

Newcomer Workshop:

FCRA, FACTA and ECOA 101

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- Equal Credit Opportunity Act/
Regulation B
- Fair Credit Reporting Act
- Fair and Accurate Credit
Transactions Act of 2003

EQUAL CREDIT OPPORTUNITY ACT

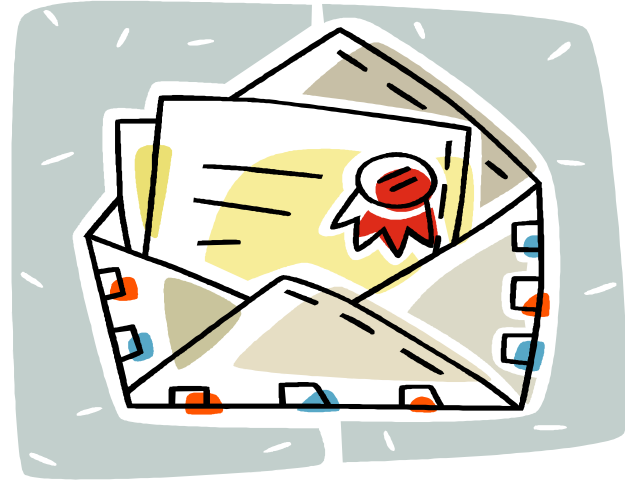
ECOA and Regulation B prohibit discrimination with respect to any aspect of a credit transactions on the basis of:

- Race
- Color
- Religion
- National Origin
- Sex
- Marital Status
- Age (provided the applicant has the capacity to contract)
- Receipt of public assistance programs
- Good faith exercise of rights under ECOA or TILA, etc.

- Prescreening and Advertising
- Notifications
- Furnishing Credit Information

Prescreening

Prescreened offers are based on Information in your credit report indicating that the consumer meets criteria set by the creditor.



Prescreened offers are typically sent via the mail or email.

Prescreening tactics that discourage potential minority applicants are prohibited under ECOA and Regulation B.

Notice of Action Taken

- Give notice of positive actions as well as “adverse”
- “Notice” of positive actions can be implied – such as by giving access to the credit
- Notice must be provided within 30 days after receipt of a completed written or oral application except:
 - In the case of a counteroffer, provide adverse action notice within 90 days unless the applicant accepts or uses the credit during that time
 - When the financial institution and applicant agree that the applicant will inquire about what action was taken and the applicant fails to do so within 30 days of application, the financial institution need not provide the required notice of approval.

Adverse Action

- Adverse action is:
 - A refusal to grant credit in substantially the amount or terms requested unless the creditor makes a counteroffer and the alternative offer is accepted by the applicant
 - A termination of an existing account or a change in terms on an existing account which is undesirable if the same action is not taken on a substantial portion of similar accounts;
 - A termination of an account due to past delinquency or default, when such delinquency or default was cured prior to the creditor's action; or
 - A denial or increase in the credit available to the applicant when requested in accordance with appropriate financial institution procedures.

Adverse Action

Adverse action is NOT:

- Any change in terms of an account that is expressly agreed to by the applicant;
- Any action or forbearance taken in connection with inactivity, current delinquency, or current default on an account;
- A denial of credit at the point of sale or loan (for example, when a customer unsuccessfully attempts to use a credit card) unless: (i) the denial is a termination nor unfavorable change in terms that does not affect all or a substantial portion of a classification of the creditor's accounts, or; (ii) the denial is a reapplication to increase the amount of credit available for the account;
- A denial of credit because extending the credit requested is prohibited by laws affecting the financial institution; or
- A denial of credit because the financial institution does not offer the type of credit requested.

Contents of Adverse Action Notice

- The “ECOA Notice”
- A statement of specific reasons for the action take, or a disclosure of the applicant’s right to request such a statement and to receive it within 30 days after the financial institution receives the request. The application must make the request within 60 days of the notice of action taken.

This statement of reasons must include the name, address, and telephone number of the individual or office where the reasons may be obtained.

The “ECOA Notice”

The federal Equal Credit Opportunity Act prohibits creditors from discrimination against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant’s income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is [name and address as specified by the appropriate agency listed in appendix A of Regulation B]

FAIR CREDIT REPORTING ACT

Important definitions

- **“Consumer”** – An individual.
- **“Consumer Report”** – Any written, oral or other communication of any information by a consumer reporting agency that bears on a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected, in whole or in part, for the purpose of servicing as a factor in establishing the consumer’s eligibility for:
 - Credit or insurance to be used primarily for personal, family or household purposes;
 - Employment purposes; or
 - Any other “authorized” purpose.
- **“Adverse Action”** – Has the same meaning as used in ECOA, and:
 - A denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.
 - A denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

Any prospective user of a consumer report must have a legally permissible purpose to obtain the report.

Relevant permissible purposes include:

- In accordance with the written instruction of the consumer
- To a person that intends to use the report as information for any of the following reasons:
 - In connection with a credit transaction involving the consumer (includes extending, reviewing and collecting credit)
 - As a potential investor or servicer, or current insurer in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation
- Otherwise has a legitimate business need for the information:
 - In connection with a business transaction that the consumer initiates; or
 - To review an account to determine whether the consumer continues to meet the terms of the account.

Prescreened Reports

- Users of consumer reports may obtain prescreened consumer reports to make firm offers of credit or insurance to consumers unless the consumers elected to opt out of being included on prescreened lists.
- Persons may obtain and use consumer reports on any consumer in connection with any credit or insurance transaction that the consumer does not initiate to make firm offers of credit or insurance.
- Prescreening occurs when a lender obtains a list from a consumer reporting agency who meet certain predetermined creditworthiness criteria and who have not elected to be excluded from such lists. To use these lists, a lender must make a “firm offer of credit or insurance.” A lender is not required to grant credit or insurance if the consumer is not creditworthy, or cannot furnish required collateral, provided that the lender determines the underwriting criteria in advance and applies it consistently.

Prescreening Examples

- **Example #1.** A mortgage lender obtains a list from a consumer reporting agency of everyone in County X, with a current home mortgage loan and credit score of 700. The lender will use this list to market a second lien home equity loan product. The lender's other non-consumer report criteria, in addition to those used in the prescreened list for this product, include a maximum total debt-to-income of 50 percent or less. The consumer reporting agency can screen some of the criteria but the lender must determine other criteria individually, such as the DTI, when consumers respond to the offer. If a consumer responds to the offer, but already has a DTI of 60 percent, the lender does not have to grant the loan.
- **Example #2.** On January 1, a mortgage lender obtains a list from a consumer reporting agency of consumers in County Y who have credit scores of 720, and no previous bankruptcy records. The lender mails pre-approved credit letters to everyone on that list on January 2. On January 31, a consumer responds to the offer and the lender obtains and reviews a full consumer report that shows a bankruptcy record was added on January 15. Since the consumer no longer meets the lender's predetermined criteria, the lender is not required to make the loan.

FAIR AND ACCURATE CREDIT TRANSACTIONS ACT

FACTA

- FACTA amended FCRA to combat identity theft, increase accuracy of consumer reports and enhance consumer control over credit solicitations
- “Red Flag Rules”
- “Affiliate Marketing” Regulation
- “Risk Based Pricing” Regulation

Red Flag Rules



- The “Red Flag” Rules apply to “financial institutions” and “creditors” with “covered accounts.”
- A “**financial institution**” is a state or national bank, a state or federal savings association, a mutual savings bank, a state or federal credit union, or any other entity that holds a “transaction account” belonging to a consumer.
- A “**transaction account**” is a deposit or other account from which the owner makes payments or transfers. Transaction accounts include checking accounts, negotiable order of withdrawal accounts, savings deposits subject to automatic transfers, and share draft accounts.

FACTA

- A “**creditor**” is any entity that regularly extends, renews, or continues credit; any entity that regularly arranges for the extension, renewal or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew or continue credit. Creditors include finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies.
- A “**covered account**” is an account used mostly for personal, family or household purposes, and that involves multiple payments or transactions. Covered accounts include credit card accounts, mortgage loans, automobile loans, margin accounts, cell phone accounts, utility accounts, checking accounts, and savings accounts. A covered account is also an account for which there is a foreseeable risk of identity theft – for example, small business or sole proprietorship accounts.

Creating the Program

- Financial institutions and creditors must develop a written program that identifies and detects the relevant warning signs or red flags of identity theft.
- The agencies identify 26 possible red flags falling into the following five categories:
 - Alerts, notifications or warnings from a consumer reporting agency;
 - Suspicious documents;
 - Suspicious personally identifying information, such as a suspicious address;
 - Unusual use of – or suspicious activity relating to – a covered account; and
 - Notices from customers, victims of identify theft, law enforcement authorities or other businesses about possible identity theft in connection with covered accounts.
- The Board of Directors or senior employees must manage the program and provide for oversight or any service providers.
- All financial institutions and creditors must design and implement a program that is appropriate to their size and complexity as well as the nature of their operations.

Creating the Program

- Each covered entity must identify and incorporate into its Program relevant patterns, practices and specific forms of activity that are “red flags” signaling possible identity theft.
- Each covered entity must develop policies and procedures to detect red flags that have been incorporated into the entity’s Program. The agency guidelines recommend such measures as obtaining identifying information about, and verifying the identity of, a person opening an account, and, in the case of existing accounts, authenticating customers, monitoring transactions, and verifying the validity of address change requests
- Each covered entity must respond appropriately to any red flags that are detected to prevent and mitigate identity theft. Such measures include monitoring an account for evidence of identity theft, contacting the customers, calling law enforcement, changing any password or security device that permits account access, closing an account.
- Each covered entity must update its Program periodically to reflect changes in risks to customers from identity theft, or to the safety and soundness of the covered entity.

Administration of the written Program includes:

- Obtaining approval of the initial written Program by the Board of Directors or a committee of the Board;
- Involving the Board of Directors, a committee of the Board, or senior management in the development, implementation and administration of the Program;
- Reporting, at least annually, to the Board of Directors, a committee of the Board or senior management on compliance with the red flag regulations;
- Training staff to implement the Program effectively; and
- Exercising appropriate and effective oversight of arrangements with third-party and affiliated service providers.

Red Flag Program

- Effective Date: **January 1, 2008**
- Compliance Date:
November 1, 2008



Affiliate Marketing Rule

Key Definitions

- “Affiliate” – Any company that is related by common ownership or common corporate control with another company.
- “Eligibility Information” – Transactional and experience information and “other” information that would normally be considered a “consumer report” but for the exclusions under FCRA. Does not include aggregate or blind data.
- “Solicitation” – Marketing of a product or service by a person to a particular consumer where the marketing is: (i) based on eligibility information communicated to that person by its affiliate; and (ii) is intended to encourage a person to purchase or obtain a a product or service (not general marketing to the public).

Affiliate Marketing Opt Out Notice

Unless otherwise falling within an exemption, a solicitation cannot occur unless the consumer receives a clear and conspicuous disclosure in writing or (if the consumer assents) electronically, that:

- Such marketing activities may occur;
- The consumer is given a reasonable opportunity to opt out;
- A simple means of opting out is available; and
- The consumer has not opted out.

Affiliate Opt Out Notice Content

Model notices are contained in the final rule, and must:

- Identify the name of the affiliate providing the notice;
- Identify the types of eligibility information that may be used to make solicitations;
- State that the consumer may elect to limit the use of eligibility information for solicitations;
- State that the consumer's selection will apply for a specified time (*i.e.*, 5 years);
- State that the consumer will be able to renew the election once that period expires;
- State that the consumer need not opt out again until he receives a renewal notice; and
- Provide a reasonable and simple opt out.

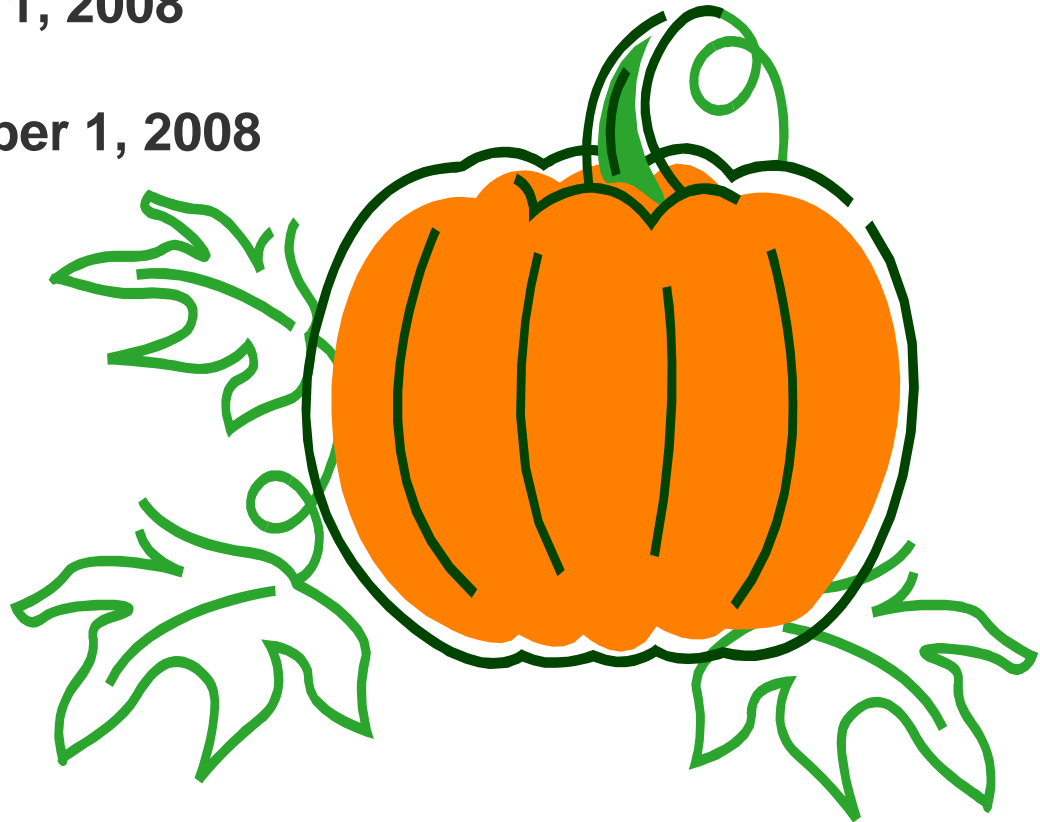
Affiliate Marketing Rule Exceptions

In the following instances, an affiliate-marketing notice and opt-out opportunity is not required:

- **Pre-Existing Business Relationship** – The relationship must be between the consumer and the person looking to sell the goods or services.
- **Consumer-Initiated Communication** – The solicitation must be in response to a communication initiated by the consumer in writing, orally or electronically.
- **Consumer Authorization or Request** – The request must be specific (*i.e.*, no boilerplate waivers) and the solicitation must be responsive to that specific request.

Affiliate Marketing Rule

- Effective Date: **January 1, 2008**
- Compliance Date: **October 1, 2008**



Risk Based Pricing Notice

- Proposed rule issued by the Federal Reserve System and Federal Trade Commission on May 19, 2008
- Comment period closed August 18, 2008
- No final rule has been issued.

Risk Based Pricing Notice

Users of consumer reports who grant credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers who get credit from or through that person must provide notice to those consumers who did not receive the most favorable terms.

Risk Based Pricing - Key Definitions

- **“Material Terms”** – For open-end credit this is the APR (excluding any initial discount period) and any penalty rate that will apply upon the occurrence of event, such as a late payment. For closed-end credit, this is the disclosed APR.
- **“Materially Less Favorable”** – The terms granted or extended to a consumer differ from the terms granted or extended to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted to extended to the other consumers. Factors relevant to “significant” include type of credit product, term of credit extension, extent of difference between the terms offered.

Who Receives the Notice?

- **Direct Comparison** – Directly compare one consumer to another in similar types of transactions
- **Credit Score Proxy Method** – Identifying a “cut off” credit score where approximately 40 percent have higher scores and 60 percent have lower scores, and provide the notice to the lower credit score.
- **Tiered Pricing Model** – Provide notice to those consumers not placed in the top pricing tier.

Contents of Risk Priced Notice

The Notice must provide, at a minimum:

- A statement informing the consumer that a consumer report includes information about the consumer's credit history and the type of information included;
- The terms offered were based on information in the credit report;
- The terms offered may be less favorable than the terms offered to consumers with better credit histories;
- The consumer is encouraged to verify the accuracy of the report and dispute it;
- Identity of each consumer report agency furnishing a report;
- The consumer is entitled to a copy of the report and how to get one (along with a toll free number); and
- Directing consumers to the Federal Reserve and FTC Web sites to obtain more information.

Risk Based Pricing Notice Exceptions

- Consumer applies for specific terms
- Provides an adverse action notice
- Prescreened offers of credit

For extensions of credit secured by residential real property –
creditors may use Model Form H-3

A copy of this model form is included in the proposed
regulations.