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Mission Creep: A Primer on Use of Credit Reports & Scores for Non-Credit Purposes

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A. SUMMARY

This white paper provides an overview of the most significant uses of credit reports and credit scores for purposes other than credit underwriting. These non-credit uses include:

- Employment
- Rental housing
- Insurance

There are other non-credit uses beyond these three. This white paper briefly discusses two additional uses at Section E: utility ratesetting/deposit-taking and the Department of Homeland Security's now-vacated Public Charge Rule.

The Fair Credit Reporting Act restricts the use of credit reports to those entities with a "permissible purpose" to obtain this information, but those purposes can be fairly broad, as discussed in Appendix A.

B. BACKGROUND ON CREDIT REPORTS AND CREDIT SCORES

The common everyday understanding of "credit report" is a record from one of the Big Three credit bureaus – Equifax, Experian, TransUnion – documenting how a consumer has borrowed and repaid certain debts. A credit report contains the history and current status of many (but not all)[1] of a consumer's credit accounts, including payment history, the date the account was opened, the type of account (mortgage, credit card, student loan, auto loan, and others), credit limit, and the current balance.

A credit score is a number generated by an algorithm or computer model analyzing the information in a credit report. About 90% of the credit scores used by creditors are issued using a scoring algorithm, or computer software program, developed by the company called FICO.[2] FICO's credit scores range from 350 to 900. The Consumer Financial Protection Bureau (CFPB) has explained that credit scores are specifically designed to measure the likelihood that a borrower will become 90 days late on a credit obligation.[3] They are not designed for other purposes.

The main law that governs credit reports and credit scores is the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681y. The FCRA governs all "consumer reports" and "consumer reporting agencies," including companies that issue credit reports, employment background checks, tenant screening reports, and more. The FCRA has provisions that govern accuracy, dispute investigations, consumer's access to their own reports, limitations on dissemination to those with a permissible purpose, and notices when a consumer report is used to take an action that is adverse to the interests of the consumer. Appendix A includes an outline of the key requirements of the FCRA.

The credit reporting system and credit scores are often criticized over several issues, including that they have too many inaccuracies, they are arbitrary, they produce discriminatory results based on race and income, and they are not relevant for certain purposes, such as determining a person's ability to do a job or to pay rent.

First, with respect to inaccuracies, the definitive study by the Federal Trade Commission (FTC) found that 20% of consumers had verified errors in their reports, with 5% having an error so serious that it would cause them to be denied or pay more for credit.[4] While 5% might not seem terrible in the abstract, that translates to over 10 million consumers with serious errors in their credit reports. The CFPB received 700,000 complaints against Big Three CRAs between January 2020 and September 2021, constituting more than 50% of complaints received by the CFPB in 2020 and more than 60% in 2021.[5] The majority of those complaints involved "incorrect information on your report."

Second, there are deep and serious disparities in credit scores by race. An Urban Institute report analyzing 2016 Freddie Mac data found that over 50% of white households had FICO score above 700, compared with only 20.6% of Black households.[6] A 2012 study by the CFPB found that the median FICO score for consumers in majority-minority zip codes was in the 34th percentile, while it was in the 52nd percentile for zip codes with a low minority population.[7] A 2007 Federal Reserve Board (FRB) report to Congress noted that in one of the two models used by the FRB, the mean score of Blacks was approximately half that of white non-Hispanics (54.0 out of 100 points for white non-Hispanics versus 25.6 for Blacks), with Hispanics faring only slightly better (38.2).[8] There have been several other studies with similar results.[9]

These racial disparities are likely due to the racial wealth gap and the effects of historical and current day discrimination.[10] Even when factors such as income, age, and marital status are taken into account, considerable gaps remain. For example, the 2007 FRB report found that the difference in mean credit scores between non-Hispanic whites and blacks was 28.3 points (54.0 minus 25.6); when marital status and age were considered, it was 22.8 points, and when estimated income was considered, it was still 18.7 points.[11]

There are also disparities in credit scores by income. The 2012 CFPB report found that the median FICO score in low- and moderate-income (LMI) areas was in the 34th percentile, while the median FICO score in non-LMI areas was 52th percentile, similar the disparities by race.[12] The 2007 FRB study found that the mean score of a low-income Census tract was 32.5 out of 100, and that it was 57.9 for a high-income Census tract, a difference of 25.4 points.[13] However, a 2007 FTC study found that, while credit scores tend to increase as income increases, the results were much weaker than for race.[14] A 2018 study by Federal Reserve researchers indicated only a moderate correlation between income and credit scores."[15]

Supplemental Information

- CFPB, Credit Reports and Scores (visited November 26, 2021).
- FTC, Understanding Your Credit (January 2020).
- FTC, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (December 2012).
- Chi Chi Wu, National Consumer Law Center (NCLC), Essentials About Credit Reporting: Consumer Debt Advice from NCLC, Sept. 6, 2018.
- Chi Chi Wu, NCLC, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination (May 2016).

C. EMPLOYMENT USE OF CREDIT REPORTS

One of the most controversial non-credit uses of credit reports is for employment screening purposes. Nearly half of employers consider credit reports when screening workers: 31% use them for at least some of their positions, and 16% use them for all positions, for a total of 47%.[16] This is down from a high of 60% in 2010.[17] However, it represents a significant increase historically; for example in 1996, only 19% of employers used credit reports.[18]

Employer groups such as the U.S. Chamber of Commerce and the Society for Human Resource Management (SHRM) support the use of credit reports, arguing that the information in a report is "an indicator of a person's judgment and potential risk to an organization, especially for certain positions involving finances and accounting."[19] Financial institutions are required to conduct a criminal history check of job applicants and often obtain a credit report as part of that screening.[20] A sociological study found that employers often analyze credit reporting data by using a process of moral storytelling, inferring events that led to delinquent debt and testing to see if candidates can offer morally redeeming accounts for negative information.[21]

Consumer advocates argue that the use of credit reports is not justified because there is no relationship between a worker's credit history and their moral character, nor is there any evidence that it has any bearing on a worker's ability to do a job or propensity for negative behavior. In fact, the Legislative Director for TransUnion once said, *"…we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."*[22] A scientific study by two academic psychologists found no relationship between credit reports and employee performance or employee dismissals for bad conduct, even at a financial services corporation.[23] The sociological study discussed in the paragraph above noted that "existing research provides few convincing correlations between personal financial data and employee behavior" (summarizing studies).[24]

Furthermore, the use of credit reports in employment can have a vicious cycle effect –a worker who loses their job may fall behind on paying their bills due to lack of income. With the use of credit reports as a screening tool, the worker is shut out of a substantial number of jobs because they fell behind on their bills. And as the COVID-19 pandemic has shown, many consumers experience financial difficulties through no fault of their own, but because of circumstances beyond their control, such as illness or mass unemployment in an entire sector (e.g., hospitality).

Given the striking racial disparities discussed above, the use of credit reports for employment is likely to have a disparate impact on Black and Latinx consumers. While the industry claims it does not use credit scores, but only credit reports, the former is based on a translation of the latter – a low score means there are negative items on a credit report that could prevent a worker from obtaining employment.

Supplemental materials

- Fact Sheet: An Act Regulating the Use of Credit Reports by Employers, MA H. 2019/S. 1154, the Fair Chance in Employment Act, April 2021.
- Barbara Kiviat, The art of deciding with data: evidence from how employers translate credit reports into hiring decisions, Socio-Economic Review, Volume 17, Issue 2, April 2019, pp 283–309.

- Amy Traub & Sean McElwee, Demos, Bad Credit Shouldn't Block Employment: How to Make State Bans on Employment Credit Checks More Effective, Feb. 25, 2016.
- Amy Traub & Sean McElwee, Demos, Discredited: How Employment Credit Checks Keep Qualified Workers Out of a Job, Feb. 3, 2014.

D. USE OF CREDIT REPORTS AND SCORES FOR TENANT SCREENING PURPOSES

About 90% of landlords run credit checks on all prospective tenants.[25] Landlords often automatically reject prospective tenants with low credit scores[26] as well as those who are alleged to owe money to former landlords.[27] Experian claims that "too many credit cards, loans, medical bills or unpaid taxes" are also "warning signs" to landlords, as is a "spotty payment history."[28] However, there are no quantitative or scientific studies showing that credit reports and scores accurately predict a successful tenancy. Landlords appear to be using credit checks as a result of successful marketing by the credit bureaus or untested assumptions about predictiveness.

Tenant Screening Reports

Most landlords use specialized tenant screening reports, typically purchased from companies that focus on tenant screening, to evaluate prospective tenants. One component of these tenant screening reports is a credit report, which comes from one of the Big Three credit bureaus. Tenant screening reports also include other information, such as income information, employment history, previous address history, rental history information including eviction actions, criminal history, sex offender registry information, and national terrorist watch list information.

Consumer advocates argue landlords should not rely on credit reports and scores for many reasons. First, credit reports and scores are not intended to gauge whether someone will be a good tenant. Credit scores are designed to predict the likelihood that a borrower will become 90 days late on a credit obligation—not rent, which is a different sort of obligation.[29] What's more, credit reports tell a story about past ability to pay in particular instances, not current ability to pay rent, which is a high-priority bill that families pay before all others.[30] A prospective tenant could show their current ability to pay with paystubs, tax returns, W-2s, and bank statements.

Second, as discussed above, credit reports are riddled with errors, which makes them an unreliable tool whether for housing providers or others. Third, as with the use of credit reports for employment, the use of credit reports for rental housing likely has a disparate impact on Black and Latinx tenants.

Finally, landlords' use of credit reports and scores to determine whether to accept a prospective tenant can lead to dire, long-term consequences for tenants. Tenants may be forced to turn to predatory landlords who charge above-market rates for low-quality housing (such as extended stay motels), trapping them in a spiral of debt.[31] They may also face homelessness.[32]

Supplemental Materials

- Fact Sheet: An Act Relative to the Use of Credit Reporting in Housing, MA H. 1429/S. 894, the Fair Chance in Housing Act (April 2021).
- Philadelphia Commission on Human Relations, Fair Housing Commission, Renters'

Access Act: Tenant Screening Guidelines (October 2021).

- Mya Frazier, *When No Landlord Will Rent to You, Where Do You Go?*, N.Y. Times Magazine (Oct. 1, 2021).
- NCLC, Salt in the Wound: How Eviction Records and Back Rent Haunt Tenant Screening Reports and Credit Scores (2020).

E. INSURANCE COMPANIES USE OF CREDIT-BASED INSURANCE SCORES

Since the early 1990s, almost all auto and homeowner's insurance companies have used credit scores to determine whether to approve a policy (underwriting) and/or how much the premiums for that policy will cost (ratesetting). These credit scores are not the same credit scores used for credit approvals; instead, they are calculated using the same factors from a consumer's credit history but the formulas stress different factors. FICO estimates approximately 95% of auto insurers and 85% of homeowners' insurers use credit-based insurance scores in states where it is a legally allowed.[33]

Insurance companies base their justification for using credit scores on studies that have found a correlation between credit scores and insurance losses (*i.e.*, injury or damages resulting in an insurance claim). One of the earliest studies (June 2003) commissioned by the insurance industry found that individuals with the lowest credit-based insurance scores incurred 33% higher losses than average, while the highest scorers incurred 19% lower losses.[34] A 2007 study conducted by the FTC found that "credit-based insurance scores are effective predictors of risk under automobile policies. They are predictive of the number of claims consumers file and the total cost of those claims."[35]

A more recent study found that the average loss per policy is about 65 percent more for individuals in the bottom 10 percent in terms of lowest credit scores than for individuals in the top 10 percent with the highest credit scores.[36] The authors of this study speculated that the correlation between credit scores and insurance losses could be explained by "biological and chemical correlates of risk taking that helps explain why knowing risk-taking behavior in one realm (*e.g.*, risky financial behavior and poor credit history) transits to predicting risk-taking behavior in other realms (*e.g.*, automobile insurance incurred losses)."[37] Some of the biological and chemical correlates posited by the authors as indicative of risk-taking, and thus poor credit scores, are testosterone, dopamine, and being a "sensation seeker."[38]

Consumer advocates criticize the use of credit scores as irrational and harmful to consumers.[39] They argue that correlation does not mean causation, and there is no logical explanation as to why a person with a lower credit score is supposedly more likely to cause losses to insurers. The industry's theory that consumers with lower scores are biologically wired to be bigger risk-takers and thus likelier to have accidents is refuted by the recent experience of the COVID-19 pandemic. In the pandemic, we witnessed how consumers' financial situations (and thus their credit scores) suffered due to circumstances entirely outside of their control, such as whether they or a family member became sick with COVID-19, whether the consumer was employed in a hard-hit industry (*e.g*. hospitality), or even whether they lived in a state in which it was harder versus easier to get their unemployment benefits approved.

Advocates argue that the reason for the correlation between credit scores and losses might be that credit scores are proxies for factors that our society has decided should not be used for insurance, such as race or income. The 2007 FTC study found that credit-based insurance scores had a slight effect in serving as a statistical proxy (*i.e.*, stand-in) for race and ethnicity, although they were an effective predictor of risk.[40]

Credit-based insurance scores can result in significantly higher insurance premiums for consumers with less than stellar credit histories. A 2007 study by the Center for Economic Justice and NCLC estimates that insurance credit scores could cost consumers as much as $67 billion per year.[41] A 2013 study from the Consumer Federation of America (CFA) of data from Quadrant Information Services revealed an average difference of 39% for an Allstate policy for consumers between the top and bottom credit score tiers, and a whopping 127% difference for a State Farm policy between the two credit tiers.[42] A CFA analysis in 2021 found that that good drivers in Washington State face a penalty of 35% if they had "Fair" credit histories rather than "Excellent" credit, and those with "Poor" credit pay 79% more on average.[43]

The 2007 FTC study discussed above found that Black and Latinx consumers are substantially overrepresented among consumers with the lowest credit-based insurance scores and substantially underrepresented among those with the highest scores. A number of state insurance commissions have conducted studies on the relationship between credit scores and race, as well as gender, age, and income. Several studies showed significant racial disparities similar to those found in the studies of credit scores used for credit underwriting.

For example, in 2004, the Missouri Department of Insurance found strong disparities between credit-based insurance scores and race.[44] The average consumer in an "all minority" neighborhood had a credit score that fell into the 18.4th percentile, while the average consumer in a "no minority" neighborhood had a credit score that fell into the 57.3th percentile – a difference of 38.9 percentile points. The average consumer in the lowest income neighborhoods had a credit score 12.8 percentile points lower than residents in the wealthiest communities.

The Texas Department of Insurance issued a study in 2004 with similar findings.[45] The Texas study found African Americans constituted 33% of the consumers with the worst scores, but only 2% of the consumers with the best scores. Latinx consumers constituted 28% of the consumers with the worst scores, but only 5% of the consumers with the best scores. The Texas study also found disparities by income, though they were less dramatic that those for race.

Supplemental materials

- Nat'l Ass'n of Insurance Comm'r, Credit-Based Insurance Scores, May 7, 2021.
- Stephen Brobeck, J. Robert Hunter, Tom Feltner, Consumer Federation of America, The Use of Credit Scores by Auto Insurers: Adverse Impacts on Low- and Moderate-Income Drivers, December 2013.
- FTC, Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance (July 2007).
- Chi Chi Wu & Birny Birnbaum, National Consumer Law Center & Ctr. for Economic Justice, Credit Scoring and Insurance: Costing Consumers Billions and Perpetuating the Economic Racial Divide (June 2007).

F. OTHER NON-CREDIT USES OF CREDIT REPORTS OR SCORES

Employment, tenant screening, and insurance are the three most significant non-credit uses of credit reports or scores, but they are by no means the only ones. The FCRA permits use of credit reports and scores for any "permissible purpose," which encompasses a broad range of uses as discussed in Appendix A. Thus, one can imagine a host of other problematic uses of credit reports and scores for non-credit purposes. Two examples are briefly discussed below.

1. Utility Deposits or Ratesetting

Some gas, water, or electric utilities use credit scores to determine whether to require a security deposit from a customer.[46] Like other non-credit uses of credit reports and scores, their use by utilities not been without criticism. Historically, because they are natural monopolies, utilities have been under an obligation to serve any member of the public who is willing to pay for the service, and they have been prohibited from refusing to provide service because of some collateral matter unrelated to utility service.[47] An argument could be made that denial of service or a decision to seek or increase the amount of a security deposit based solely on a credit score is a collateral matter.

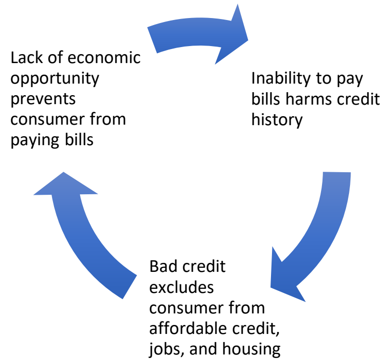
Like rent, consumers tend to pay their utility bills before paying other obligation such as credit cards.[48] As a result, negative information from a credit report based on non-utility transactions does not necessarily provide useful information on a customer's likelihood of paying a home utility bill.

2. Trump Administration's Public Charge Rule

In August 2019, the Department of Homeland Security (DHS) issued a regulation that greatly expanded the factors to be considered in determining whether an immigrant would be a potential "public charge" and thus should be denied a visa or green card.[49] Among the many controversial provisions of this regulation, it required DHS to consider an immigrant's credit score and credit report. Advocates had objected to this particular provision based on many of the arguments discussed above – that credit reports and scores are inappropriate tools for this purpose; that they have inaccuracy rates too high for such a critical purpose; and that they would have a disparate impact on immigrants of color.[50] DHS subsequently vacated the public charge rule in March 2021.[51]

G. CONCLUSION

Credit reports and scores provide a stark reflection of the racial and economic disparities endemic in our society. They actually could work well as ***measurement*** *tools, i.e.*, they are good analytical tools to measure how racial and economic disparities translate into impact on consumer's finances. The problem, however, is that they are used as ***decisionmaking*** tools without consideration of these disparities. Using tools that "bake in" racial and economic disparities results in perpetuating and reinforcing these same disparities, creating a vicious cycle.



For credit decision-making, it's a thorny and difficult task to reduce the racial and economic disparities from the use of credit scores, since they are a main tool used for underwriting.[52] But it's a much simpler matter to avoid the use of credit scores and reports for non-credit purposes. There's no evidence that credit reports or scores are useful predictive tools for employment and tenant screening. And while there may be a correlation between credit scores and insurance losses, the underlying factors creating that correlation could be the very factors that society has decided should not factor into insurance decisions, *i.e*., income and race.

Thus, consumer advocates have called for, and legislators have introduced, various bills to ban or severely restrict the use of credit reports or scores in employment, tenant screening, and insurance. The bills supported by consumer advocates have strictly limited exceptions. For example, for employment usage, they would only permit use of credit reports for national security clearance or when required by another federal or state law. Strong bills with very narrow exceptions are necessary to prevent the vicious cycle described above, and break the cycle of inequality.

H. ENDNOTES

[1] Furnishing information to credit bureaus is generally voluntary, and not all lenders choose to report. For example, many "Buy Now Pay Later" lenders do not report, although that may be changing. Some types of credit, especially high cost credit such as payday loans, are not included in credit reports.

[2] FICO, Frequently Asked Questions about FICO Scores 2013–2018, at 9, ("FICO® Scores are used in over 90% of U.S. credit lending decisions," citing Mercator Advisory Group, Analysis, 2018).

[3] CFPB, Data Point: Credit Invisibles 7, May 2015, (most credit scoring models built to predict likelihood relative to other borrowers that consumer will become 90 or more days past due in the following two years).

[4] FTC, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (December 2012).

[5] CFPB, Annual report of credit and consumer reporting complaints: An analysis of complaint responses by Equifax, Experian, and TransUnion, January 2022.

[6] Jung Hyun Choi, et al., Urban Institute, Explaining the Black-White Homeownership Gap: A Closer Look at Disparities across Local Markets, November 2019.

[7] CFPB, Analysis of Differences Between Consumer- and Creditor-Purchased Credit Scores, at 18, September 2012.

[8] FRB, Report to Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit 80-81 (Aug. 2007).

[9] Chi Chi Wu, NCLC, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination (May 2016).

[10] *Id.* Current discriminatory practices also lead to income gaps between different races. *Id.*

[11] FRB, Report to Congress, *supra* note 8, at 83.

[12] CFPB, Analysis of Differences, *supra* note 7.

[13] FRB, Report to Congress, *supra* note 8.

[14] FTC, Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance 3 (July 2007).

[15] Rachael Beer, Felicia Ionescu, and Geng Li, Are Income and Credit Scores Highly Correlated?, FEDS Notes, Aug. 13, 2018.

[16] National Association of Professional Background Screeners, How Human Resource Professionals View the Use and Effectiveness of Background Screening Methods, 2018, 10.

[17] Society of Human Resources Management, Background Checking—The Use of Credit Background Checks in Hiring Decisions, July 19, 2012.

[18] Matt Fellowes, Brookings Inst., Credit Scores, Reports, and Getting Ahead in America, 17, n.3(B) (May 2006).

[19] Roy Maurer, Society of Human Resources Management, House Approves Ban on Most Employment Credit Checks, Jan. 30, 2020.

[20] A criminal background check is required by Section 19 of the Federal Deposit Insurance Act. However, a credit check is not mandatory, although FDIC Guidance suggests it in some cases. *See* FDIC, Applications Procedures Manual: Section 19 of the FDI Act, 2019, at 1.5-4 (“Consumer reports may be requested to more thoroughly evaluate an individual’s financial condition and ability to participate in the affairs of the financial institution”) and 17.6 (“a credit bureau report will only be obtained when there is a need to confirm information relevant to the application”).

[21] Barbara Kiviat, The art of deciding with data: evidence from how employers translate credit reports into hiring decisions, Socio-Economic Review, Volume 17, Issue 2, April 2019, pp 283–309.

[22] Andrew Martin, As a Hiring Filter, Credit Checks Draw Questions, New York Times, April 9, 2010.

[23] Laura Koppes Bryan & Jerry K. Palmer, Do job applicant credit histories predict performance appraisal ratings or termination decisions? The Psychologist-Manager Journal, 15(2) (2o12), 106–127.

[24] Kiviat, *supra* note 21.

[25] TransUnion SmartMove, *TransUnion Independent Landlord Survey Insights* (Aug. 7, 2017).

[26] According to Experian, a credit score of 620 is the minimum necessary to qualify for an apartment. Brian J. Roberts, *How to Get an Apartment with Bad Credit* (Oct. 22, 2019).

[27] NCLC, Salt in the Wound: How Eviction Records and Back Rent Haunt Tenant Screening Reports and Credit Scores (2020).

[28] Roberts, *supra* note 26 (“Your payment history, rental history, debt and bankruptcy status are all important aspects of your consumer profile.”); *see also* Andrew Khouri, *Depleted savings, ruined credit: What happens when all the rent comes due?*, L.A. Times (Feb. 2, 2021).

[29] Credit scores and reports are an especially poor predictor of tenant performance in the subsidized housing context. Letter from NCLC., Nat’l Hous. Law Project, Nat’l Low Income Hous. Coal., & Ctr. For Survivor Agency & Justice to Sec’y. Marcia L. Fudge, U.S. Dept. of Hous. & Urban Dev. (Nov. 3, 2021).

[30] Matthew Desmond, The Rent Eats First, Even During a Pandemic, N.Y. Times, Aug. 29, 2020.

[31] Mya Frazier, *When No Landlord Will Rent to You, Where Do You Go?*, N.Y. Times Magazine (Oct. 1, 2021).

[32] See id.

[33] Nat’l Ass’n of Insurance Comm’r, Credit-Based Insurance Scores, May 7, 2021.

[34] Michael J. Miller and Richard A. Smith, *The Relationship of Credit-Based Insurance Scores to Private Passenger Automobile Insurance Loss Propensity*, EPIC Actuaries (June 2003).

[35] FTC, Credit-Based Insurance Scores, *supra* note 14, at 3.

[36] Linda L. Golden, et al., Empirical Evidence on the Use of Credit Scoring for Predicting Insurance Losses with Psychosocial and Biochemical Explanations, North American Actuarial Journal, 20:3, 233-251 (2016).

[37] *Id.* at 233.

[38] *Id*.

[39] Stephen Brobeck, J. Robert Hunter, Tom Feltner, Consumer Federation of America, The Use of Credit Scores by Auto Insurers: Adverse Impacts on Low- and Moderate-Income Drivers, December 2013.

[40] FTC, Credit-Based Insurance Scores, *supra* note 14, at 3.

[41] Chi Chi Wu & Birny Birnbaum, NCLC & Ctr. for Economic Justice, Credit Scoring and Insurance: Costing Consumers Billions and Perpetuating the Economic Racial Divide (June 2007).

[42] Brobeck, et al., *supra* note 39.

[43] Doug Heller, Consumer Federation of America, Insurance Companies Charge 79% More To Safe Drivers in Washington State Due to Low Credit Scores; State Farm Nearly Triples Premium for Good Drivers with Credit Problems, Jan. 12, 2021.

[44] Brent Kabler, *Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri*, Missouri Department of Insurance – Statistics Section, January 2004).

[45] Texas Department of Insurance, *Report to the 79th Legislature - Use of Credit Information by Insurers in Texas*, Dec. 30, 2004.

[46] Laura Burrows, Experian, Utilities Q&A Perspective Series: To Deposit or Not To Deposit? That Is the Question, Nov. 18, 2020.

[47] NCLC, Access to Utility Service (6th ed. 2018), §§ 2.1.2, 2.2.1.

[48] *Id.* at § 5.2.4.1.

[49] 84 Fed. Reg. 41292 (Aug. 14, 2019).

[50] NCLC, Comments of 50 Organizations on DHS Notice of Proposed Rulemaking on Public Charge Determinations (DHS Docket No. USCIS–2010–0012), Dec. 10, 2018.

[51] 86 Fed. Reg. 14221 (Mar. 15, 2021).

[52] See Chi Chi Wu, Reparations, Race, and Reputation in Credit: Rethinking the Relationship Between Credit Scores and Reports with Black Communities, www.medium.com, Aug. 7, 2020.

APPENDIX: LAWS GOVERNING EMPLOYMENT, TENANT SCREENING, AND INSURANCE USE OF CREDIT REPORTS AND SCORES

1. General

Fair Credit Reporting Act (FCRA)

The main law that governs credit reports and credit scores is the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681y. The FCRA governs "consumer reports" and "consumer reporting agencies (CRAs)."[1] Credit reports are only one type of a consumer report – other varieties including background check reports used by employers to screen workers, and tenant screening reports, discussed in Section C of the main memo. Equifax, Experian, and TransUnion are a special type of CRA called a "nationwide" CRA. The entities that supply information for credit reports are mainly creditors and debt collectors, referred to as "furnishers" by Regulation V, which is the FCRA's implementing regulation.

The key protections of the FCRA are based on basic principles of fair information practices. Some of the most critical are:

- *The right to have information be accurate:* The FCRA requires CRAs to have "reasonable procedures for maximum possible accuracy."[2]
- *The right to correct errors:* Consumers have the right to dispute inaccurate information and get it corrected.[3]
- *The right to access information about ourselves*: The FCRA gives consumers the right to disclosure of information about themselves in a CRA's files.[4]
- *The right to know when information is used against us*: Consumers receive an "adverse action" notices when information in the form of a consumer report is used to deny them credit, employment, insurance, rental housing, and more.[5] The adverse action must provide certain information, including contact information for the CRA that supplied the report and information regarding the consumer's right to dispute inaccurate information.
- *Privacy protections to prevent inappropriate dissemination and use*: Only users with a "permissible purpose" can access consumer reports. However, the term "permissible purpose," encompasses a broad range of uses. In addition to credit purposes, these can include employment, insurance underwriting, eligibility for a government benefit or license, setting a child support award, pursuant to a court order, as an investor in a credit portfolio, or the broad catch-all of a "legitimate business need for the information—(i) in connection with a business transaction that is initiated by the consumer." Furthermore, any entity can use a credit report or score if they obtain the consumer's written permission.[6]

2. Employment

Federal

The FCRA allows the use of consumer reports for employment purposes,[7] and does not distinguish between credit reports and specialized employment background reports in this respect. The Act does have special procedural protections whenever any consumer report (whether a credit report or a specialized background check report) is used for employment purposes. In addition to the adverse action notice described in Section 1, employers must provide a separate notice that includes an actual copy of the report that they used.[8] Furthermore, there could be an argument that the use of credit reports implicates employment discrimination laws, such as Title VII of the Civil Rights Act.

State/Municipal

Eleven states and three major cities restrict the use of credit reports for employment.

- The states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington States.[9]
- The cities are Chicago, Washington, D.C. and New York.[10]

Each of these laws contain various exceptions. Weaker laws have more exceptions, including broad exceptions for employees handling cash or goods (which could include cashiers), for employees with access to financial information, and even simply if a credit check is "substantially job related." New York City's law is considered the strongest law, and even that has a number of less-than-ideal exceptions, such as for law enforcement positions (which could serve as a barrier for increasing the number of minority officers); executive-level jobs with control over finances, computer security, or trade secrets; and positions where bonding or security clearance is required by law. There is a very good explanation of all the state laws and their exceptions, including how they are based on questionable assumptions, in the Demos report: Bad Credit Shouldn't Block Employment: How to Make State Bans on Employment Credit Checks More Effective, Feb. 25, 2016.

3. Tenant Screening

Federal

The FCRA does not restrict the use of credit reports for rental housing purposes.[11] Landlords are required to provide the adverse action notice described in Section 1 to the prospective tenant if they deny a rental application based on a credit report.[12] These protections are weaker than in the employment context, as discussed in Section 2. In addition to FCRA protections, there could be an argument that the use of credit reports implicates housing discrimination laws, such as the Fair Housing Act.

State/Municipal

At least three jurisdictions have a law that governs the use of credit reports or scores in tenant screening. Philadelphia prohibits landlords from maintaining a policy of automatically declining to rent to a prospective tenant solely because their credit score falls below a specific numerical threshold. Washington, DC and Minneapolis both prohibit rejection of an application based solely on their credit score (or lack thereof), though they permit the use of information in a credit report that is "directly relevant" to fitness as a tenant.[13]

To our knowledge, no state or local jurisdiction has banned or largely restricted the use of credit reports and scores for rental housing purposes. A bill has been introduced in Massachusetts that would prohibit the practice, with the exception of when federal or state requirement mandates it.[14]

4. Insurance

Federal

The FCRA allows the use of consumer reports for insurance purposes,[15] and does not distinguish between credit reports and other types of consumer reports in this respect. Insurance companies are required to provide the adverse action notice described in Section 1 to the consumer if they decline coverage, cancel a policy, or refuse to renew a policy based on a credit score.[16] They must also provide an adverse action notice if they increase a rate above what they charge if no credit score is considered, *i.e.*, a "neutral" rate.[17]

State/Municipal

Most states have passed legislation regulating the use of credit-based insurance scores[18] that is based on model legislation written by the National Conference of Insurance Legislators (NCOIL) and supported by the insurance industry.[19] The NCOIL model law explicitly permits the use of credit-based insurance scores and includes only limited protections such as:

- A prohibition that credit scores cannot be used as the *sole* basis for increasing rates or denying, cancelling, or not renewing policies.
- Prohibitions on the use of certain factors, such as medical collection items and lack of a credit card.
- A requirement that insurance companies to *consider* making exceptions for "extraordinary life circumstances" such as serious illness or job loss over three months.
- Provision of certain notices to the consumer about the use of credit-based insurance scores.

A handful of states, including California,[20] Hawaii,[21] Maryland,[22] and Massachusetts,[23] ban or significantly limit insurance companies' use of credit scores for either auto or homeowner's insurance. In March 2021, the Washington state insurance commissioner issued a three-year ban, in response to the COVID-19 pandemic, prohibiting insurance companies from using credit scores to set policy rates on auto, homeowners, and renter's insurance.[24]

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[1] 15 U.S.C. § 1681a(d), (f).

[2] 15 U.S.C. § 1681e(b).

[3] 15 U.S.C. § 1681i(a).

[4] 15 U.S.C. § 1681g.

[5] 15 U.S.C. § 1681m(a).

[6] 15 U.S.C. § 1681b(a)

[7] 15 U.S.C. § 1681b(a)(3)(B). *See* NCLC., *Fair Credit Reporting §7.2.4* (9th ed. 2017).

[8] NCLC, Fair Credit Reporting, § 8.11.3.1 (9th ed. 2017), (discussing FCRA requirement that employers provide notices before taking any adverse employment action whenever that decision is based, even just in part, on a consumer report).

[9] Cal. Civ. Code § 1785.20.5; Cal. Labor Code § 1024.5 et seq.; Colo. Rev. Stat. § 8-2-126; Conn. Gen. Stat. § 31-51tt; Del. Code Ann. tit. 19, § 711 (limited to public employers); Haw. Rev. Stat. §§ 378-2(a)(8), 378-2.7; 820 Ill. Comp. Stat. §§ 70/1 to 70/30; Md. Code Ann., Labor & Empl. Law § 3-711; Nev. Rev. Stat. §§ 613.520 to 613.600; Or. Rev. Stat. § 659A.320; Vt. Stat. Ann. tit. 21, § 495 ; Wash. Rev. Code § 19.182.020.

[10] Chicago Municipal Code Chapter 2-160; D.C. Official Code § 2-1401.01, et seq.; N.Y.C. Admin. Code §§ 8-102(29), 8-107(9)(d), 8-107(24).

[11] *See* NCLC., *Fair Credit Reporting* §§ 2.3.6.3.3, 7.2.3.1.2 (9th ed. 2017), ("[I]t is unclear whether a residential lease is a credit or a business transaction. Under either view, the report of a tenant screening agency is a consumer report and a landlord has a permissible purpose to review the report in deciding whether to accept a rental application.").

[12] NCLC., *Fair Credit Reporting* §§ 8.5.2.1, 8.5.4.1.1, 8.5.4.6.3 (9th ed. 2017).

[13] Phila., Pa., Code § 9-810(2) (2021); Eviction Record Sealing Authority and Fairness in Renting Amendment Act of 2022, D.C. Law 24–115; Minneapolis, Minn., Code of Ordinances, Chapter 244.2030 (2022).

[14] H. 1429, 192nd Gen. Ct. (Mass. 2021); S. 894 192nd Gen. Ct. (Mass. 2021).

[15] 15 U.S.C. § 1681b(a)(3)(C). *See* NCLC., *Fair Credit Reporting* §7.2.5 (9th ed. 2017).

[16] NCLC, *Fair Credit Reporting* § 8.5.4.4 (9th ed. 2017).

[17] *Id.*

[18] A summary of state insurance laws governing use of credit information is included in NCLC, *Fair Credit Reporting* Appx. H (9th ed. 2017).

[19] Nat'l Conference of Ins. Legislators, Model Act Regarding Use of Credit Information in Personal Insurance (Nov. 2002, amended July 2009, re-adopted Nov. 2015). *See also* Nat'l Conference of State Legislatures, Use of Credit Information in Insurance 2016 Legislation (Apr. 2016).

[20] Proposition 103. *See* Sarah Breitenbach, Some States Take Aim at 'Discriminatory' Auto Insurance Pricing, Pew Stateline, Aug. 28, 2015.

[21] Haw. Rev. Stat. § 431:10C-207.

[22] Md. Code Ann., Ins. § 27-50.

[23] Mass. Gen. Laws ch. 175, § 4E.

[24] Press Release, Kreidler issues emergency rule banning credit scoring for three years, Office of the WA State Ins. Comm'r, Mar. 23, 2021.

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