



# FCRA Developments

Risk-Based Pricing Notices and Firm Offers

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MBA's Regulatory Compliance Conference

September 6-8, 2006 Washington, DC



# FCRA Developments: Risk-Based Pricing Notices and Firm Offers

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# Risk Based Pricing

- FACTA requires a new “risk based pricing” notice
  - Must be provided when a credit report affects pricing or other terms
  - Adverse action rules still apply

# Risk Based Pricing

- Many issues will be decided in joint regulations to be issued by FTC and FRB. Major issues include:
  - Which consumers get the notice?
  - When is notice delivered?



# Risk Based Pricing

- Who gets the notice?
  - Consumer must receive notice if:
    - Offer is on terms that are “materially less favorable” than the best offered to others, *and*
    - Lender used a consumer report in connection with the offer

# Risk Based Pricing

- When is the notice delivered?
  - FACTA generally allows delivery at application
  - But also allows FTC & FRB to specify later time, after rates & terms set
  - Industry seeking notice to all consumers at application

# Risk Based Pricing

- When is the notice delivered (cont'd)?
  - Up-front notices from mortgage lenders could be combined with credit-score notice
  - FTC and FRB being urged to consider generic “up-front” option by MBA and others

# Firm Offer

- To access a credit report under FCRA in a pre-screened credit solicitation, transaction must consist of “firm offer” of credit



# Firm Offer

- Courts have interpreted the “firm offer” requirement in a way that:
  - Makes it difficult to use prescreening for complicated products like mortgages
  - Has generated over 140 class-action cases nationwide

# Firm Offer

- Under the definition of “firm offer” in FCRA:
  - Lender must establish credit criteria in advance
  - Must generally honor offer for all consumers who respond to the solicitation

# Firm Offer

- But definition of “firm offer” has some exceptions. Lender may still:
  - Verify that the consumer continues to meet prescreening criteria furnished to the credit bureau
  - Consider additional criteria from the consumer’s application
    - Income
    - LTV
    - Employment status and history
  - Require adequate collateral
    - If requirements disclosed to consumer in the solicitation letter



# Firm Offer

- Courts have added to the “firm offer” requirement
- 2004 *Cole* case in U.S. Court of Appeals for the Seventh Circuit held that a “firm offer”:
  - Must involve a “legitimate credit product” to be a valid firm offer
  - Must have value to a rational consumer
- 2006 Seventh Circuit *Murray v. GMAC Mortgage Corp.* case:
  - Only the “four corners of the offer” must be examined to determine if offer has economic value

# Firm Offer

- Several district court cases within the Seventh Circuit (IL, IN, WI) have gone beyond *Cole*:
  - Cases imply that initial mailer itself must contain the material terms of the “credit offer”
    - *E.g.*, amount, APR, length of loan
  - *E.g.*, *Kudlicki v. Farragut Financial Corp.*:
    - Letter contained a statement that the rates and terms were subject to change
    - Therefore, did not set out the material terms and violated the “firm offer” requirement
    - Lender liable as a matter of law for willful violation of FCRA.
      - \$100-\$1000 per violation, *i.e.*, possibly, each separate mailer



# Firm Offer

- Other federal district courts within the Seventh have held that some solicitations were “firm offers”:
  - *E.g., Bonner v. CorTrust Bank*
    - Credit card mailer that set out terms characterized as “lousy” by court was upheld
    - Mailer showed the exact terms of the worst-case offer
    - Despite initial fee of \$175 on \$250 credit line, offer could have economic value to some consumers
    - Very difficult to meet requirement to quote exact terms in a mortgage solicitation, even though actual terms offered are desirable

# Firm Offer

- Courts elsewhere in the country have rejected the requirement to quote specific terms in initial mailing:
  - *E.g., Putkowski v. Irwin Home Equity Corp.*
    - U.S. District Court for the Northern District of California rejected *Cole*
    - Court held FCRA allows a firm offer to contain a range of loan amounts and interest rates. In this case:
      - Rate from 5.65% to 24%
      - Loan from \$15,000 to \$300,000
      - Offer stated that loan is "subject to change" and "may not be available"



# Firm Offer

- While the courts have not come to a final resolution nationwide, in view of the very high potential liability, any proposed credit solicitation should be reviewed carefully by counsel





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