

Greyed-out sections are Rescinded

Fair Credit Reporting Act

Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003



Telephone Consumer Protection Act and Junk Fax Act

This Handbook Section contains background information, regulatory guidance, and examination programs for the following three laws:

- The Fair Credit Reporting Act
- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003
- Telephone Consumer Protection Act and Junk Fax Act

FAIR CREDIT REPORTING ACT

Background and Summary

LINKS	
	Program
	Appendix A

The Fair Credit Reporting Act (FCRA)¹ became effective on April 25, 1971. The FCRA is a part of a group of acts contained in the Federal Consumer Credit Protection Act² such as the Truth in Lending Act and the Fair Debt Collection Practices Act.

Congress substantively amended FCRA upon the passage of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act)³. The FACT Act created many new responsibilities for consumer reporting

¹ 15 USC §§ 1681-1681u.

² 15 USC § 1601 *et seq.*

³ Pub. L. No. 108-159, 117 Stat. 1952.

agencies and users of consumer reports. It contained many new consumer disclosure requirements as well as provisions to address identity theft. In addition, it provided free annual consumer report rights for consumers and improved access to consumer report information to help increase the accuracy of data in the consumer reporting system.

The FCRA contains significant responsibilities for business entities that are consumer reporting agencies and lesser responsibilities for those that are not. Generally, financial institutions are not consumer reporting agencies; however, depending on the degree to which their information sharing business practices approximate those of a consumer reporting agency, they can be deemed as such.

In addition to the requirements related to financial institutions acting as consumer reporting agencies, FCRA requirements also apply to financial institutions that operate in any of the following capacities:

- Procurers and users of information (for example, as credit grantors, purchasers of dealer paper, or when opening deposit accounts).
- Furnishers and transmitters of information (by reporting information to consumer reporting agencies, other third parties, or to affiliates).
- Marketers of credit or insurance products.
- Employers.

Structure and Overview of Examination Modules

We structured the examination procedures as a series of modules, grouping similar requirements together. The modules contain general information about each of the requirements:

- Module 1 Obtaining Consumer Reports.
- Module 2 Obtaining Information and Sharing Among Affiliates.
- Module 3 Disclosures to Consumers and Miscellaneous Requirements.
- Module 4 Financial Institutions as Furnishers of Information.
- Module 5 Consumer Alerts and Identity Theft Protections

Financial institutions are subject to a number of different requirements under the FCRA. The statute contains some of the requirements, while others are in regulations issued jointly by the FFIEC agencies or in regulations issued by the Federal Reserve Board and/or the Federal Trade Commission. [Appendix A](#) contains a matrix of the different statutory and regulatory cites applicable to financial institutions that are not consumer reporting agencies.

Important Definitions

The FCRA uses a number of definitions. Key definitions include the following:

Consumer

A consumer is defined as an individual.

Consumer Report

A consumer report is 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 serving as a factor in establishing the consumer's eligibility for any of the following:

- Credit or insurance to be used primarily for personal, family, or household purposes.
- Employment purposes.
- Any other purpose authorized under § 604 (15 USC 1681b).

The term consumer report does not include any of the following:

- Any report containing information solely about transactions or experiences between the consumer and the institution making the report.
- Any communication of that transaction or experience information among entities related by common ownership or affiliated by corporate control (for example, different institutions that are members of the same holding company, or subsidiary companies of an insured institution).
- Communication of other information among persons related by common ownership or affiliated by corporate control if:
 - It is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons; and
 - The consumer is given the opportunity, before the time that the information is communicated, to direct that the information not be communicated among such persons.
- Any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device.

Consumer Affairs Laws and Regulations

Section 1300

- Any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer, such as a lender who has received a request from a broker, conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 615 (15 USC § 1681m), Requirements On Users Of Consumer Reports.
- A communication described in subsection (o) or (x) of section 603 (15 USC § 1681a(o)) (which relates to certain investigative reports and certain reports to prospective employers).

Person

A person means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

Investigative Consumer Report

An investigative consumer report means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information does not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

Adverse Action

The term adverse action has the same meaning as used in § 701(d)(6) (15 USC 1691(d)(6)) of the Equal Credit Opportunity Act (ECOA). Under the ECOA, it 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 same amount or on terms substantially similar to those requested. Under the ECOA, the term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

The term has the following additional meanings for purposes of the FCRA:

- 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.

- A denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D) (15 USC § 1681b(a)(3)(D)).
- An action taken or determination that is:
 - Made in connection with an application made by, or transaction initiated by, any consumer, or in connection with a review of an account to determine whether the consumer continues to meet the terms of the account.
 - Adverse to the interests of the consumer.

Employment Purposes

The term employment purposes when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

Consumer Reporting Agency

The term consumer reporting agency means any person that, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and that uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

MODULE 1: OBTAINING CONSUMER REPORTS

Overview

Consumer reporting agencies have a significant amount of personal information about consumers. This information is invaluable in assessing a consumer's creditworthiness for a variety of products and services, including loan and deposit accounts, insurance, and utility services, among others. The FCRA governs access to this information to ensure that a prospective user of the information obtains it for permissible purposes and does not exploit it for illegitimate purposes.

The FCRA requires any prospective user of a consumer report, for example, a lender, insurer, landlord, or employer, among others, to have a legally permissible purpose to obtain a report.

Permissible Purposes of Consumer Reports (Section 604) and Investigative Consumer Reports (Section 606)

Legally Permissible Purposes. The FCRA allows a consumer reporting agency to furnish a consumer report for the following circumstances and no other:

- In response to a court order or Federal Grand Jury subpoena.
- In accordance with the written instructions of the consumer.
- To a person, including a financial institution, that the agency has reason to believe 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).
 - For employment purposes.⁴
 - In connection with the underwriting of insurance involving the consumer.
 - In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality that is required by law to consider an applicant's financial responsibility.
 - 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.
- In response to a request by the head of a State or local child support enforcement agency (or authorized appointee) if the person certifies various information to the consumer reporting agency regarding the need to obtain the report. (Generally, this particular purpose does not impact a financial institution that is not a consumer reporting agency.)

⁴ Use of consumer reports for employment purposes requires specific advanced authorization, disclosure, and adverse action notices. Module 3 of the examination procedures contains these issues.

Prescreened Consumer Reports. Users of consumer reports, such as financial institutions, 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. The FCRA contains many requirements, including an opt out notice requirement when prescreened consumer reports are used. In addition to defining prescreened consumer reports, Module 3 covers these requirements.

Investigative Consumer Reports (Section 606). This section on Investigative Consumer Reports contains specific requirements for use of an investigative consumer report. This type of consumer report contains information about a consumer's character, general reputation, personal characteristics, or mode of living obtained in whole or in part through personal interviews with neighbors, friends, or associates of the consumer. If a financial institution procures an investigative consumer report, or causes the preparation of one, the institution must meet the following requirements:

- The institution clearly and accurately discloses to the consumer that it may obtain an investigative consumer report.
- The disclosure contains a statement of the consumer's right to request other information about the report and a summary of the consumer's rights under the FCRA.
- The disclosure is in writing and is mailed or otherwise delivered to the consumer not later than three business days after the date on which the report was first requested.
- The financial institution procuring the report certifies to the consumer reporting agency that it has complied with the disclosure requirements and will comply in the event that the consumer requests additional disclosures about the report.

Institution Procedures. Given the preponderance of electronically available information and the growth of identity theft, financial institutions should manage the risks associated with obtaining and using consumer reports. Financial institutions should employ procedures, controls, or other safeguards to ensure that they obtain and use consumer reports only in situations for which there are permissible purposes. Management should deal with information access, storage, and destruction under an institution's Information Security Program; however, management must comply with FCRA in initially obtaining consumer reports.

MODULE 2: OBTAINING INFORMATION AND SHARING AMONG AFFILIATES

Overview

The FCRA contains many substantive compliance requirements for consumer reporting agencies designed to help ensure the accuracy and integrity of the consumer reporting system. As noted in the definitions section, a consumer reporting agency is a person that generally furnishes consumer reports

to third parties. By their very nature, banks, credit unions, and savings associations have a significant amount of consumer information that could constitute a consumer report, and thus communication of this information could cause the institution to become a consumer reporting agency. The FCRA contains several exceptions that enable a financial institution to communicate this type of information, within strict guidelines, without becoming a consumer reporting agency.

Rather than containing strict information sharing prohibitions, the FCRA creates a business disincentive such that if a financial institution shares consumer report information outside of the exceptions, then the institution is a consumer reporting agency and will be subject to the significant, substantive requirements of the FCRA applicable to those entities. Typically, a financial institution will structure its information sharing practices within the exceptions to avoid becoming a consumer reporting agency. This examination module generally covers the various information sharing practices within these exceptions.

If upon completion of this module, you determine that the financial institution's information sharing practices fall outside of these exceptions, you should consider the financial institution a consumer reporting agency and complete Module 6 of the examination procedures.

Consumer Report and Information Sharing (Section 603(d))

This section on Consumer Report and Information Sharing defines a consumer report to include information about a consumer such as that which bears on a consumer's creditworthiness, character, and capacity among other factors. Communication of this information may cause a person, including a financial institution, to become a consumer reporting agency. The statutory definition contains key exemptions to this definition that enable financial institutions to share this type of information under certain circumstances, without becoming consumer reporting agencies. Specifically, the term consumer report does not include:

- A report containing information solely as to transactions or experiences between the consumer and the financial institution making the report. A person, including a financial institution, may share information strictly related to its own transactions or experiences with a consumer (such as the consumer's payment history, or an account with the institution) with any third party, without regard to affiliation, without becoming a consumer reporting agency. The Privacy of Consumer Financial Information regulations that implement the Gramm-Leach-Bliley Act (GLBA) may restrict this type of information sharing because it meets the definition of nonpublic personal information under the Privacy regulations. Therefore, sharing it with nonaffiliated third parties may be subject to an opt out under the privacy regulations. In turn, the FCRA may also restrict activities that the GLBA permits. For example, the GLBA permits a financial institution to share a list of its customers and information such as their credit scores with another financial institution to jointly market or sponsor other financial products or services. This communication may be a consumer report under the FCRA and could potentially cause the sharing financial institution to become a consumer reporting agency.

- Communication of such transaction or experience information among persons, including financial institutions related by common ownership or affiliated by corporate control.
- Communication of other information (for example, other than transaction or experience information) among persons and financial institutions related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information will be communicated among such entities, and before the information is initially communicated, the consumer is given the opportunity to opt out of the communication. This allows a financial institution to share other information (that is, information other than its own transaction and experience information) that could otherwise be a consumer report, without becoming a consumer reporting agency under both of the following circumstances:
 - The sharing of the “other” information is done with affiliates.
 - Consumers are provided with the notice and an opportunity to opt out of this sharing before the information is first communicated among affiliates.

For example, “other” information can include information a consumer provides on an application form concerning accounts with other financial institutions. It can also include information a financial institution obtains from a consumer reporting agency, such as the consumer’s credit score. If a financial institution shares other information with affiliates without providing a notice and an opportunity to opt out, the financial institution may become a consumer reporting agency subject to all of the other requirements of the FCRA.

GLBA and its implementing regulations require that a financial institution’s Privacy Notice contain the Consumer Report (Section 603(d)) opt out right.

Other Exceptions

Specific extensions of credit. In addition, the term consumer report does not include the communication of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device. For example, this exception allows a lender to communicate an authorization through the credit card network to a retailer, to enable a consumer to complete a purchase using a credit card.

Credit Decision to Third Party (for example, auto dealer). The term consumer report also does not include any report in which a person, including a financial institution, who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer, conveys the decision with respect to the request. The third party must advise the consumer of the name and address of the financial institution to which the request was made, and such financial institution makes the adverse action disclosures required by section 615 of the FCRA. For example, this exception allows a lender to communicate a credit decision to an automobile dealer who is arranging financing for a consumer purchasing an automobile and who requires a loan to finance the transaction.

Joint User Rule. The Federal Trade Commission staff commentary discusses another exception known as the “Joint User Rule.” Under this exception, users of consumer reports, including financial institutions, may share information if they are jointly involved in the decision to approve a consumer’s request for a product or service, provided that each has a permissible purpose to obtain a consumer report on the individual. For example, a consumer applies for a mortgage loan that will have a high loan-to-value ratio, and thus the lender will require private mortgage insurance (PMI) in order to approve the application. An outside company provides the PMI. The lender and the PMI company can share consumer report information about the consumer because both entities have permissible purposes to obtain the information and both are jointly involved in the decision to grant the products to the consumer. This exception applies to entities that are affiliated or nonaffiliated third parties. It is important to note that the GLBA will still apply to the sharing of nonpublic, personal information with nonaffiliated third parties; therefore, financial institutions should be aware the GLBA may still limit or prohibit sharing under the FCRA joint user rule.

Protection of Medical Information (Section 604(g))

Section 604(g) generally prohibits creditors from obtaining and using medical information in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit. The statute contains no prohibition on creditors obtaining or using medical information for other purposes that are not in connection with a determination of the consumer’s eligibility, or continued eligibility for credit.

Section 604(g)(5)(A) requires the federal banking agencies and NCUA to prescribe regulations that permit transactions that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes. On November 22, 2005, the FFIEC Agencies published final rules in the Federal Register (70 FR 70664). The rules contain the general prohibition on obtaining or using medical information, and provide exceptions for the limited circumstances when medical information may be used. The rules define “credit” and “creditor” as having the same meanings as in section 702 of the Equal Credit Opportunity Act (15 USC 1691a).

Obtaining and Using Unsolicited Medical Information. A creditor does not violate the prohibition on obtaining medical information if it receives the medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit without specifically requesting medical information. However, the creditor may only use this medical information in connection with a determination of the consumer’s eligibility, or continued eligibility, for credit in accordance with either the financial information exception or one of the specific other exceptions provided in the rules. We discuss these exceptions below.

Consumer Affairs Laws and Regulations

Section 1300

Financial Information Exception. The rules allow a creditor to obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility or continued eligibility for credit, so long as:

- The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of the loan proceeds.
- The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction.
- The creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

The financial information exception is designed in part to allow creditors to consider a consumer's medical debts and expenses in the assessment of that consumer's ability to repay the loan according to the loan terms. In addition, the financial information exception also allows a creditor to consider the dollar amount and continued eligibility for disability income, worker's compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment.

The creditor may use the medical information in a manner and to an extent that is no less favorable than it would use comparable, nonmedical information. For example, a consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other is to a retailer. The creditor may use and consider the debt to the hospital in the same manner in which it considers the debt to the retailer, such as including the debts in the calculation of the consumer's proposed debt-to-income ratio. In addition, the consumer's payment history of the debt to the hospital may be considered in the same manner as the debt to the retailer. For example, if the creditor does not grant loans to applicants who have debts that are 90-days past due, the creditor could consider the past-due status of a debt to the hospital, in the same manner as the past-due status of a debt to the retailer.

A creditor may use medical information in a manner that is more favorable to the consumer, according to its regular policies and procedures. For example, if a creditor has a routine policy of declining consumers who have a 90-day past due installment loan to a retailer, but does not decline consumers who have a 90-day past due debt to a hospital, the financial information exception would allow a creditor to continue this policy without violating the rules because in these cases, the creditor's treatment of the debt to the hospital is more favorable to the consumer.

A creditor may not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any determination regarding the consumer's eligibility, or continued eligibility for credit. The creditor may only consider the financial implications as discussed above, such as the status of a debt to a hospital, continued eligibility for disability income, etc.

Consumer Affairs Laws and Regulations

Section 1300

Specific Exceptions for Obtaining and Using Medical Information. In addition to the financial information exception, the rules also provide for the following nine specific exceptions under which a creditor can obtain and use medical information in its determination of the consumer's eligibility, or continued eligibility for credit:

- To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate, or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as a legal representative for a consumer based on an asserted medical condition or event. For example, if Person A is attempting to act on behalf of Person B under a Power of Attorney that is invoked based on a medical event, a creditor is allowed to obtain and use medical information to verify that Person B has experienced a medical condition or event such that Person A is allowed to act under the Power of Attorney.
- To comply with applicable requirements of local, state, or Federal laws.
- To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit related assistance program that is:
 - Designed to meet the special needs of consumers with medical conditions; AND
 - Established and administered pursuant to a written plan that:
 - ✓ Identifies the class of persons that the program is designed to benefit; and
 - ✓ Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program.
- To the extent necessary for purposes of fraud prevention or detection.
- In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of the loan and the use of the proceeds.
- Consistent with safe and sound banking practices, if the consumer or the consumer's legal representative requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor. For example, at the consumer's request, a creditor may grant an exception to its ordinary policy to accommodate a medical condition that the consumer has experienced. This exception allows a creditor to consider medical information in this context, but it does not require a creditor to make such an accommodation nor does it require a creditor to grant a loan that is unsafe or unsound.

- Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer. For example, if a creditor has a policy of delaying foreclosure in cases where a consumer is experiencing a medical hardship, this exception allows the creditor to use medical information to determine if the policy would apply to the consumer. Like the exception listed in the bullet above, this exception does not require a creditor to grant forbearance, it merely provides an exception so that a creditor may consider medical information in these instances.
- To determine the consumer's eligibility for the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement, if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement.
- To determine the consumer's eligibility for the triggering of, or the reactivation of a credit insurance product, if a medical condition or event is a triggering event for the provision of benefits under the product.

Limits on redisclosure of information. If a creditor subject to the medical information rules receives medical information about a consumer from a consumer reporting agency or its affiliate, the creditor must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

Sharing medical information with affiliates. In general, the exclusions from the definition of "consumer report" in section 603(d)(2) of the FCRA allow the sharing of non-medical information among affiliates. With regard to medical information, section 603(d)(3) of the FCRA provides that the exclusions in section 603(d)(2) do not apply when a person subject to the medical information rules shares any of the following information with an affiliate:

- Medical information.
- An individualized list or description based on the payment transactions of the consumer for medical products or services.
- An aggregate list of identified consumers based on payment transactions for medical products or services.

If a person who is subject to the medical rules shares with an affiliate the type of information discussed above, the exclusions from the definition of "consumer report" do not apply. Effectively, this means that if a person shares medical information, that person becomes a consumer reporting agency, subject to all of the other substantive requirements of the FCRA.

The rules provide exceptions to these limitations on sharing medical information with affiliates. A person, such as a bank, thrift, or credit union, may share medical information with its affiliates without becoming a consumer reporting agency under any of the following circumstances:

- In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003).
- For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).
- For any purpose referred to in section 1179 of HIPAA.
- For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act.
- In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with the financial information exceptions or specific exceptions.
- As otherwise permitted by order of the appropriate federal agency or NCUA, as applicable.

Affiliate Marketing Opt Out (Section 624)

Section 624 gives a consumer the right to restrict an entity, with which it does not have a pre-existing business relationship, from *using* certain information obtained from an affiliate to make solicitations to that consumer. This provision is distinct from Section 603(d)(2)(A)(iii) which gives a consumer the right to restrict the *sharing* of certain consumer information among affiliates.⁵

Under Section 624, an entity may not use information received from an affiliate to market its products or services to a consumer, unless the consumer is given notice and a reasonable opportunity and a reasonable and simple method to opt out of the making of such solicitations. The affiliate marketing opt-out applies to both transaction or experience information and "other" information, such as information from credit reports and credit applications. On November 7, 2007, the federal financial institution regulators published final regulations in the Federal Register to implement this section (72 FR 62910).⁶

Exceptions to the notice and opt out requirements apply when an entity uses eligibility information in certain ways, as described later in these procedures.

⁵ See Module 2, Section 603(d) Consumer Report and Information Sharing, for provisions pertaining to the sharing of consumer information. Under Section 603(d)(2)(A)(iii) of the FCRA, entities are responsible for complying with the affiliate *sharing* notice and opt-out requirement, where applicable. Thus, under the FCRA, certain consumer information will be subject to two opt-outs, a sharing opt-out (Section 603(d)) and a marketing use opt-out (Section 624). These two opt-outs may be consolidated.

⁶ See 12 CFR 571.20(a) for the scope of entities covered by Subpart C of 12 CFR 571.

Key Definitions (12 CFR 571.20)⁷

- *Eligibility information* (12 CFR 571.20(b)(3)) includes not only transaction and experience information, but also the type of information found in consumer reports, such as information from third party sources and credit scores. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.⁸
- *Pre-existing business relationship* (12 CFR 571.20(b)(4))⁹ means a relationship between a person, such as a financial institution (or a person's licensed agent), and a consumer based on:
 - A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by the affiliate marketing regulation;
 - The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force, or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by the affiliate marketing regulation; or
 - An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by the affiliate marketing regulation.
- *Solicitation* (12 CFR 571.20(b)(5)) means the marketing of a product or service initiated by a person, such as a financial institution, to a particular consumer that is:
 - Based on eligibility information communicated to that person by its affiliate; and
 - Intended to encourage the consumer to purchase or obtain such product or service.

Examples of a solicitation include a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate. A solicitation does not include marketing communications that are directed at the general public (e.g., television, general circulation magazine, and billboard advertisements).

⁷ See 12 CFR 571.20 for other definitions.

⁸ Specifically, "eligibility information" is defined in the affiliate marketing regulation as "any information the communication of which would be a consumer report if the exclusions from the definition of "consumer report" in Section 603(d)(2)(A) of the [Fair Credit Reporting] Act did not apply."

⁹ See 12 CFR 571.20(b)(4)(ii) and (iii) for examples of pre-existing business relationships and situations where no pre-existing business relationship exists.

Consumer Affairs Laws and Regulations

Section 1300

Initial Notice and Opt-out Requirement (12 CFR 571.21(a), 571.24, and 571.25). A financial institution and its subsidiaries (financial institution) generally may not use eligibility information about a consumer that it receives from an affiliate to make a solicitation for marketing purposes to the consumer, unless:

- It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the financial institution may use eligibility information about that consumer that it received from an affiliate to make solicitations for marketing purposes to the consumer;
- The consumer is provided a reasonable opportunity and a reasonable and simple method to “opt out” (that is, the consumer prohibits the financial institution from using eligibility information to make solicitations for marketing purposes to the consumer);¹⁰ and
- The consumer has not opted out.

For example, a consumer has a homeowner’s insurance policy with an insurance company. The insurance company shares eligibility information about the consumer with its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its home equity loan products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The depository institution may not use eligibility information it received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the insurance company gave the consumer a notice and opportunity to opt out and the consumer does not opt out.

Making Solicitations (12 CFR 571.21(b)).¹¹ A financial institution (or a service provider acting on behalf of the financial institution) makes a solicitation for marketing purposes if:

- The financial institution receives eligibility information from an affiliate, including when the affiliate places that information into a common database that the financial institution may access;
- The financial institution uses that eligibility information to do one or more of the following:
 - Identify the consumer or type of consumer to receive a solicitation;
 - Establish criteria used to select the consumer to receive a solicitation; or

¹⁰ See 12 CFR 571.24 and 571.25 for examples of “a reasonable opportunity to opt out” and “reasonable and simple methods for opting out.”

¹¹ See 12 CFR 571.21(b)(6) for examples of making solicitations.

Consumer Affairs Laws and Regulations

Section 1300

— Decide which of the financial institution’s products or services to market to the consumer or tailor the financial institution’s solicitation to that consumer; and

- As a result of the financial institution’s use of the eligibility information, the consumer is provided a solicitation.

A financial institution does *not* make a solicitation for marketing purposes (and therefore the affiliate marketing regulation, with its notice and opt-out requirements, does not apply) in the situations listed below, commonly referred to as “constructive sharing.” Constructive sharing occurs when a financial institution provides criteria to an affiliate to use in marketing the financial institution’s product and the affiliate uses the criteria to send marketing materials to the affiliate’s own customers that meet the criteria. In this situation, the financial institution is not *using* shared eligibility information to make solicitations.

- The financial institution provides criteria for consumers to whom it would like its affiliate to market the financial institution’s products. Then, based on this criteria, the affiliate uses eligibility information that the affiliate obtained in connection with its own pre-existing business relationship with the consumer to market the financial institution’s products or services (or directs its service provider to use the eligibility information in the same manner and the financial institution does not communicate with the service provider regarding that use).
- A service provider, applying the financial institution’s criteria, uses information from an affiliate, such as that in a shared database, to market the financial institution’s products or services to the consumer, so long as it meets certain requirements, including all of the following.
 - The affiliate controls access to and use of its eligibility information by the service provider under a written agreement between the affiliate and the service provider.
 - The affiliate establishes, in writing, specific terms and conditions under which the service provider may access and use the affiliate’s eligibility information to market the financial institution’s products and services (or those of affiliates generally) to the consumer.
 - The affiliate requires the service provider, under a written agreement, to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate’s eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of the financial institution’s products or services.
 - The affiliate is identified on or with the marketing materials provided to the consumer.
 - The financial institution does not directly use its affiliate’s eligibility information in the manner described above under “Making Solicitations (12 CFR 571.21(b)),” item 2.

Consumer Affairs Laws and Regulations

Section 1300

Exceptions to Initial Notice and Opt-out Requirements (12 CFR 571.21(c)).¹² The initial notice and opt-out requirements do not apply to a financial institution if it uses eligibility information that it receives from an affiliate:

- To make a solicitation for marketing purposes to a consumer with whom the financial institution has a pre-existing business relationship;
- To facilitate communications to an individual for whose benefit the financial institution provides employee benefit or other services pursuant to a contract with an employer;
- To perform services on behalf of an affiliate (but this would not allow solicitation where the consumer has opted out);
- In response to a communication about the financial institution's products or services initiated by the consumer;
- In response to a consumer's authorization or request to receive solicitations; or
- If the financial institution's compliance with the affiliate marketing regulation would prevent it from complying with State insurance laws pertaining to unfair discrimination in any state in which the financial institution is lawfully doing business.

Contents of Opt-out Notice (12 CFR 571.23). A financial institution must provide to the consumer a reasonable and simple method for the consumer to opt out. The opt-out notice must be clear, conspicuous, and concise, and must accurately disclose specific information outlined in 12 CFR 571.23(a), including that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer. See Appendix C to the regulation for the model notices contained in the affiliate marketing regulation.

Alternative contents. An affiliate that provides a consumer a broader right to opt out than that required by the affiliate marketing regulation may satisfy the regulatory requirements by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

Coordinated, consolidated, and equivalent notices. Opt-out and renewal notices may be coordinated and consolidated with any other notice or disclosure required under any other provision of law, such as the Gramm-Leach-Bliley Act (GLBA), 15 USC 6801 et seq. Renewal notices, which have additional required content (12 CFR 571.27), may be consolidated with the annual GLBA privacy notices.

Delivery of the Opt-out Notice (12 CFR 571.21(a)(3) and 571.26).¹³ An affiliate that has or previously had a pre-existing business relationship with the consumer must provide the notice either

¹² See 12 CFR 571.21(d) for examples of exceptions to the initial notice and opt-out requirement.

individually or as part of a joint notice from two or more members of an affiliated group of companies. The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. A consumer may not reasonably be expected to receive actual notice if, for example, the affiliate providing the notice sends the notice via e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice.¹⁴

Scope of Opt-out (12 CFR 571.22(a) and 571.23(a)(2)).¹⁵ As a general rule, the consumer's election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate, described in the notice, to make solicitations to the consumer. If two or more consumers jointly obtain a product or service, any of the joint consumers may exercise the right to opt out. It is impermissible to require all joint consumers to opt out before implementing any opt-out direction.

Menu of alternatives. A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by:

- Electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice.
- Electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information.
- Electing to prohibit solicitations by certain methods of delivery but not other methods of delivery.

One of the alternatives, however, must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

Continuing relationship. If the consumer establishes a continuing relationship with a financial institution or its affiliate, an opt-out notice may apply to eligibility information obtained from one or more continuing relationships (such as a deposit account, a mortgage loan, or a credit card), if the notice adequately describes the continuing relationships covered. The opt-out notice can also apply to future continuing relationships if the notice adequately describes the continuing future relationships that would be covered.

Special rule for a notice following termination of all continuing relationships. After all continuing relationships with a financial institution or its affiliate(s) are terminated, a consumer must be

¹³ See 12 CFR 571.26(b) and (c) for examples of “reasonable expectation of actual notice” and “no reasonable expectation of actual notice.”

¹⁴ For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions of 12 CFR 571.24(b)(2) and 571.24(b)(3) or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 *et seq.*

¹⁵ See 12 CFR 571.22(a) for examples of the scope of the opt-out, including examples of continuing relationships.

given a new opt-out notice if the consumer later establishes another continuing relationship with the financial institution or its affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election that applies to eligibility information obtained in connection with a

No continuing relationship (isolated transaction). If the consumer does not establish a continuing relationship with a financial institution or its affiliate, but the financial institution or its affiliate obtains eligibility information about the consumer in connection with a transaction with the consumer (such as an ATM cash withdrawal, purchase of traveler's checks, or a credit application that is denied), an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

Time, Duration, and Renewal of Opt-out (12 CFR 571.22(b) and (c) and 571.27). A consumer may opt out at any time. The opt-out must be effective for a period of at least five years beginning when the consumer's opt-out election is received and implemented, unless the consumer later revokes the opt-out in writing or, if the consumer agrees, electronically. An opt-out period may be set at more than five years, including an opt-out that does not expire unless the consumer revokes it.

Renewal after opt-out period expires. After the opt-out period expires, a financial institution may not make solicitations based on eligibility information it receives from an affiliate to a consumer who previously opted out, unless:

- The consumer receives a renewal notice and opportunity to opt out, and the consumer does not renew the opt-out; or
- An exception to the notice and opt-out requirements applies.¹⁶

Contents of renewal notice. The renewal notice must be clear, conspicuous, and concise, and must accurately disclose most of the elements of the original opt-out notice, as well as the following information as applicable:

- The consumer previously elected to limit the use of certain information to make solicitations to the consumer.
- The consumer's election has expired or is about to expire.
- The consumer may elect to renew the consumer's previous election.
- If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires.

¹⁶ See 12 CFR 571.21(c) for exceptions.

Consumer Affairs Laws and Regulations

Section 1300

See 12 CFR 571.27(b) for all the content requirements of a renewal notice.

Renewal period. Each opt-out renewal must be effective for a period of at least five years.

Affiliate who may provide the notice. The renewal notice must be provided by the affiliate that provided the previous opt-out notice, or its successor; or as part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

Timing of the renewal notice. A renewal notice may be provided to the consumer either a reasonable period of time before the expiration of the opt-out period¹⁷ or any time after the expiration of the opt-out period but before solicitations are made to the consumer that would have been prohibited by the expired opt-out.

Prospective application (12 CFR 571.28(c)). A financial institution may use eligibility information received from an affiliate to make solicitations to a consumer if it received such information prior to October 1, 2008, the mandatory compliance date of the affiliate marketing regulation. An institution is deemed to have received eligibility information when such information is placed into a common database and is accessible by the institution prior to that date.

Model forms for opt-out notices (12 CFR 571, Appendix C). Appendix C of the affiliate marketing regulation contains model forms that may be used to comply with the requirement for clear, conspicuous, and concise notices. The five model forms are:

- C-1 Model Form for Initial Opt-out Notice (Single-Affiliate Notice)
- C-2 Model Form for Initial Opt-out Notice (Joint Notice)
- C-3 Model Form for Renewal Notice (Single-Affiliate Notice)
- C-4 Model Form for Renewal Notice (Joint Notice)
- C-5 Model Form for Voluntary “No Marketing” Notice

Use of the model forms is not required and a financial institution may make certain changes to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Institutions making such extensive revisions

¹⁷ An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt-out. If a financial institution provides an annual privacy notice under the Gramm-Leach-Bliley Act, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt-out period is a reasonable period of time before expiration of the opt-out in all cases (12 CFR 571.27(d)).

will lose the safe harbor that Appendix C provides. Examples of acceptable changes are provided in Appendix C to the regulation.

MODULE 3: DISCLOSURES TO CONSUMERS AND MISCELLANEOUS REQUIREMENTS

Overview

The FCRA requires financial institutions to provide consumers with various notices and information under a variety of circumstances. This module contains examination responsibilities for these various areas.

Use of Consumer Reports for Employment Purposes (Section 604(b))

This section on the Use of Consumer Reports for Employment Purposes has specific requirements for financial institutions that obtain consumer reports of its employees or prospective employees prior to, and/or during, the term of employment. The FCRA generally requires the written permission of the consumer to procure a consumer report for “employment purposes.” Moreover, the financial institution must provide to the consumer in writing a clear and conspicuous disclosure that it may obtain a consumer report for employment purposes prior to procuring a report.

Prior to taking any adverse action involving employment that is based in whole or in part on the consumer report, the user generally must provide to the consumer:

- A copy of the report.
- A description in writing of the rights of the consumer under this title, as FTC prescribes under § (609)(c)(3).

At the time a financial institution takes adverse action in an employment situation, § 615 requires that it must provide the consumer with an adverse action notice described later in this module.

Prescreened Consumer Reports and Opt out Notice (Sections 604(c) and 615(d)) (and Parts 642 and 698 of Federal Trade Commission Regulations)

The sections on Prescreened Consumer Reports and Opt Out Notice allows persons, including financial institutions, to 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. This process, known as prescreening, occurs when a financial institution obtains a list from a consumer reporting agency of consumers who meet certain predetermined creditworthiness criteria and

Consumer Affairs Laws and Regulations

Section 1300

who have not elected to be excluded from such lists. These lists may only contain the following information:

- The name and address of a consumer.
- An identifier that is not unique to the consumer and that the person uses solely for the purpose of verifying the identity of the consumer.
- Other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

Each name appearing on the list is considered an individual consumer report. In order to obtain and use these lists, financial institutions must make a “firm offer of credit or insurance” as defined in § 603(l) to each person on the list. An institution is not required to grant credit or insurance if the consumer is not creditworthy or insurable, or cannot furnish required collateral, provided that the financial institution determines the underwriting criteria in advance, and applies it consistently.

Example 1: Assume a home mortgage lender obtains a list from a consumer reporting agency of everyone in County X, with a current home mortgage loan and a credit score of 700. The lender will use this list to market a second lien home equity loan product. The lender’s other nonconsumer report criteria, in addition to those used in the prescreened list for this product, include a maximum total debt-to-income ratio (DTI) of 50 percent or less. The consumer reporting agency can screen some of the criteria but 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.

In addition, the financial institution is allowed to obtain a full consumer report on anyone responding to the offer to verify that the consumer continues to meet the creditworthiness criteria. If the consumer no longer meets those criteria, the financial institution does not have to grant the loan.

Example 2: On January 1, a credit card 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 solicitations offering a pre-approved credit card to everyone on the 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 this consumer no longer meets the lender’s predetermined criteria, the lender is not required to issue the credit card.

These basic requirements help prevent financial institutions from obtaining prescreened lists without following through with an offer of credit or insurance. The financial institution must maintain the criteria used for the product (including the criteria used to generate the prescreened report and any other criteria such as collateral requirements) on file for a period of three years, beginning on the date that the financial institution made the offer to the consumer.

Consumer Affairs Laws and Regulations

Section 1300

Technical Notice and Opt Out Requirements (Section 615(d)). This section contains consumer protections and technical notice requirements concerning prescreened offers of credit or insurance. The FCRA requires nationwide consumer reporting agencies to jointly operate an “opt out” system, whereby consumers can elect to be excluded from prescreened lists by calling a toll-free number.

When a financial institution obtains and uses these lists, it must provide consumers with a Prescreened Opt Out Notice with the offer of credit or insurance. This notice alerts consumers that they are receiving the offer because they meet certain creditworthiness criteria. The notice must also provide the toll-free telephone number operated by the nationwide consumer reporting agencies for consumers to call to opt out of prescreened lists.

The FCRA contains the basic requirement to provide notices to consumers at the time the prescreened offers are made. The Federal Trade Commission (FTC) published an implementing regulation containing the technical requirements of the notice at 16 CFR Parts 642 and 698. This regulation is applicable to anyone, including banks, credit unions, and saving associations, that obtains and uses prescreened consumer reports. These requirements became effective on August 1, 2005; however, the requirement to provide a notice containing the toll-free opt out telephone number has existed under the FCRA for many years.

Short and Long Notice. FTC regulations 16 CFR 642 and 698 require that the financial institution give a “short” notice and a “long” notice of the prescreened opt out information with each written solicitation made to consumers using prescreened consumer reports. These regulations also contain specific requirements concerning the content and appearance of these notices. The requirements are listed within the following paragraphs of these procedures. The regulations were published on January 31, 2005, in 70 Federal Register 5022, and took effect August 1, 2005.

The short notice must be a clear and conspicuous, simple, and easy-to-understand statement as follows:

- **Content.** The short notice must state that the consumer has the right to opt out of receiving prescreened solicitations. It must provide the toll-free number and direct consumers to the existence and location of the long notice. It should also state the title of the long notice. The short notice may not contain any other information.
- **Form.** The short notice must be in a type size larger than the principal text on the same page, but it may not be smaller than 12-point type. If the financial institution provides the notice by electronic means, it must be larger than the type size of the principal text on the same page.
- **Location.** The short form must be on the front side of the first page of the principal promotional document in the solicitation. If provided electronically, it must be on the same page and in close proximity to the principal marketing message. The statement must be located so that it is distinct from other information, such as inside a border, and must be in a distinct type style, such as bolded, italicized, underlined, and/or in a color that contrasts with the principal text on the page, if the solicitation is provided in more than one color.

Consumer Affairs Laws and Regulations

Section 1300

The long notice must also be a clear and conspicuous, simple, and easy-to-understand statement as follows:

- **Content.** The long notice must state the information required by § 615(d) of the FCRA and may not include any other information that interferes with, detracts from, contradicts, or otherwise undermines the purpose of the notice.
- **Form.** The notice must appear in the solicitation, be in a type size that is no smaller than the type size of the principal text on the same page, and, for solicitations provided other than by electronic means, the type size may not be smaller than 8-point type. The notice must begin with a heading in capital letters, underlined, and identifying the long notice as the “PRESCREEN & OPT OUT NOTICE.” It must be in a type style that is distinct from the principal type style used on the same page, such as bolded, italicized, underlined, and/or in a color that contrasts from the principal text, if the solicitation is in more than one color. The notice must be set apart from other text on the page, such as by including a blank line above and below the statement, and by indenting both the left and right margins from other text on the page.

The FTC developed model Prescreened Opt Out Notices, which are contained in Appendix A to 16 CFR 698 of the FTC’s regulations. Appendix A contains complete sample solicitations for context. The prescreen notice text is contained below:

Sample Short Notice:

You can choose to stop receiving “prescreened” offers of (credit or insurance) from this and other companies by calling toll-free (toll-free number). See PRESCREEN & OPT-OUT NOTICE on other side (or other location) for more information about prescreened offers.

Sample Long Notice:

PRESCREEN & OPT-OUT NOTICE: This “prescreened” offer of (credit or insurance) is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria (including providing acceptable property as collateral). If you do not want to receive prescreened offers of (credit or insurance) from this and other companies, call the consumer reporting agencies (or name of consumer reporting agency) toll-free, (toll-free number); or write: (consumer reporting agency name and mailing address).

Truncation of Credit and Debit Card Account Numbers (Section 605(g))

This section on Truncation of Credit and Debit Card Account Numbers provides that persons, including financial institutions that accept debit and credit cards for the transaction of business will be prohibited from issuing electronic receipts that contain more than the last five digits of the card

number, or the card expiration date, at the point of sale or transaction. This requirement applies only to electronically developed receipts and does not apply to hand-written receipts or those developed with an imprint of the card.

For Automatic Teller Machines (ATMs) and Point-of-Sale (POS) terminals or other machines that were put into operation before January 1, 2005, this requirement took effect on December 4, 2006. For ATMs and POS terminals or other machines that were put into operation on or after January 1, 2005, the effective date was the date of installation.

Disclosure of Credit Scores by Certain Mortgage Lenders (Section 609(g))

This section on Disclosure of Credit scores by Certain Mortgage Lenders requires financial institutions that make or arrange mortgage loans using credit scores to provide the score with accompanying information to the applicants.

Credit score. For purposes of this section, the term “credit score” is defined as a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a “risk predictor” or “risk score”). The credit score does not include either of the following:

- Any mortgage score or rating by an automated underwriting system that considers one or more factors in addition to credit information, such as the loan-to-value ratio, the amount of down payment, or the financial assets of a consumer.
- Any other elements of the underwriting process or underwriting decision.

Covered transactions. The disclosure requirement applies to both closed-end and open-end loans that are for consumer purposes and are secured by one- to four-family residential real properties, including purchase and refinance transactions. This requirement will not apply in circumstances that do not involve a consumer purpose, such as when a borrower obtains a loan secured by his or her residence to finance his or her small business.

Specific required notice. Financial institutions in covered transactions that use credit scores must provide a disclosure containing the following specific language, which is contained in § 609(g)(1)(D):

Notice to The Home Loan Applicant

In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

If you have questions concerning the terms of the loan, contact the lender.

The notice must include the name, address, and telephone number of each consumer reporting agency that provided a credit score that was used.

Credit score and key factors disclosed. In addition to the notice, financial institutions must also disclose the credit score, the range of possible scores, the date that the score was created, and the “key factors” used in the score calculation. “Key factors” are all relevant elements or reasons adversely affecting the credit score for the particular individual, listed in the order of their importance, and based on their effect on the credit score. The total number of factors the financial institution should disclose must not exceed four. However, if one of the key factors is the number of inquiries into a consumer’s credit information, then the total number of factors must not exceed five. These key factors come from information the consumer reporting agencies supplied with any consumer report that was furnished containing a credit score (Section 605(d)(2)).

This disclosure requirement applies in any application for a covered transaction, regardless of the final action the lender takes on the application. The FCRA requires a financial institution to disclose all of the credit scores used in these transactions. For example, if two joint applicants apply for a mortgage loan to purchase a single-family residence and the lender uses both credit scores, then the financial

institution needs to disclose both. The statute specifically does not require more than one disclosure per loan. Therefore, if the financial institution uses multiple scores, it can include all of them in one disclosure containing the Notice to the Home Loan Applicant.

If a financial institution uses a credit score that it did not obtain directly from a consumer reporting agency, but may contain some information from a consumer reporting agency, the financial institution may satisfy this disclosure requirement by providing a score and associated key factor information that a consumer reporting agency supplied. For example, certain automated underwriting systems generate a score used in a credit decision. These systems are often populated by data obtained from a consumer reporting agency. If a financial institution uses this automated system, it may satisfy the disclosure requirement by providing the applicants with a score and key factors a consumer reporting agency supplied based on the data, including credit score(s) imported into the automated underwriting system. This will provide applicants with information about their credit history and its role in the credit decision, in the spirit of this section of the statute.

Timing. With regard to the timing of the disclosure, the statute requires that the financial institution provide it as soon as is reasonably practicable after using a credit score.

Adverse Action Disclosures (Section 615(a) and (b))

This section requires users of consumer reports to make certain disclosures when they take adverse actions with respect to consumers, based on information received from third parties. Specific disclosures are required depending upon whether the source of the information is: a consumer reporting agency, a third party other than a consumer reporting agency, or an affiliate. The disclosure requirements are discussed separately below.

Information Obtained From a Consumer Reporting Agency

Section 615(a), Duties of Users Taking Adverse Actions on the Basis of Information Contained in Consumer Reports, provides that when adverse action is taken with respect to any consumer based in whole or in part on any information contained in a consumer report, the financial institution must:

- Provide oral, written, or electronic notice of the adverse action to the consumer.
- Provide to the consumer orally, in writing, or electronically:
 - The name, address, and telephone number of the consumer reporting agency from which it received the information (including a toll-free telephone number established by the agency, if the consumer reporting agency maintains files on a nationwide basis).
 - A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken.

Consumer Affairs Laws and Regulations

Section 1300

- Provide the consumer an oral, written, or electronic notice of the consumer's right to obtain a free copy of the consumer report from the consumer reporting agency within 60 days of receiving notice of the adverse action, and the consumer's right to dispute the accuracy or completeness of any information in the consumer report with the consumer reporting agency.

Information Obtained from a Source Other Than a Consumer Reporting Agency

Section 615(b)(1), Adverse Action Based on Information Obtained from Third Parties Other than Consumer Reporting Agencies, provides that if a financial institution:

- Denies credit for personal, family, or household purposes involving a consumer, or;
- Increases the charge for such credit,

Partially or wholly on the basis of information obtained from a person other than a consumer reporting agency and bearing upon the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the financial institution:

- At the time it communicates an adverse action to a consumer, must clearly and accurately disclose the consumer's right to file a written request for the reasons for the adverse action.
- If it receives such a request within 60 days after the consumer learns of the adverse action, must disclose, within a reasonable period of time, the nature of the adverse information. The financial institution should sufficiently detail the information to enable the consumer to evaluate its accuracy. The financial institution may, but need not, disclose the source of the information. In some instances, it may be impossible to identify the nature of certain information without also revealing the source.

Information Obtained from an Affiliate

Section 615(b)(2), Duties of Taking Certain Actions Based on Information Provided by Affiliate, provides that if a person, including a financial institution, takes an adverse action involving credit (taken in connection with a transaction initiated by a consumer), insurance or employment, based in whole or in part on information provided by an affiliate, the financial institution must notify the consumer that the information:

- Was furnished by a person related to the financial institution by common ownership or affiliated by common corporate control.
- Bears upon the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

- Does not pertain solely to transactions or experiences between the consumer and the person furnishing the information.
- Does not include information in a consumer report.

The notification must inform the consumer of the action and that the consumer may obtain a disclosure of the nature of the information relied upon by making a written request within 60 days of transmittal of the adverse action notice. If the consumer makes such a request, the user must disclose the nature of the information received from the affiliate not later than 30 days after receiving the request.

Debt Collector Communications Concerning Identity Theft (Section 615(g))

This section, Debt Collector Communications Concerning Identity Thefts, has specific requirements for financial institutions that act as debt collectors, whereby they collect debts on behalf of a third party that is a creditor or other user of a consumer report. The requirements do not apply when a financial institution is collecting its own loans. When a financial institution is notified that any information relating to a debt that it is attempting to collect may be fraudulent or may be the result of identity theft, the financial institution must notify the third party of this fact. In addition, if the consumer, to whom the debt purportedly relates, requests information about the transaction, the financial institution must provide all of the information the consumer would otherwise be entitled to if the consumer wished to dispute the debt under other provisions of law applicable to the financial institution.

Risk-Based Pricing Notice (Section 615(h))

Section 615(h) of the Fair Credit Reporting Act (FCRA) generally requires a user of consumer reports, such as a financial institution, to provide a risk-based pricing notice to a consumer when the financial institution, based on a consumer report, extends credit to the consumer on terms that are “materially less favorable” than the terms the financial institution has extended to other consumers. On January 15, 2010, the Federal Reserve and the Federal Trade Commission published final rules in the *Federal Register* (75 FR 2724) implementing this section of the FCRA.

The risk-based pricing notice requirement is designed primarily to improve the accuracy of consumer reports by alerting consumers to the existence of negative information in their consumer reports so that the consumers can, if they choose, check their consumer reports for accuracy and correct any inaccurate information. This notice provision is meant to complement an existing provision of the FCRA, Section 615(a), whereby a creditor that denies a consumer’s application for credit, based in whole or in part on information in a consumer’s report, must provide an adverse action notice. The new provision, Section 615(h), covers the situation where credit is offered at “materially less favorable terms,” rather than being denied.

Consumer Affairs Laws and Regulations

Section 1300

Definitions (12 CFR 222.71)

The following definitions pertain to the rules governing the risk-based pricing regulation:

- “Material terms” means in general:
 - For open-end credit, the annual percentage rate (APR) required to be disclosed in the account opening disclosures required under Regulation Z. This does not include a temporary initial rate that is lower than the rate that will apply when the temporary rate expires, any penalty rate that applies upon the occurrence of specific events (such as a late payment), or any fixed APR option for a home equity line of credit;
 - For credit cards (other than a credit card used to access a home equity line of credit or a charge card), the APR that applies for purchases. For credit cards without a purchase APR, “material terms” means the APR that varies based on consumer report information and that has the most significant financial impact on consumers;
 - For closed-end credit, the APR required to be disclosed prior to consummation under the closed-end provisions of Regulation Z; and
 - For credit that does not have an APR, the financial term that varies based on consumer report information and that has the most significant financial impact on consumers, such as an annual membership fee for a charge card.
- “Materially less favorable” means, generally, that the cost of credit to a consumer would be significantly greater than the cost of credit to another consumer from or through the same creditor. Relevant factors in determining the significance of a difference in cost include the type of credit product, the term of the credit extension, and the extent of the difference.

General requirements (12 CFR 222.72-73)

A financial institution must provide to a consumer a notice (“risk-based pricing notice”) in the form and manner prescribed by the regulation if:

- the institution uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer for personal, family, or household purposes; and
- based in whole or in part on the consumer report, the institution grants, extends, or otherwise provides credit to that consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from that institution.

Consumer Affairs Laws and Regulations

Section 1300

The obligation to provide the notice applies to the creditor to whom the obligation is initially payable, i.e., the original creditor. This interpretation excludes brokers and other intermediaries who do not themselves grant, extend, or provide credit to consumers. See preamble to the final regulation (75 FR at 2730 - 2731).

Determination of which consumers must receive notice (12 CFR 222.72(b)). A financial institution may determine, on a case-by-case basis, whether a consumer has received material terms that are materially less favorable by comparing the material terms offered to the consumer to the material terms offered to other consumers for a specific type of credit product. A “specific type of credit product” means one or more credit products with similar features that are designed for similar purposes. Examples include student loans, unsecured credit cards, secured credit cards, new automobile loans, used automobile loans, fixed-rate mortgage loans, and variable-rate mortgage loans.

Because making such a direct comparison between consumers may not be operationally feasible, the rules provide the two alternative methods, a credit score proxy method and a tiered pricing method, both of which are described as follows:

- *Credit score proxy method (12 CFR 222.72(b)(1)).* If a creditor uses credit scores to set the material terms of credit, the creditor may determine a cutoff score that represents the point at which approximately 40 percent of its consumers have higher credit scores and 60 percent of its consumers have lower credit scores. The creditor may then provide a risk-based pricing notice to each consumer who has a credit score lower than the cutoff score.

Credit Score Proxy Example	
The number of all, or a representative sample of, consumers to whom the institution granted credit for a specific type of credit product	10,000
40 percent of consumers	4,000
Credit scores of the 4,000 consumers with the highest credit scores	700 or higher
Cutoff score	700
Credit scores of those consumers to whom the creditor must provide a risk-based pricing notice, because the consumers' scores are lower than cutoff score	699 or lower

Alternative to 40/60 cutoff. The regulation provides an alternative to the 40/60 cutoff discussed above for situations where more than 40 percent of consumers (e.g., 80 percent) receive the most favorable material terms. In such situations, the creditor may set a different cutoff score based on its historical experience. The cutoff score would be set at a point at which the approximate percentage of consumers who historically have received the most favorable material terms based on their credit score would not receive a notice in the future. Under this alternative, the risk-based pricing notices would be provided to the approximate percentage of consumers who historically have been granted credit on material terms other than the most favorable terms.

For example, based on a sample of credit extended in the past six months, a creditor may determine that approximately 80 percent of its consumers received credit at its lowest APR (i.e., the most favorable material terms), and 20 percent of its consumers received credit at a higher APR (i.e., material terms other than the most favorable). Approximately 80 percent of the sampled consumers had a credit score at or above 750, and 20 percent had a credit score below 750. As a result, the card issuer could select 750 as its cutoff score. Consumers who have credit scores lower than 750 would receive the risk-based pricing notice. See preamble to the final regulation (75 FR at 2733).

Recalculation. An institution must recalculate the score no less than every two years.

Specific type of product. A financial institution must calculate the cutoff score by considering the credit scores of all, or a representative sample of, the consumers who have received credit for a specific type of credit product.

New entrants or new products. For new entrants into the credit business or for new products subject to risk-based pricing, a financial institution may determine the cutoff score based on information from market research or other third-party sources. For a newly acquired credit portfolio, a financial institution may determine the cutoff score from information obtained from the party from which it acquired the portfolio. The institution must recalculate the cutoff score using the scores of its own consumers within one year after it begins using a score derived from market research, a third-party, or the party from which it acquired the portfolio. If, within that one year, it has not granted credit to a sufficient number of new consumers, thus preventing it from having sufficient data with which to recalculate a cut-off score based on the credit scores of its own consumers, it may continue to use the original cutoff score. However, within two years, it must calculate its own cutoff score if it has granted credit to some new consumers within those two years.

Use of multiple credit scores. For a financial institution that generally uses two or more credit scores to set material credit terms, the institution must determine the cutoff score using the same method used to evaluate multiple scores when making credit decisions (for example, using an average credit score). If the institution does not consistently use the same method for evaluating multiple scores, the institution must use a reasonable means. For example, the institution may use any one of the methods that the institution ordinarily uses or the average credit score of each consumer to calculate the credit score by a reasonable means.

No credit score available for a consumer. If no credit score is available for a consumer, a financial institution must assume that it is granting credit on materially less favorable terms and thus must provide a risk-based pricing notice to the consumer.

- *Tiered pricing method (12 CFR 222.72(b)(2)).* If a financial institution sets the material terms of credit by assigning each consumer to one of a discrete number of pricing tiers for a specific type of credit product, based in whole or in part on a consumer report, the institution may provide a risk-based pricing notice to each consumer who is not assigned to the top pricing tier or tiers.

Consumer Affairs Laws and Regulations

Section 1300

If the financial institution uses four or fewer pricing tiers, it complies by providing risk-based pricing notices to all consumers who do not qualify for the top, best-priced tier. If the institution uses five or more pricing tiers, it complies by providing the notices to all consumers who do not qualify for the two top, best-priced tiers and any other tier that, combined with the top two tiers, equal no less than the top 30 percent and no more than the top 40 percent of the total number of tiers.

Consumer Affairs Laws and Regulations

Section 1300

Tiered Pricing Example		
Four or fewer tiers		
Top tier = best rate	APR	Notice requirements.
Tier 1 (top)	8%	No risk-based pricing notice required.
Tier 2	10%	Risk-based pricing notice required for Tiers 2, 3 and 4.
Tier 3	12%	
Tier 4	14%	

Five or more tiers (5 tiers)		
Top tier = best rate	APR	
Tier 1 (top)	8%	No risk-based pricing notice required for top 30% to 40% of tiers.
Tier 2	10%	
Tier 3	12%	Risk-based notices required for Tiers 3-5.
Tier 4	14%	
Tier 5	16%	

Five or more tiers (9 tiers)		
Top tier = best rate	APR	
Tier 1 (top)	8%	No risk-based pricing notice required for top 30% to 40% of tiers.
Tier 2	10%	
Tier 3	12%	
Tier 4	14%	Risk-based notices required for Tiers 4-9.
Tier 5	16%	
Tier 6	18%	
Tier 7	20%	
Tier 8	22%	
Tier 9	24%	

Consumer Affairs Laws and Regulations

Section 1300

- *Application to credit card issuers (12 CFR 222.72(c)).* A credit card issuer may use any of the methods in 12 CFR 222.72(b) to identify consumers to whom it must provide a risk-based pricing notice. Alternatively, the card issuer may provide the notice when:
 - a consumer applies for a credit card in connection with an application program or in response to a solicitation, and more than one purchase APR may apply under the program or solicitation, and
 - based in whole or in part on a consumer report, the credit card is issued to a consumer with an APR that is higher than the lowest APR available in connection with the application or solicitation.

The risk-based pricing requirements do not apply to a card issuer if the credit card program offers only a single annual APR (other than temporary initial rates or penalty rates) or if the issuer offers the consumer the lowest possible APR under the credit card program.

Content of the notice (12 CFR 222.73(a)(1)). The risk-based pricing notice must include:

- a statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;
- a statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;
- the identity of each consumer reporting agency that furnished a consumer report used in the credit decision;
- a statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;
- a statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies;
- a statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports;
- a statement that the terms offered, such as the APR, have been set based on information from a consumer report; and

Consumer Affairs Laws and Regulations

Section 1300

- a statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories.

See Appendix H-1 of the regulation for a model form for the risk-based pricing notice.

Account Review (12 CFR 222.72(d)). Generally, creditors must provide an account review risk-based pricing notice to the consumer if the creditor, based in whole or in part on a consumer report, increases the consumer's APR after a review of the consumer's account, unless one of the exceptions in 12 CFR 222.74(a), (b), or (c) applies (for example, the creditor provides an adverse action notice).

Content of account review risk-based pricing notice (12 CFR 222.73(a)(2)). The account review risk-based pricing notice must include:

- a statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;
- a statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;
- the identity of each consumer reporting agency that furnished a consumer report used in the account review;
- a statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;
- a statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies;
- a statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports;
- a statement that the financial institution has conducted a review of the account using information from a consumer report; and
- a statement that as a result of the review, the APR on the account has been increased based on information from a consumer report.

Consumer Affairs Laws and Regulations

Section 1300

NOTE: Items 1 through 6 for account review risk-based pricing notice are substantially the same as items 1 through 6 for the risk-based pricing notice. Only the last two items in each list are different.

See Appendix H-2 of the regulation for a model form for the account review risk-based pricing notice.

Form of the notice (12 CFR 222.73(b)). The risk-based pricing notices and the account review risk-based pricing notices must be clear and conspicuous and provided to the consumer in oral, written, or electronic form. Creditors are deemed to be in compliance with the disclosure requirements through use of the optional, applicable model forms, found in Appendix H of the regulation.

Timing (12 CFR 222.73(c)). The timing requirement depends on the specific type of credit transaction as specified below:

- For closed-end credit, a risk-based pricing notice must be provided to the consumer after the decision to approve a credit request is communicated to the consumer, but before consummation of the transaction.
- For open-end credit, the notice must be provided after the decision to grant credit is communicated to the consumer, but before the first transaction under the plan has been made.
- For account reviews, the notice must be provided at the time that the decision to increase the APR is communicated to the consumer. If no notice of the increase in the APR is provided to the consumer prior to the effective date of the APR change, the notice must be provided no later than five days after the effective date of the APR change.
- For automobile lending transactions made through an auto dealer that is unaffiliated with the institution, the institution may provide a risk-based pricing notice in the time periods described above for closed-end credit. Alternatively, the institution may arrange to have the auto dealer provide a risk-based pricing notice to the consumer on its behalf within these time periods and maintain reasonable policies and procedures to verify that the auto dealer provides the notices to consumers within the applicable time periods.
- For instant credit that is granted under an open-end credit plan to a consumer in person or by telephone, the risk-based pricing notice may be provided at the earlier of:
 - The time of the first mailing to the consumer after the decision is made to approve the credit, such as in a mailing containing the account agreement or a credit card; or
 - Within 30 days after the decision to approve the credit.

Consumer Affairs Laws and Regulations

Section 1300

Exceptions (12 CFR 222.74)

The rules contain a number of exceptions to the risk-based pricing notice requirement, as follows:

- when a consumer applies for specific terms of credit, and receives them, unless those terms were specified by the creditor using a consumer report after the consumer applied for the credit and after the creditor obtained the consumer report (12 CFR 222.74(a));
- when a creditor provides a notice of adverse action (12 CFR 222.74(b));
- when a creditor makes a firm offer of credit in a prescreened solicitation (12 CFR 222.74(c));
- when an institution generally provides a credit score disclosure to each consumer that requests a loan that is or will be secured by residential real property (12 CFR 222.74(d));
- when an institution generally provides a credit score disclosure to each consumer that requests a loan that is *not* or will *not* be secured by residential real property (12 CFR 222.74(e));
- when an institution, which otherwise provides credit score disclosures to consumers that request loans, provides a disclosure about credit scores when no credit score is available (12 CFR 222.74(f)).

The regulation contains specific disclosure requirements for Sections 222.74(d)-(f) exceptions, as discussed below.

Section 222.74(d) exception - credit score disclosure for loans secured by residential real property (12 CFR 222.74(d)). An institution is not required to provide a risk-based pricing notice to a consumer under Sections 222.72(a) or (c) if:

- The consumer requests from an institution an extension of credit that is or will be secured by one to four units of residential real property; and
- The institution generally provides to each consumer that requests such an extension of credit a notice that contains the following:
 - A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;
 - A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

Consumer Affairs Laws and Regulations

Section 1300

- A statement that the consumer’s credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;
- A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;
- A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;
- Contact information for the centralized source from which consumers may obtain their free annual consumer reports;
- A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports;
- The information required to be disclosed to the consumer in Section 609(g) of the FCRA, and as described in Module 3 of these examination procedures, under “Disclosure of Credit Scores by Certain Mortgage Lenders (FCRA), Section 609(g);” and
- The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer’s credit score. The distribution must:
 - ✓ Use the same scale as that of the credit score provided to the consumer, and
 - ✓ Be presented:
 - in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar,
 - by other clear and readily understandable graphical means, or
 - in a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers.

The presentation may use a graph or statement obtained from the entity providing the credit score if it meets these requirements.

Form of the notice. The Section 222.74(d) notice must be:

- Clear and conspicuous;
- Provided on or with the notice required by Section 609(g) of the FCRA;
- Segregated from other information provided to the consumer, except for the notice required by Section 609(g) of the FCRA; and
- Provided to the consumer in writing and in a form that the consumer may keep.

Timing. The Section 222.74(d) notice must be provided to the consumer at the same time as the disclosure required by Section 609(g) of the FCRA is provided to the consumer, which must be provided as soon as reasonably practicable after the credit score has been obtained. In any event, the Section 222.74(d) notice must be provided at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

Content of the notice when using multiple credit scores. When an institution obtains two or more credit scores from consumer reporting agencies in setting material terms of credit, the content of the Section 222.74(d) notice varies depending upon whether the institution only relies upon *one* of the credit scores or relies upon *multiple* credit scores.

- If an institution only relies upon one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer (for example, by using the low, middle, high, or most recent score), the notice must include that credit score and the other information required by Section 222.74(d).
- If an institution relies upon multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer (for example, by computing the average of all the credit scores obtained), the notice must include one of those credit scores and the other information required by Section 222.74(d).

At the institution's option, the notice may include more than one credit score, along with the additional information required by Section 222.74(d) for each credit score disclosed.

Examples:

- An institution uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers and regularly requests credit scores from several consumer reporting agencies. It relies upon the low score when determining the material terms it will offer to the consumer. The institution must disclose the low score in the Section 222.74(d) notice.

- An institution uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers and regularly requests credit scores from several consumer reporting agencies. The institution takes an average of all of the credit scores obtained in order to determine the material terms it will offer to the consumer, and thus relies upon all of the credit scores that it receives. The institution may choose one of these scores to include in the Section 222.74(d) notice.

Model form. Appendix H-3 of the regulation contains a model form of the Section 222.74(d) notice that is consolidated with the notice required by Section 609(g) of the FCRA. While use of the model form is optional, appropriate use of Model Form H-3 is deemed to comply with the requirements of Section 222.74(d).

Section 222.74(e) exception - credit score disclosure for loans not secured by residential real property (12 CFR 222.74(e)). An institution is not required to provide a risk-based pricing notice to a consumer under Section 222.72(a) or (c) if:

- The consumer requests from an institution an extension of credit that is *not* or will *not* be secured by one to four units of residential real property; and
- The institution provides to each consumer that requests such an extension of credit a notice that contains the following:
 - A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;
 - A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;
 - A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;
 - A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;
 - A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

Consumer Affairs Laws and Regulations

Section 1300

- Contact information for the centralized source from which consumers may obtain their free annual consumer reports;
- A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports;
- The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the consumer reporting agency for a purpose related to the extension of credit;
- The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score. The distribution must:

- ✓ Use the same scale as that of the credit score provided to the consumer, and
- ✓ Be presented:
 - in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar,
 - by other clear and readily understandable graphical means, or
 - in a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers.

The presentation may use a graph or statement obtained from the entity providing the credit score if it meets these requirements.

- The range of possible credit scores under the model used to generate the credit score;
- The date on which the credit score was created; and
- The name of the consumer reporting agency or other person that provided the credit score.

NOTE: Items a, b, c, d, e, f, g, and i for the Section 222.74(e) notice are the same as items a, b, c, d, e, f, g, and i for the Section 222.74(d) notice.

Form of the notice. The Section 222.74(e) notice must be:

- Clear and conspicuous;
- Segregated from other information provided to the consumer; and

— Provided to the consumer in writing and in a form that the consumer may keep.

Timing. The Section 222.74(e) notice generally must be provided to the consumer as soon as reasonably practicable after the credit score has been obtained, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan. The notice may alternatively be provided in the following manner:

— For automobile lending transactions made through an auto dealer that is unaffiliated with the institution, the institution may provide a Section 222.74(e) notice in the time periods described above. Alternatively, the institution may arrange to have the auto dealer provide a Section 222.74(e) notice to the consumer on its behalf within these time periods and maintain reasonable policies and procedures to verify that the auto dealer provides the notice to the consumer within the applicable time periods. If the institution arranges to have the auto dealer provide a Section 222.74(e) notice, the institution complies if the consumer receives a notice containing a credit score obtained by the dealer, even if a different credit score is obtained and used by the institution (12 CFR 222.73(c)(2)).

— For instant credit that is granted under an open-end credit plan to a consumer in person or by telephone, the Section 222.74(e) notice may be provided at the earlier of:

- ✓ The time of the first mailing to the consumer after the decision is made to approve the credit, such as in a mailing containing the account agreement or a credit card; or
- ✓ Within 30 days after the decision to approve the credit (12 CFR 222.73(c)(3)).

Multiple credit scores. When an institution obtains two or more credit scores from consumer reporting agencies in setting material terms of credit, the content of the Section 222.74(e) notice varies depending if the institution relies upon only *one* of the credit scores or relies upon *multiple* credit scores. These disclosures requirements are the same as those for the Section 222.74(d) notices, as described previously.

Model form. Appendix H-4 of the regulation contains a model form of the Section 222.74(e) notice. While use of the model form is optional, appropriate use of Model Form H-4 is deemed to comply with the requirements of Section 222.74(e).

Section 222.74(f) exception - credit score not available (12 CFR 222.74(f)). An institution is not required to provide a risk-based pricing notice to a consumer under Section 222.72(a) or (c) if the institution:

- Regularly obtains credit scores from a consumer reporting agency and provides credit score disclosures to consumers in accordance with Sections 222.74(d) or (e), but a credit score is not available from the consumer reporting agency from which the institution regularly obtains credit scores for a consumer to whom the institution grants, extends, or provides credit;

Consumer Affairs Laws and Regulations

Section 1300

- Does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or providing credit to the consumer; and
- Provides to the consumer a notice that contains the following:
 - A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;
 - A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time in response to changes in the consumer's credit history;
 - A statement that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms;
 - A statement that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;
 - A statement that a credit score about the consumer was not available from a consumer reporting agency, which must be identified by name, generally due to insufficient information regarding the consumer's credit history;
 - A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report;
 - A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period;
 - The contact information for the centralized source from which consumers may obtain their free annual consumer reports; and
 - A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

NOTE: Items b, f, g, h, and i for the Section 222.74(f) notice are the same as items b, f, g, h, and i for the Sections 222.74(d) and (e) notices.

Example. An institution uses consumer reports to set the material terms of non-mortgage credit granted, extended, or provided to consumers and regularly requests credit scores from a particular consumer reporting agency. As required by Section 222.74(e), the institution provides

those credit scores and additional information to consumers. The consumer reporting agency provides to the institution a consumer report on a particular consumer that contains one trade line, but does *not* provide the institution with a credit score on that consumer. If the institution does not obtain a credit score from *another* consumer reporting agency and, based in whole or in part on information in a consumer report, grants, extends, or provides credit to the consumer, the institution may provide the Section 222.74(f) notice. If, however, the institution obtains a credit score from another consumer reporting agency, the institution may not rely upon the Section 222.74(f) exception, but must satisfy the requirements of Section 222.74(e).

Form of the notice. The Section 222.74(f) notice must be:

- Clear and conspicuous;
- Segregated from other information provided to the consumer; and
- Provided to the consumer in writing and in a form that the consumer may keep.

Timing. The Section 222.74(f) notice generally must be provided to the consumer as soon as reasonably practicable after the institution has requested the credit score, but in any event not later than consummation of a transaction in the case of closed-end credit or when the first transaction is made under an open-end credit plan. The notice may alternatively be provided in the following manner:

- For automobile lending transactions made through an auto dealer that is unaffiliated with the institution, the institution may provide a Section 222.74(f) notice in the time periods described above. Alternatively, the institution may arrange to have the auto dealer provide a Section 222.74(f) notice to the consumer on its behalf within these time periods and maintain reasonable policies and procedures to verify that the auto dealer provides the notice to the consumer within the applicable time periods (12 CFR 222.73(c)(2)).
- For instant credit that is granted under an open-end credit plan to a consumer in person or by telephone, the Section 222.74(f) notice may be provided at the earlier of:
 - ✓ The time of the first mailing to the consumer after the decision is made to approve the credit, such as in a mailing containing the account agreement or a credit card; or
 - ✓ Within 30 days after the decision to approve the credit (12 CFR 222.73(c)(3)).

Model form. Appendix H-5 of the regulation contains a model form of the Section 222.74(f) notice. While use of the model form is optional, appropriate use of Model Form H-5 is deemed to comply with the requirements of Section 222.74(f).

Consumer Affairs Laws and Regulations

Section 1300

Rules of Construction (12 CFR 222.75)

The rules clarify that, in general, only one risk-based pricing notice or one credit score exception notice is required to be provided per credit extension (however, an account review would still be required, if applicable). In a transaction involving two or more consumers, a financial institution must provide a risk-based pricing notice to each consumer. If the consumers have the same address, a financial institution may satisfy the requirements by providing a single risk-based pricing notice addressed to both consumers. For credit score disclosure exception notices, whether the consumers have the same address or not, the financial institution must provide a separate notice to each consumer.

Appendix H

Appendix H contains five optional model forms that may be used to comply with the regulatory requirements. The five model forms are:

- H-1 Model form for risk-based pricing notice
- H-2 Model form for account review risk-based pricing notice
- H-3 Model form for credit score disclosure exception for credit secured by one to four units of residential real property
- H-4 Model form for credit score disclosure exception for loans not secured by residential real property
- H-5 Model form for credit score disclosure exception for loans where credit score is not available

Use of the model forms is not required. A financial institution may change the forms by rearranging the format or by making technical modifications to the language of the forms. However, any change may not be so extensive as to materially affect the substance, clarity, comprehensibility, or meaningful sequence of the forms. Institutions making such extensive revisions would lose the “safe harbor” that Appendix H provides. Examples of acceptable changes are provided in Appendix H to the regulation.

MODULE 4: DUTIES OF USERS OF CONSUMER REPORTS AND FURNISHERS OF CONSUMER REPORT INFORMATION

DUTIES OF USERS OF CREDIT REPORTS REGARDING ADDRESS DISCREPANCIES (12 CFR 571.82) (SECTION 605(H))

Section 605(h)(1) requires that, when providing a consumer report to a person that requests the report (a user), a nationwide consumer reporting agency (NCRA) must provide a notice of address discrepancy to the user if the address provided by the user in its request “substantially differs” from the address the NCRA has in the consumer’s file. Section 605(h)(2) requires the federal banking agencies and the NCUA (the Agencies), and the FTC to prescribe regulations providing guidance regarding reasonable policies and procedures that a user of a consumer report should employ when such user has received a notice of address discrepancy. On November 9, 2007, the Agencies and the FTC published final rules in the Federal Register implementing this section (72 FR 63718).

Definitions

- **Nationwide consumer reporting agency (NCRA).** Section 603(p) defines a NCRA as one that compiles and maintains files on consumers on a nationwide basis and regularly engages in the practice of assembling or evaluating and maintaining the following two pieces of information about consumers residing nationwide for the purpose of furnishing consumer reports to third parties bearing on a consumer’s credit worthiness, credit standing, or credit capacity:
 - Public record information.
 - Credit account information from persons who furnish that information regularly and in the ordinary course of business.
- **Notice of address discrepancy (12 CFR 571.82(b)).** A “notice of address discrepancy” is a notice sent to a user by an NCRA (section 603(p)) that informs the user of a substantial difference between the address for the consumer that the user provided to request the consumer report and the address(es) in the NCRA’s file for the consumer.

Requirement to form a reasonable belief (12 CFR 571.82(c)). A user must develop and implement reasonable policies and procedures designed to enable the user to form a reasonable belief that the consumer report relates to the consumer whose report was requested, when the user receives a notice of address discrepancy in connection with a new or existing account.

The rules provide the following examples of reasonable policies and procedures for forming a reasonable belief that a consumer report relates to the consumer whose report was requested:

- Comparing information in the consumer report with information the user
 - has obtained and used to verify the consumer's identity as required by the Customer Identification Program rules (31 CFR 103.121);
 - maintains in its records; or
 - obtains from a third party; or
- Verifying the information in the consumer report with the consumer.

Requirement to furnish a consumer's address to an NCRA (12 CFR 571.82(d)). A user must develop and implement reasonable policies and procedures for furnishing to the NCRA an address for the consumer that the user has reasonably confirmed is accurate when the user does the following:

- Forms a reasonable belief that the report relates to the consumer whose report was requested.
- Establishes a continuing relationship with the consumer (i.e., in connection with a new account).
- Regularly, and in the ordinary course of business, furnishes information to the NCRA that provided the notice of address discrepancy.

A user's policies and procedures for furnishing a consumer's address to an NCRA must require the user to furnish the confirmed address as part of the information it regularly furnishes to the NCRA during the reporting period when it establishes a continuing relationship with the consumer.

The rules also provide the following examples of how a user may reasonably confirm an address is accurate:

- Verifying the address with the consumer whose report was requested.
- Reviewing its own records.
- Verifying the address through third-party sources.
- Using other reasonable means.

FINANCIAL INSTITUTIONS AS FURNISHERS OF INFORMATION

Overview

The FCRA contains many responsibilities for financial institutions that furnish information to consumer reporting agencies. These requirements generally involve ensuring the accuracy of the data that is placed in the consumer reporting system. This examination module includes reviews of the various areas associated with furnishers of information. This module will not apply to financial institutions that do not furnish any information to consumer reporting agencies.

Furnishers of Information – General (Section 623)

Section 623 of the FCRA requires the Agencies and the Federal Trade Commission (FTC) to:

- Issue guidelines for use by furnishers regarding the accuracy and integrity of the information about consumers that they furnish to consumer reporting agencies;
- Prescribe regulations requiring furnishers to establish reasonable policies and procedures for implementing the guidelines; and
- Issue regulations identifying the circumstances under which a furnisher must reinvestigate disputes concerning the accuracy of information contained in a consumer report based on a direct request from a consumer.

The Agencies and the FTC published final rules in the Federal Register (74 FR 31484) implementing this section of FCRA. These rules took effect July 1, 2010.

Definitions (12 CFR 571.41)

The following definitions pertain to the rules governing the furnishers of information to a consumer reporting agency:

- “Accuracy” means that the information a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer correctly:
 - Reflects the terms of and liability for the account or other relationship;
 - Reflects the consumer’s performance and other conduct with respect to the account or other relationship; and
 - Identifies the appropriate consumer.

Consumer Affairs Laws and Regulations

Section 1300

- “Direct dispute” means a dispute submitted by a consumer directly to a furnisher (including a furnisher that is a debt collector) concerning the accuracy of any information contained in a consumer report and pertaining to an account or other relationship that the furnisher has or had with the consumer.
- “Furnisher” means an entity that furnishes information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report. An entity is not a furnisher when it:
 - Provides information to a consumer reporting agency solely to obtain a consumer report in accordance with the permissible purposes outlined in sections 604(a) and (f) of the FCRA;
 - Is acting as a “consumer reporting agency” as defined in section 603(f) of the FCRA;
 - Is a consumer to whom the furnished information pertains; or
 - Is a neighbor, friend, or associate of the consumer, or another individual with whom the consumer is acquainted or who may have knowledge about the consumer, and who provides information about the consumer’s character, general reputation, personal characteristics, or mode of living in response to a specific request from a consumer reporting agency.
- “Identity theft” means a fraud committed or attempted using the identifying information of another person without authority. “Identifying information” means any name or number that may be used alone or in conjunction with any other information to identify a specific person (16 CFR 603.2).
- “Integrity” means that the information a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer:
 - Is substantiated by the furnisher’s records at the time it is furnished;
 - Is furnished in a form and manner that is designed to minimize the likelihood that the information may be incorrectly reflected in a consumer report; and
 - Includes the information in the furnisher’s possession about the account or other relationship that:
 - ✓ the relevant Agency has determined that the absence of which would likely be materially misleading in evaluating a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living; and

Consumer Affairs Laws and Regulations

Section 1300

- ✓ is specified in the Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies (12 CFR 571, Appendix E). Currently, the Guidelines specify the credit limit, if applicable and in the furnisher's possession.

Duties of furnishers to provide accurate information (Section 623(a)). This section states that a person, including a financial institution, may, but need not, specify an address for receipt of notices from consumers concerning inaccurate information. If the financial institution specifies such an address, then it may not furnish information relating to a consumer to any consumer reporting agency, if (a) the consumer notified the financial institution, at the specified address, that the information is inaccurate, and (b) the information is inaccurate. If the financial institution does not specify an address, then it may not furnish any information relating to a consumer to any consumer reporting agency if the financial institution knows or has reasonable cause to believe that the information is inaccurate.

When a financial institution that (regularly and in the ordinary course of business) furnishes information to one or more consumer reporting agencies about its transactions or experiences with any consumer determines that any such information is not complete or accurate, the financial institution must promptly notify the consumer reporting agency of that determination. The financial institution must provide corrections to that information or any additional information necessary to make the information complete and accurate to the consumer reporting agency. Further, the financial institution thereafter must not furnish any information that remains incomplete or inaccurate to the consumer reporting agency.

If a consumer disputes the completeness or accuracy of any information a financial institution furnishes to a consumer reporting agency, that financial institution may not furnish the information to any consumer reporting agency without notice that the consumer disputes the information.

Reasonable policies and procedures concerning the accuracy and integrity of furnished information (12 CFR 571.42) and Interagency Guidelines (12 CFR 571, Appendix E). Each furnisher must establish and implement reasonable written policies and procedures regarding the accuracy and integrity of consumer information that it furnishes to a consumer reporting agency. The policies and procedures must be appropriate to the nature, size, complexity, and scope of each furnisher's activities. In developing its policies and procedures, a furnisher must consider the Interagency Guidelines and may include its existing policies and procedures that are relevant and appropriate. Each furnisher must also review its policies and procedures periodically and update them as necessary to ensure their continued effectiveness. The guideline's recommendations include the following:

- Using standard data reporting formats and standard procedures for compiling and furnishing data, where feasible, such as electronic transmission of information about consumers to consumer reporting agencies;

Consumer Affairs Laws and Regulations

Section 1300

- Maintaining records for a reasonable period of time, not less than any applicable recordkeeping requirement, in order to substantiate the accuracy of any information furnished about consumers to consumer reporting agencies that is subject to a direct dispute; and
- Training staff that participates in activities related to the furnishing of information about consumers to consumer reporting agencies.

Voluntary closures of accounts (Section 623(a)(4)). This section requires a person, including a financial institution, who regularly and in the ordinary course of business furnishes information to a consumer reporting agency regarding one of its consumer credit accountholders, to notify the consumer reporting agency of the consumer's voluntary account closure. This notice is to be furnished to the consumer reporting agency as part of the regularly furnished information for the period in which the account is closed.

Notice involving delinquent accounts (Section 623(a)(5)). This section requires that a person, including a financial institution, that furnishes information to a consumer reporting agency about a delinquent account placed for collection, charged off, or subjected to any similar action, must, not later than 90 days after furnishing the information to the consumer reporting agency, notify the consumer reporting agency of the month and year of the commencement of the delinquency that immediately preceded the action.

Duties upon notice of dispute from a consumer reporting agency (Section 623(b)). This section requires that whenever a financial institution receives a notice of dispute from a consumer reporting agency regarding the accuracy or completeness of any information the financial institution provided to a consumer reporting agency pursuant to section 611 (Procedure in Case of Disputed Accuracy), that financial institution must, pursuant to § 623(b):

- Conduct an investigation regarding the disputed information.
- Review all relevant information the consumer reporting agency provided along with the notice.
- Report the results of the investigation to the consumer reporting agency.
- If the investigation finds the information is incomplete or inaccurate, report those results to all nationwide consumer reporting agencies to which the financial institution previously provided the information.
- If the disputed information is incomplete, inaccurate, or not verifiable by the financial institution, it must promptly, for purposes of reporting to the consumer reporting agency do one of the following:
 - Modify the item of information.

Consumer Affairs Laws and Regulations

Section 1300

- Delete the item of information.
- Permanently block the reporting of that item of information.

The financial institution must complete the required investigations, reviews, and reports within 30 days. The financial institution may extend the time period for 15 days if a consumer reporting agency receives additional relevant information from the consumer.

Duties upon notice of dispute from a consumer (direct disputes) (12 CFR 571.43)

General rule. A furnisher must conduct a reasonable investigation of a direct dispute (unless exceptions, described later, apply) if the dispute relates to:

- The consumer's liability for a credit account or other debt with the furnisher, such as direct disputes relating to whether there is or has been identity theft or fraud against the consumer, whether there is individual or joint liability on an account, or whether the consumer is an authorized user of a credit account;
- The terms of a credit account or other debt with the furnisher, such as, direct disputes relating to the type of account, principal balance, scheduled payment amount on an account, or the amount of the credit limit on an open-end account;
- The consumer's performance or other conduct concerning an account or other relationship with the furnisher such as, direct disputes relating to the current payment status, high balance, payment date, the payment amount, or the date an account was opened or closed; or
- Any other information contained in a consumer report regarding an account or other relationship with the furnisher that bears on the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

Exceptions. The direct dispute requirements do not apply to a furnisher if the direct dispute relates to:

- The consumer's identifying information such as name(s), date of birth, Social Security number, telephone number(s), or address(es);
- The identity of past or present employers;
- Inquiries or requests for a consumer report;
- Information derived from public records, such as judgments, bankruptcies, liens, and other legal matters (unless the information was provided by a furnisher with an account or other relationship with the consumer);

Consumer Affairs Laws and Regulations

Section 1300

- Information related to fraud alerts or active duty alerts; or
- Information provided to a consumer reporting agency by another furnisher.

The direct dispute requirements also do not apply if the furnisher has a reasonable belief that the direct dispute is:

- Submitted by a credit repair organization;
- Is prepared on behalf of the consumer by a credit repair organization; or
- Is submitted on a form supplied to the consumer by a credit repair organization.

Note: The direct dispute requirements also do not apply if any of the above are done by an entity that would be a credit repair organization but for the fact that it is a 501(c)(3) nonprofit organization.

Direct Dispute Address. A furnisher is required to investigate a direct dispute only if a consumer submits a dispute notice to the furnisher at:

- The address provided by a furnisher and listed on a consumer report relating to the consumer;
- An address clearly and conspicuously specified by the furnisher that is provided to the consumer in writing or electronically (if the consumer has agreed to the electronic delivery of information from the furnisher); or
- Any business address of the furnisher if the furnisher has not provided a specific address for submitting direct disputes.

Direct Dispute Notice Contents. A dispute notice from a consumer must include:

- Sufficient information to identify the account or other relationship that is in dispute, such as an account number and the name, address, and telephone number of the consumer;
- The specific information that the consumer is disputing and an explanation of the basis for the dispute; and
- All supporting documentation or other information reasonably required by the furnisher to substantiate the basis of the dispute. This documentation may include, for example, a copy of the relevant portion of the consumer report that contains the allegedly inaccurate information; a police report; a fraud or identity theft affidavit; a court order; or account statements.

Duties of a Furnisher after Receiving a Direct Dispute Notice from a Consumer. After receiving a dispute notice from a consumer, the furnisher must:

Consumer Affairs Laws and Regulations

Section 1300

- Conduct a reasonable investigation with respect to the disputed information;
- Review all relevant information provided by the consumer with the dispute notice;
- Complete its investigation of the dispute and report the results of the investigation to the consumer before the expiration of the period under section 611(a)(1) of the FCRA (15 U.S.C. 1681i(a)(1)) within which a consumer reporting agency would be required to complete its action if the consumer had elected to dispute the information under that section; and
- If the investigation finds that the information reported was inaccurate, promptly notify each consumer reporting agency to which the furnisher provided inaccurate information of investigation findings and provide to the consumer reporting agency any correction to that information that is necessary to make the information provided by the furnisher accurate.

Frivolous or Irrelevant Disputes. A furnisher is not required to investigate a direct dispute if the furnisher has reasonably determined that the dispute is frivolous or irrelevant. A dispute qualifies as frivolous or irrelevant if:

- The consumer did not provide sufficient information to investigate the disputed information;
- The direct dispute is substantially the same as a dispute previously submitted by or on behalf of the consumer and the dispute is one with respect to which the furnisher has already complied with the statutory or regulatory requirements. However, a direct dispute would not be “substantially the same” as the one previously submitted if the dispute includes new information required by the regulation to be provided to the furnisher, but that had not previously been provided to the furnisher; or
- The furnisher is not required to investigate the direct dispute because one or more of the exceptions listed in 12 CFR 571.43(b) applies.

Upon making a determination that a dispute is frivolous or irrelevant, the furnisher must notify the consumer of the determination not later than five business days after making the determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the furnisher. The furnisher’s notice that a dispute is frivolous or irrelevant must include the reasons for such determination and identify any information required to investigate the disputed information. The notice may consist of a standardized form describing the general nature of such information.

Prevention of Re-Pollution of Consumer Reports (Section 623(a)(6))

This section, Prevention of Re-Pollution of Consumer Reports, has specific requirements for furnishers of information, including financial institutions, to a consumer reporting agency that received notice from a consumer reporting agency that furnished information may be fraudulent as a result of identity theft. Section 605B, Block of Information Resulting From Identity Theft, requires consumer reporting

agencies to notify furnishers of information, including financial institutions, that the information may be the result of identity theft, an identity theft report has been filed, and that a block has been requested. Upon receiving such notice, § 623(a)(6) requires financial institutions to establish and follow reasonable procedures to ensure that it does not re-report this information to the consumer reporting agency, thus “re-polluting” the victim’s consumer report.

Section 615(f), Prohibition on Sale or Transfer of Debt Caused by Identity Theft, also prohibits a financial institution from selling or transferring debt caused by an alleged identity theft.

Negative Information Notice (Section 623(a)(7))

This section, Negative Information Notice, requires a financial institution to provide consumers with a notice either before it provides negative information to a nationwide consumer reporting agency, or within 30 days after reporting the negative information.

Negative information. For these purposes, negative information means any information concerning a customer’s delinquencies, late payments, insolvency, or any form of default.

Nationwide consumer reporting agency. Section 603(p) of the FCRA defines a nationwide consumer reporting agency as a “consumer reporting agency that compiles and maintains files on consumers on a nationwide basis.” It defines this type of consumer reporting agency as one that regularly assembles or evaluates, and maintains, each of the following regarding consumers residing nationwide for the purpose of furnishing consumer reports to third parties bearing on a consumer’s creditworthiness, credit standing, or credit capacity:

- Public Record Information.
- Credit account information from persons who furnish that information regularly and in the ordinary course of business.

Institutions may provide this disclosure on or with any notice of default, any billing statement, or any other materials provided to the customer, as long as the notice is clear and conspicuous. Institutions may also choose to provide this notice to all customers as an abundance of caution. However, financial institutions may not include this notice in the initial disclosures provided under § 127(a) of the Truth in Lending Act.

Model text. As required by the FCRA, the Federal Reserve Board developed the following model text that institutions can use to comply with these requirements. The first model contains text an institution can use when it provides a notice before furnishing negative information. The second model form contains text to use when an institution provides notice within 30 days after reporting negative information:

Notice prior to communicating negative information (Model B-1):

“We may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.”

Notice within 30 days after communicating negative information (Model B-2):

“We have told a credit bureau about a late payment, missed payment, or other default on your account. This information may be reflected in your credit report.”

Use of the model form(s) is not required; however, proper use of the model forms provides a financial institution with a safe harbor from liability. A financial institution may make certain changes to the language or format of the model notices without losing the safe harbor from liability provided by the model notices. The changes to the model notices may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model notices. A financial institution making extensive revisions will lose the safe harbor from liability that the model notices provide. Acceptable changes include:

- Rearranging the order of the references to “late payment(s),” or “missed payment(s).”
- Pluralizing the terms “credit bureau,” “credit report,” and “account.”
- Specifying the particular type of account on which it may furnish information, such as “credit card account.”
- Rearranging in Model Notice B-1 the phrases “information about your account” and “to credit bureaus” such that it would read, “We may report to credit bureaus information about your account.”

MODULE 5: CONSUMER ALERTS AND IDENTITY THEFT PROTECTIONS

Overview

The FCRA contains several provisions for both consumer reporting agencies and users of consumer reports, including financial institutions, that are designed to help combat identity theft. This module applies to financial institutions that are not consumer reporting agencies, but are users of consumer reports.

Two primary requirements exist: first, a user of a consumer report that contains a fraud or active duty alert must take steps to verify the identity of an individual to whom the consumer report relates, and second, a financial institution must disclose certain information when consumers allege that they are the victims of identity theft.

Fraud and Active Duty Alerts (Section 605A(h))

Initial fraud and active duty alerts. Consumers who suspect that they may be the victims of fraud including identity theft may request nationwide consumer reporting agencies to place initial fraud alerts in their consumer reports. These alerts must remain in a consumer's report for no less than 90 days. In addition, members of the armed services who are called to active duty may also request that active duty alerts be placed in their consumer reports. Active duty alerts must remain in these service members' files for no less than 12 months.

Section 605A(h)(1)(B), Limitations on Use of Information for Credit Extensions, requires users of consumer reports, including financial institutions, to verify a consumer's identity if a consumer report includes a fraud or active duty alert. Unless the financial institution uses reasonable policies and procedures to form a reasonable belief that it knows the identity of the person making the request, the financial institution may not:

- Establish a new credit plan or extension credit (other than under an open-end credit plan) in the name of the consumer.
- Issue an additional card on an existing account.
- Increase a credit limit.

Extended Alerts. Consumers who allege that they are the victim of an identity theft may also place an extended alert, which lasts seven years, on their consumer report. Extended alerts require consumers to submit identity theft reports and appropriate proof of identity to the nationwide consumer reporting agencies.

Section 605A(h)(2)(B), Limitation on Users, requires a financial institution that obtains a consumer report that contains an extended alert to contact the consumer in person or by the method the consumer lists in the alert prior to performing any of the three actions listed above.

Information Available to Victims (Section 609(e))

This section, Information Available to Victims, requires a financial institution to provide records of fraudulent transactions to victims of identity theft within 30 days after the receipt of a request for the records. These records include the application and business transaction records under the control of the financial institution whether maintained by the financial institution or another person on behalf of the institution (such as a service provider). The financial institution should provide this information to any of the following:

- The victim.
- Any federal, state, or local government law enforcement agency or officer specified by the victim in the request.

Consumer Affairs Laws and Regulations

Section 1300

- Any law enforcement agency investigating the identity theft that was authorized by the victim to take receipt of these records.

The victim must make the request for the records in writing and send it to the financial institution at the address specified by the financial institution for this purpose. The financial institution may ask the victim to provide information, if known, regarding the date of the transaction or application, and any other identifying information such as an account or transaction number.

Unless the financial institution has a high degree of confidence that it knows the identity of the victim making the request for information, the financial institution must take prudent steps to positively identify the person before disclosing any information. Proof of identity can include any of the following:

- A government-issued identification card.
- Personally identifying information of the same type that was provided to the financial institution by the unauthorized person.
- Personally identifiable information that the financial institution typically requests from new applicants or for new transactions.

At the election of the financial institution, the victim must also provide the financial institution with proof of an identity theft complaint, which may consist of a copy of a police report evidencing the claim of identity theft and a properly completed affidavit. The affidavit can be either the standardized affidavit form prepared by the Federal Trade Commission (published in April 2005 in 70 Federal Register 21792), or an “affidavit of fact” that is acceptable to the financial institution for this purpose.

When these conditions are met, the financial institution must provide the information at no charge to the victim. However, the financial institution is not required to provide any information if, acting in good faith, the financial institution determines any of the following:

- Section 609(e) does not require disclosure of the information.
- The financial institution does not have a high degree of confidence in knowing the true identity of the requestor, based on the identification and/or proof provided.
- The request for information is based on a misrepresentation of fact by the requestor.
- The information requested is Internet navigational data or similar information about a person’s visit to a web site or online service.

Duties Regarding the Detection, Prevention, and Mitigation of Identity Theft (12 CFR 571.90) (Section 615 (e))

Section 615(e) requires the federal banking agencies and the NCUA (the Agencies) as well as the FTC to prescribe regulations and guidelines for financial institutions and creditors¹⁸ regarding identity theft. On November 9, 2007, the Agencies published final rules and guidelines in the Federal Register implementing this section (72 FR 63718).

Definitions (12 CFR 571.90(b)). The following regulatory definitions pertain to the regulations regarding identify theft red flags.

- An “**account**” is a continuing relationship established by a person with a financial institution to obtain a product or service for personal, family, household or business purposes. An account includes the following:
 - An extension of credit, such as the purchase of property or services involving a deferred payment.
 - A deposit account.
- The “**board of directors**” includes, for a branch or agency of a foreign bank, the managing official in charge of the branch or agency and, for any other creditor that does not have a board of directors, a designated employee at the level of senior management.
- A “**covered account**” is:
 - An account that a financial institution offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account or savings account.
 - Any other account offered or maintained by the financial institution for which there is a reasonably foreseeable risk to customers or the safety and soundness of the financial institution from identity theft, including financial, operational, compliance, reputation or litigation risks.
- A “**customer**” is a person that has a “covered account” with a financial institution.
- “**Identity theft**” means a fraud committed or attempted using the identifying information of another person without authority. “Identifying information” means any name or number that

¹⁸ For purposes of these examination procedures, “financial institutions and creditors” are referred to jointly as “financial institutions.”

Consumer Affairs Laws and Regulations

Section 1300

may be used alone or in conjunction with any other information to identify a specific person (16 CFR 603.2).

- A “**red flag**” is a pattern, practice or specific activity that indicates the possible existence of identity theft.
- A “**service provider**” is a person that provides a service directly to a financial institution.

Periodic identification of covered accounts (12 CFR 571.90(c)). Each financial institution must periodically determine whether it offers or maintains covered accounts. As part of this determination, the financial institution must conduct a risk assessment to determine whether it offers or maintains covered accounts taking into consideration:

- The methods it provides to open its accounts.
- The methods it provides to access its accounts.
- Its previous experiences with identity theft.

Establishment of an identity theft prevention program (Program) (12 CFR 571.90 (d)). A financial institution must develop and implement a written Program designed to detect, prevent, and mitigate identity theft in connection with the opening of a “covered account” or any existing “covered account.” The Program must be tailored to the financial institution’s size and complexity and the nature and scope of its operations and must contain “reasonable policies and procedures” to:

- Identify red flags for the covered accounts the financial institution offers or maintains and incorporate those red flags into the Program.
- Detect red flags that have been incorporated into the Program.
- Respond appropriately to any red flags that are detected to prevent and mitigate identity theft.
- Ensure the Program (including the red flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution from identity theft.

Administration of the Program (12 CFR 571.90 (e)). A financial institution must provide for the continued administration of the Program by doing all of the following:

- Obtaining approval of the initial written Program by the board of directors or an appropriate committee of the board.

Consumer Affairs Laws and Regulations

Section 1300

- Involving the board of directors, a committee of the board, or an employee at the level of senior management, in the oversight, development, implementation, and administration of the Program.
- Training staff, as necessary, to implement the Program effectively.
- Exercising appropriate and effective oversight of service provider arrangements.

Guidelines (12 CFR 571.90(f)). Each financial institution that is required to implement a program also must consider the guidelines in Appendix J of the regulation and include in its Program guidelines that are appropriate. The guidelines are intended to assist financial institutions in the formulation and maintenance of a Program that satisfies the regulatory requirements. A financial institution may determine that a particular guideline is not appropriate to incorporate into its Program; however, the financial institution must have policies and procedures that meet the specific requirements of the rules.

A financial institution may incorporate into its Program, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers and to the safety and soundness of the financial institution from identity theft.

Illustrative examples of red flags are located in Supplement A to Appendix J of the regulation. A financial institution is not required to use the examples, nor will it need to justify its failure to include in its Program a specific red flag from the list of examples. However, the financial institution must be able to account for the overall effectiveness of its Program that is appropriate to its size and complexity and the nature and scope of its activities.

Duties of Card Issuers Regarding Changes of Address (12 CFR 571.91) (Section 615(e))

Section 615(e)(1)(C) requires the Agencies and the FTC to prescribe regulations for debit and credit card issuers regarding the assessment of the validity of address changes for existing accounts. The regulations require card issuers to have procedures to assess the validity of an address change if the card issuer receives a notice of change of address for an existing account, and within a short period of time (during at least the first 30 days) receives a request for an additional or replacement card for the same account. On November 9, 2007, the Agencies and the FTC published final rules in the Federal Register implementing this section (72 FR 63718).

Definitions (12 CFR 571.91(b)). The following definitions pertain to the rules governing the duties of card issuers regarding changes of address:

- A “**cardholder**” is a consumer who has been issued a credit or debit card.
- “**Clear and conspicuous**” means reasonably understandable and designed to call attention to the nature and significance of the information presented.

Address validation requirements (12 CFR 571.91(c)). A card issuer must establish and implement policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. In such situations, the card issuer must not issue an additional or replacement card until it assesses the validity of the change of address in accordance with its policies and procedures.

The policies and procedures must provide that the card issuer will:

- Notify the cardholder of the request for an additional or replacement card
 - at the cardholder's former address; or
 - by any other means of communication that the card issuer and the cardholder have previously agreed to use; and
- Provide to the cardholder a reasonable means of promptly reporting incorrect address changes; or
 - Assess the validity of the change of address according to the procedures the card issuer has established as a part of its Identity Theft Prevention Program (12 CFR 571.90).

Alternative timing of address validation (12 CFR 571.91(d)). A card issuer may satisfy the requirements of these rules prior to receiving any request for an additional or replacement card by validating an address when it receives an address change notification.

Form of notice (12 CFR 571.91(e)). Any written or electronic notice that a card issuer provides to satisfy these rules must be clear and conspicuous and provided separately from its regular correspondence with the cardholder.

CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND MARKETING ACT OF 2003

Background

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM or Act)¹⁹, charged the Federal Trade Commission (FTC) with issuing implementing regulations.²⁰ The FTC issued regulations, which became effective March 28, 2005, that provide criteria to determine the *primary purpose* of electronic mail (e-mail) messages. The FTC also issued regulations that contain criteria pertaining to warning labels on sexually oriented materials, which became effective May 19, 2004.

The goals of the Act are to:

- Reduce spam and unsolicited pornography by prohibiting senders of unsolicited commercial e-mail messages from disguising the source and content of their messages.
- Give consumers the choice to cease receiving a sender's unsolicited commercial e-mail messages.

Section 8 of the Federal Deposit Insurance Act grants compliance authority to the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Reserve Board, and the Office of Thrift Supervision. The Federal Credit Union Act 12 USC 1751 grants authority to the National Credit Union Association.

The FTC researched and determined that a "Do Not Spam" registry (similar to the highly effective "Do Not Call" registry) would not be effective or practicable at this time.

Key Definitions

Affirmative consent (usage: commercial e-mail messages):

- The recipient expressly consents to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative; and

¹⁹ 15 USC 7701 - 7713

²⁰ Final rules relating to the established criteria for determining when the primary purpose of an e-mail message is commercial were published in the *Federal Register* on January 19, 2005 (70 FR 3110). Final rules relating to governing the labeling of commercial e-mail containing sexually oriented material were published in the *Federal Register* on April 19, 2004 (69 FR 21024). A notice of proposed rulemaking relating to definitions, implementation and reporting requirements under the CAN-SPAM Act was published in the *Federal Register* on May 12, 2005 (70 FR 25426).

Consumer Affairs Laws and Regulations

Section 1300

- If the message is from a party other than the party to which the recipient communicated such consent, at which time the recipient was given clear and conspicuous notice that the recipient's e-mail address could be transferred to such other party for the purpose of initiating commercial e-mail messages.

Commercial e-mail message: Any e-mail message the *primary purpose* of which is to advertise or promote for a commercial purpose, a commercial product or service (including content on the Internet). An e-mail message would not be considered to be a commercial e-mail message solely because such message includes a reference to a commercial entity that serves to identify the sender, or a reference or link to an Internet Web site operated for a commercial purpose.

Dictionary attacks: Obtaining e-mail addresses by using automated means to generate possible e-mail addresses by combining names, letters, or numbers into numerous permutations.

Harvesting: Obtaining e-mail addresses using automated means from an Internet Web site or proprietary online service operated by another person, where such service/person, at the time the address was obtained, provided a notice stating that the operator of such Web site or online service would not give, sell, or otherwise transfer electronic addresses.

Header information: The source, destination, and routing information attached to the beginning of an e-mail message, including the originating domain name and originating e-mail address.

Hijacking: The use of automated means to register for multiple e-mail accounts or online user accounts from which to transmit, or enable another person to transmit, a commercial e-mail message that is unlawful.

Initiate: To originate, transmit, or to procure the origination or transmission of such message but shall not include actions that constitute routine conveyance. For purposes of the Act, more than one person may be considered to have initiated the same message.

Primary purpose: The FTC's regulations provide further clarification regarding determination of whether an e-mail message has "commercial" promotion as its *primary purpose*: (16 CFR 316.3)

- The primary purpose of an e-mail message is deemed commercial if it contains only the commercial advertisement or promotion of a commercial product or service (commercial content).
- The primary purpose of an e-mail message is deemed commercial if it contains both commercial content and "transactional or relationship" content (see below for definition) if either of the following occurs:
 - A recipient reasonably interpreting the subject line of the e-mail message would likely conclude that the message contains commercial content.

- The e-mail message’s “transactional or relationship” content does not appear in whole or substantial part at the beginning of the body of the message.
- The primary purpose of an e-mail message is deemed commercial if it contains both commercial content as well as content that is not transactional or relationship content if a recipient reasonably interpreting either:
 - The subject line of the e-mail message would likely conclude that the message contains commercial content.
 - The body of the message would likely conclude that the primary purpose of the message is commercial.
- The primary purpose of an e-mail message is deemed transactional or relationship (noncommercial) if it contains only “transactional or relationship” content.

Recipient: An authorized user of the electronic mail address to which the message was sent or delivered.

Sender: A person who initiates an e-mail message and whose product, service, or Internet website is advertised or promoted by the message.

Sexually oriented material: Any material that depicts sexually explicit conduct unless the depiction constitutes a small and insignificant part of the whole.

Transactional or relationship e-mail message: An e-mail message with the primary purpose of facilitating, completing, or confirming a commercial transaction that the recipient previously agreed to enter into; to provide warranty, product recall, or safety or security information; or subscription, membership, account, loan, or other information relating to an ongoing purchase or use.

General Requirements of the CAN-SPAM Statute:

- Prohibits the use of false or misleading transmission information (Section 7704(a)(1)) such as:
 - False or misleading header information.
 - A “from” line that does not accurately identify any person who initiated the message.
 - Inaccurate or misleading identification of a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.
- Prohibits the use of deceptive subject headings (Section 7704(a)(2)).

Consumer Affairs Laws and Regulations

Section 1300

- Requires a functioning e-mail return address or other Internet-based response mechanism (Section 7704(a)(3)).
- Requires the discontinuation of commercial e-mail messages within 10 business days after receipt of opt-out notification from recipient (Section 7704(a)(4)).
- Requires a clear and conspicuous identification that the message is an advertisement or solicitation; clear and conspicuous notice of the opportunity to decline to receive further commercial e-mail messages from the sender; and a valid physical postal address of the sender (Section 7704(a)(5)).
- Prohibits address harvesting and dictionary attacks (Section 7704(b)(1)).
- Prohibits hijacking (Section 7704(b)(2)).
- Prohibits any person from knowingly relaying or retransmitting a commercial e-mail message that is unlawful (Section 7704(b)(3)).
- Requires warning labels (in the subject line and within the message body) on commercial e-mail messages containing sexually oriented material (Section 7704(d)).
- Prohibits a person from promoting, or allowing the promotion of, that person's trade or business, or goods, products, property, or services in an unlawful commercial e-mail message (Section 7705(a)).

TELEPHONE CONSUMER PROTECTION ACT AND JUNK FAX PREVENTION ACT

BACKGROUND

The Federal Communications Commission (FCC) issued regulations that establish a national “Do-Not-Call” registry²¹ and other requirements pursuant to the Telephone Consumer Protection Act of 1991 (TCPA)²². The FCC regulations detail certain requirements for entities making telemarketing calls, such as complying with do-not-call list requirements, keeping to a maximum number of abandoned calls, and transmitting caller ID information. The regulations also detail the FCC’s unsolicited facsimile advertising requirements, which were modified by the Junk Fax Prevention Act of 2005 and became effective on July 9, 2005. The FCC regulations were generally effective as of October 1, 2003.

The FCC regulations apply to banks, insurance companies, credit unions, and savings associations. The Federal Trade Commission’s (FTC) telemarketing regulations parallel the FCC regulations²³ and apply to all other business entities, including third parties acting as agent or on behalf of a financial institution.

Key Definitions

Abandoned call – A telephone call that is not transferred to a live sales agent within two seconds of the recipient’s completed greeting.

Automatic Telephone Dialing System and **Autodialer** – Equipment that has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and the capability to dial such numbers.

Established business relationship for the purpose of telephone solicitations – A prior or existing relationship between a person or entity and a residential subscriber based on the subscriber’s purchase or transaction with the entity within the 18 months immediately preceding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, and neither party has previously terminated the relationship. The established business relationship does not extend

²¹ The Federal Trade Commission (FTC) maintains the national Do-Not-Call registry adopted by the FCC.

²² 47 USC 227; The Federal Communications Commission’s final regulations were published in the *Federal Register* on July 25, 2003 (68 FR 44144). The regulations were modified several times. *See* 68 FR 59131 (Oct. 14, 2003); 69 FR 60311 (Oct. 8, 2004); 70 FR 19337 (Apr. 13, 2005); 71 FR 25977 (May 3, 2006); 71 FR 56893 (Sept. 28, 2006); 71 FR 75122 (Dec. 14, 2006).

²³ The Federal Trade Commission final regulations were published in the *Federal Register* on January 29, 2003 (68 FR 4580).

Consumer Affairs Laws and Regulations

Section 1300

to an affiliate unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliates.

Established business relationship for purposes of sending of facsimile advertisements –

A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber, on the basis of an inquiry, application, purchase, or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

Facsimile broadcaster – A person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

Residential Subscriber – An individual who has contracted with a common carrier to provide telephone exchange service at a personal residence.

Seller – The person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging purchase or rental of, or investment in, property, goods, or services that is transmitted to any person.

Telemarketer – The person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services that is transmitted to any person.

Telemarketing – The initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services that is transmitted to any person.

Telephone facsimile machine – Equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

Telephone solicitation – The initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services that is transmitted to any person. Telephone solicitation *does not* include a call or message to any person with that person's prior express permission, to any person with whom the caller has an established business relationship, or on behalf of a tax-exempt nonprofit organization.

Unsolicited advertisement – Any material that advertises the commercial availability or quality of any property, goods, or services that is transmitted to any person without that person's prior express invitation or permission.

General Requirements of TCPA

The FCC regulations that implement the Telephone Consumer Protection Act of 1991 provide consumers with options to avoid unwanted telephone solicitations. The regulations address the following:

- The FCC’s adoption of a national “Do-Not-Call” registry expands coverage to entities not regulated by the FTC.²⁴
- Under the FCC’s rules, no seller, or entity telemarketing on behalf of the seller, can initiate a telephone solicitation to a residential telephone subscriber who has registered his or her telephone number on the national *do-not-call* registry. A safe harbor exists for an inadvertent violation of this requirement if the telemarketer can demonstrate that the violation was an error and that its routine practices include:
 - Written procedures.
 - *Training of personnel.*
 - Maintenance and recording of a list of telephone numbers excluded from contact.
 - Use of a version of the national *do-not-call* registry obtained no more than 31 days prior to the date any call is made (with records to document compliance).
 - *A process* to ensure that it does not sell, rent, lease, purchase, or use the do-not-call database in any manner except in compliance with FCC regulations (47 CFR 64.1200(c)(2)(i)) and applicable state or federal law.
- Companies must maintain company-specific do-not-call lists reflecting the names of customers with established business relationships who have requested to be excluded from telemarketing. Such requests *must be honored* for five years (47 CFR 64.1200(d)(6)).
- Telemarketing calls can be made only between the hours of 8 a.m. and 9 p.m. (local time at the called party’s location) (47 CFR 64.1200(c)(1)).
- All telemarketers must comply with limits on “abandoned calls” and employ other consumer-friendly practices when using automated telephone-dialing equipment. A telemarketer must abandon no more than three percent of calls answered by a person and must deliver a

²⁴ By doing so, the FCC asserts its considerably broader jurisdiction over telemarketing than the FTC. Specifically, telemarketing by in-house employees of banks, savings associations, and credit unions, as well as other areas of commerce, are covered by the FCC’s authority.

Consumer Affairs Laws and Regulations

Section 1300

prerecorded identification message when abandoning a call. Two or more telephone lines of a multi-line business are not to be called simultaneously. Telemarketers must not disconnect an unanswered telemarketing call prior to at least 15 seconds or four rings. All businesses that use autodialers to sell services must maintain records documenting compliance with call abandonment rules (47 CFR 64.1200(a)(4),(5),(6)).

- All prerecorded messages, whether delivered by automated dialing equipment or not, must identify the name of the entity responsible for initiating the call, along with the telephone number of that entity (this cannot be a 900 number or other number for which charges exceed local or long distance transmission charges) and must provide a valid number for the subscriber to call that can be used during normal business hours to *request* not to be called again (47 CFR 64.1200(b)).
- All persons or entities that initiate calls for telemarketing purposes to a residential telephone subscriber must have procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures must meet the following minimum standards.
 - *Written policy* – The institution must have a written policy, available on demand, for maintaining a do-not-call list.
 - *Training of personnel* – The institution must train personnel engaged in telemarketing about the existence and use of the do-not-call list.
 - *Recording and honoring of do-not-call requests* – The institution must start honoring do-not-call requests within 30 days after they are made. Disclosures of such requests may not be made to any other entity (except an affiliated entity) without the express permission of the residential telephone subscriber.
 - *Identification of sellers and telemarketers* – The person or entity making the call must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.
 - *Affiliated persons or entities* – In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

Consumer Affairs Laws and Regulations

Section 1300

— *Maintenance of do-not-call lists* – A person or entity making calls for telemarketing purposes must maintain a record of a consumer’s request not to receive further telemarketing calls. A do-not-call request must be honored for five years from the time the request is made (47 CFR 64.1200(d)(1)-(6)).

- All telemarketers must transmit caller ID information, when available, and must refrain from blocking any such transmission(s) to the consumer (47 CFR 64.1601(e)).²⁵
- Unsolicited fax transmissions must not be sent unless the sender has *both* (a) an established business relationship with the recipient; and (b) the number of the facsimile machine, received through the recipient’s voluntary communication of that number or through a directory, advertisement or Internet site to which the recipient voluntarily made its facsimile number available for public dissemination (47 CFR 64.1200(a)(3)).
- Such fax transmissions must contain a notice informing the recipient of the right to opt out of receiving future unsolicited fax advertisements and the means by which the recipient may do so (47 CFR 64.1200(a)(3)(iii)).
- The sender must honor requests to opt out that meet the criteria detailed in the regulation (47 CFR 64.1200(a)(3)(v), (vi)).
- Tax-exempt nonprofit organizations are not required to comply with the do-not-call provisions of the TCPA (47 CFR 64.1200(d)(7)).

REFERENCES

Law

- | | |
|---------------------|--|
| 15 USC 1681 et seq. | Fair Credit Reporting Act |
| 15 USC 7701 – 7713 | Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 |
| 47 USC 227 | Telephone Consumer Protection Act and Junk Fax Protection Act |

²⁵ The rule sets forth the technical information that must be made available (subject to differing technologies). The FCC stated that Caller ID information should also increase accountability and provide an important resource for the FCC and FTC in pursuing enforcement actions against TCPA violators (68 FR 44166, July 25, 2003).

Consumer Affairs Laws and Regulations

Section 1300

Regulations

12 CFR Part 571	Fair Credit Reporting
16 CFR Part 310	Telemarketing Sales Rule
16 CFR Part 316	Rules Implementing the CAN –SPAM Act of 2003
47 CFR Parts 64 and 68	Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Examination Handbook

Section 1100	Compliance Oversight Examination Program
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OTS CEO Memoranda

No. 313	Final Rule and Guidelines on Furnishing Consumer Information to Credit Reporting Agencies and Direct Disputes and ANPR
No. 306	Identity Theft Red Flags and Address Discrepancies - Frequently Asked Questions and Answers (FAQs)
No. 285	Identity Theft Red Flags and Address Discrepancies - Examination Process and Procedures
No. 276	HELOC Account Management Guidance
No. 270	Identity Theft Red Flags and Address Discrepancies - Final Rules and Guidelines
No. 265	FCRA Affiliate Marketing Rule