institutes a fifteen-minute temporary lift of the freeze.

- ***Ohio Security Freeze / SSN Bill Enacted***

TransUnion was very active in the past few years working on the security freeze issue in Columbus, and as HB 46 was enacted in May, the law reflects an excellent product of compromise and is notable because of a last minute defeat of an offered amendment on the Senate floor that would have prohibited an employer's use of a credit score in making an employment decision. Effective September 1, 2008 allows fees of up to \$5 to place, lift, and remove a freeze and also to replace a PIN.

## **Telephone Records**

- ***Clamping Down on Public Wireless Directories in California***

In an effort to crack down on providers of wireless phone number directories that publish information on the web for public consumption, the California legislature was considering AB 2385, which prohibits entities that have aggregated or generated dialing number information of subscribers of mobile telephony services from releasing to the public the dialing number information for a subscriber without first obtaining the express consent of that subscriber, is quickly advancing in the legislature. While the sponsor has pulled the bill from consideration, we will continue to monitor the subject in case it is brought up in another bill this year.

- ***Massachusetts Wireless Data Bill Sent to Study***

Also under consideration this spring was another wireless number privacy bill, SB 1892. Although we were successful in having the bill sent to study, where the issue will receive consideration in 2009, the bill would have regulated cell phone contracts by prohibiting a wireless telephone service provider from sharing the name and "wireless telephone number information" without express, written customer opt-in. This would have hindered attempts of alternative data reporting, and also would be a problem because it would have limited fraud and authentication services that include wireless phone numbers. TransUnion will be engaged when the issue is taken up next year.

- ***Washington Enacts Wireless Privacy Bill***

Enacted in April and effective June 12, HB 2479, a poorly written and ambiguous law aimed at rogue providers of wireless phone number information, prohibits a directory provider from including any phone number of a Washington state resident in any directory of any form, or selling the contents of any directory database without taking certain steps to determine whether the number at issue is a wireless number. If the number is a wireless phone number, the directory provider shall not include the number in any directory of any form, or sell the contents of any directory database without first obtaining the subscriber's express, opt-in consent. While we will be working on a legislative fix in 2009 and are seeking clarity from state officials on certain pieces of the law, in the meanwhile TransUnion is suppressing all Washington residents' wireless phone numbers on

products and services sourced from TUCS and CIS data, and on GLBA regulated products and services.

### **California Security Breach Liability Bill**

As previously reported, there continues to be much attention paid by the legislature to get the right balance when changing existing data security laws. While we are in agreement with the sponsor of this year's AB 1779 in some areas, and would not oppose a measure that enabled a card issuer to share with its customers where a breach occurred as long as that breach notification did not create additional security risks, we do have concerns with the data security standards and the reimbursement provision that are part of the bill. As Governor Schwarzenegger indicated in his veto message last year, there are multiple reasons why placing a data security standard in law is problematic, such as businesses that "reasonably believed" to have data compromised could be liable for card replacement costs – even when there was no evidence at all that card information was actually breached or ever used fraudulently. We continue to seek a reasonable solution that will work for California consumers, card issuers and all entities that accept payment cards.

### **Alternative Data Reporting**

TransUnion continues to work with legislators in California to craft a bill that would break down barriers for utilities to full-file report to CRAs. Many legislators in California are encouraged by the prospects of alternative data reporting to CRAs, especially the benefits for minorities and the poor. Unfortunately the vehicle for this, AB 588, is being held from further consideration this year because of a lack of consensus on mandatory vs. voluntary reporting, opt-in vs. opt-out models, and other issues. We expect to revisit these issues as the subject of alternative data reporting is addressed in 2009.

### **Background Check Bill DOA**

Several legislators in California have expressed concerns about using financial information for making hiring decisions, and under consideration is AB 2918. This bill would prohibit the potential user of a consumer credit report from obtaining a consumer credit report for employment purposes unless the information is (1) substantially job related and the employer's reasons for the use of the information are disclosed to the consumer in writing or (2) required by law to be disclosed to or obtained by the potential user of the report. While legislators acknowledge it may be helpful if someone is being hired for a financial position, it shouldn't be used for other positions. There has also been talk that with the mortgage crisis, many more people are having difficulty with affording housing and they should not be penalized in hiring decisions for missed payments or foreclosures. While we have been able to hold back the momentum on this bill for 2008, we do expect to see it again next year.

### **Minnesota SSN Bill Enacted – Business as Usual**

After an arduous two-year battle over Social Security numbers in Minnesota, on May 16 Minnesota enacted SF 2390 which we believe creates an exception to the ban on selling SSNs for certain transactions, including those covered by the Fair Credit Reporting Act (FCRA) or the Gramm-Leach-Bliley Act (GLBA). Accordingly, and has been communicated previously, TransUnion is not implementing our previously communicated change to automatically truncate SSNs for Minnesota residents for all customers starting on June 25, 2008. However, we will continue to provide our customers the ability to remove the display of full SSNs from our product and services and for all states. Further, our legal staff is continuing to evaluate the non-FCRA and non-GLBA products and services that may still be impacted for MN.

### **New York Inquiry Consolidation Bill Dies in Committee**

Despite having his bill vetoed last year that would have banned inquiries in scoring, Assemblyman Adam Bradley brought back AB 11086, which would have forced all auto and mortgage scoring models to consolidate inquiries within a defined time period, which a credit scoring company from Minnesota offered as a compromise during the prior session. This one-size-fits-all approach is aimed at allowing consumers' scores to not be affected by shopping around for a house or car. The unintended consequence though is that it would appear to have the effect of making scoring models less predictive and thus less accurate and therefore less fair. A model with less predictive power is less able to correctly predict performance. A model with less predictive power will result in more consumers who deserve credit being denied, or having the cost of the credit unfairly increased. Likewise, it would also likely result in more credit being extended to some consumers who should be denied. If creditors cannot rely upon models to accurately segment risk and price credit accordingly, either all consumers will pay more for credit, or more financial institutions will have to assume more risk, thereby jeopardizing their safety and soundness.

Legislative Updates are written and distributed by the Government Relations department and appear bi-monthly on TransUnion.com and TransUnion.ca.

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