

OVERVIEW OF FCRA & FACTA

By Sunny S. Huo, Esq.
ssh@severson.com

I. Purpose

The Fair Credit Reporting Act (“FCRA”) was designed to (1) provide a set of controls over how credit reporting agencies report, access and use consumer information; and (2) protect consumers from the improper use of their personal credit information. (15 U.S.C. § 1681)

The Fair and Accurate Credit Transactions Action (“FACTA”) amended FCRA to add various new requirements.

II. Does It Apply To Lenders?

Yes, although FCRA superficially appears to apply only to credit reporting agencies, it also has certain requirements that apply to lenders.

III. Requirements

A. Permissible Purposes For Use of Credit Reports

1. Consumer reporting agencies may only furnish *consumer reports* to lenders if:
 - a. the consumer applies for a loan;
 - b. the consumer authorizes it; or
 - c. the lender makes the consumer(s) a *firm offer of credit*.

15 U.S.C. 1681b(a)(3)(F)(i) and 1681b(c)(1)

2. What is a firm offer of credit?
 - a. Specific terms subject of current litigation (see *Cole v. U.S. Capital, Inc.* (7th Cir. 2004) 389 F.3d 719).
 - b. The mailer must also contain a “clear and conspicuous disclosure” that informs the consumer that credit information was used to obtain his/her name; the consumer can opt out of receiving further mailers (address and toll-free number); collateral required; and

offer may be conditioned on factors determined before the mailer is sent.

15 U.S.C. 1681a(l); 1681b(e)

3. You must maintain the selection criteria and the pre-selection conditions for 3 years from the date the offer is made.

15 U.S.C. 1681m(d)(3)

4. *Be careful:* the firm offer requirement applies any time a lender obtains a *consumer report*—that is, this requirement applies even if the lender does not obtain a full *credit* report.
5. *Be careful:* “consumer report” is defined very broadly—it includes “any information ... bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristic, or mode of living...”

15 U.S.C. 1681a(d)

6. This is a hot area of litigation.
 - a. Civil liability ranges from \$100 to \$1,000 per violation—i.e., *per mailer*—plus attorney’s fees in cases of a willful violation.

15 U.S.C. 1681n

- b. This section can also be enforced by numerous government agencies (e.g., FTC, OCC, state agencies). FTC can seek penalties up to \$2,500 per violation. State agencies can seek penalties up to \$1,000 per violation.

15 U.S.C. 1681s

7. *Be careful:* review by a non-attorney compliance officer may not be sufficient.

B. Adverse Action

1. If you take any “adverse action” based on information in a consumer report, you must provide:

- a. Notice (written, oral, or electronic) of the adverse action.
- b. Name, address, and toll-free number of the consumer reporting agency that provided the report.
- c. A statement that the consumer reporting agency did not make the decision to take the adverse action and does not know the reasons why the action was taken.
- d. Notice that the consumer has the right to obtain a free copy of his/her consumer report within a 60-day period.
- e. Notice that the consumer has the right to dispute the accuracy of the report.

15 U.S.C. 1681m(a)

- 2. If you take any “adverse action” based on information from a third party (e.g., an affiliate), you must provide:
 - a. Notice (written, oral, or electronic) of the adverse action.
 - b. Notice that the consumer has the right to obtain the information upon which the adverse action was based within 60 days of the notice.
 - i. The consumer has 60 days to ask for the information.
 - ii. If the consumer asks for it, you must provide it within 30 days.

15 U.S.C. 1681m(b)

- 3. So what is an “adverse action”?
 - a. Under FCRA, adverse action means “a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.” (This definition is borrowed from ECOA, 15 U.S.C. § 1691(d)(6)); **or**

- b. “an action or determination that is ... made in connection with an application that was made by, or a transaction that was initiated by, any consumer” and that is “adverse to the interests of the consumer.”

15 U.S.C. § 1681a(k)(1)

- c. *Be careful*: the second, “catch all,” definition is an incredibly broad definition, and has been the basis of significant litigation.

4. “Risk-based-pricing” notice.

- a. FACTA amended FCRA to require lenders to provide a notice to applicants when they are offered loans on terms that are “materially” less favorable than the most favorable terms available to a “substantial portion of consumers.”
- b. The FTC and Federal Reserve Board have not prescribed the final rules yet.

15 U.S.C. 1681m(h)

C. Accurate Credit Reporting

- 1. You cannot knowingly report inaccurate information. (Be careful when you receive notice.)

15 U.S.C. 1681s-2(a)(1)

- 2. You must investigate, and if necessary correct, inaccurate information when you receive notice of the error.

15 U.S.C. 1681s-2(a)(1) and (a)(8)

- a. You must complete the investigation within, effectively, 25 days of the date you receive notice from a consumer reporting agency.

15 U.S.C. 1681s-2(b)(2)

- b. Note: if the consumer did not report the inaccuracy to the credit reporting agency first—i.e., so that you receive notice of the dispute from the credit reporting

agency—he/she should not be able to bring a civil action against you.

15 U.S.C. 1681s-2(c)

- c. Federal agencies, however, can still enforce this requirement against you.

15 U.S.C. 1681s-2(d)

- 3. You must inform consumers, within 30 days, if you provide negative information about them to a consumer reporting agency.

15 U.S.C. 1681s-2(a)(7)

- 4. There are a number of requirements under Section 1681s-2. Please read it carefully.

D. Identity Theft

- 1. Identity theft and active duty alerts: if the applicant’s credit report contains one of these, you cannot make them a loan without taking additional steps to confirm the identity of the applicant.

15 U.S.C. 1681c-1(h)

- 2. Victims of identity theft have the right to ask you for copies of applications submitted in their names.
 - a. This request must be in writing.
 - b. You must provide the information free of charge.
 - c. You must have a “high degree of confidence” that the person requesting the information (1) is who he/she claims to be; and (2) was actually the victim of an identity theft.
 - d. If you do not have this “high degree of confidence,” you can decline the request.

15 U.S.C. 1681g(e)

3. You may not sell, transfer, or place for collection any loan where you have received notice that the loan was the result of an identity theft.

15 U.S.C. 1681m(f)

4. You must have reasonable procedures in place to respond to notices of identity theft.

15 U.S.C. 1681s-2(a)(6)

E. Limits on Information Sharing Among Affiliates

1. Limits on information sharing among affiliates.
 - a. You can share information with affiliates for marketing purposes only after you give the consumer notice and an opportunity to opt out.
 - b. If the consumer opts out, you must honor that opt out for at least 5 years.
 - c. This requirement does not apply if you have a pre-existing relationship.

15 U.S.C. 1681s-3

2. Mortgage lenders must provide a disclosure of credit scores used in application process.

15 U.S.C. 1681g(g)