Regulation B

Equal Credit Opportunity Act

Community Bankers for Compliance School

LENDING

2016

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A History of Fair Lending Legislation

The Fair Housing Act (FH Act) is Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. § 3601 et seq.). Perhaps most critically relevant to banks, the FH Act makes it unlawful for any lender to discriminate in its housing-related lending activities against any person because of race, color, religion, national origin, familial status, handicap, or sex. This regulation is discussed in Section 16 of this manual.

The Equal Credit Opportunity Act of 1974 (ECOA), as amended, prohibits discrimination with respect to any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, age, receipt of public assistance, or the exercise in good faith of rights granted by the Consumer Credit Protection Act. This regulation is discussed in Sections 3 through 15 of this manual.

Anyone who is in the business of providing loans for housing is subject to both acts and is, therefore, prohibited from discriminating on any of these bases. There are, however, a few situations in which the FH Act and ECOA diverge.

Background of the Equal Credit Opportunity Act

One of the most basic and detailed regulations that addresses fair lending issues is Regulation B, which implements the Equal Credit Opportunity Act (ECOA) of 1974. The regulation has been structured to cover the requirements imposed by a bank before, during, and following the application and evaluation process of granting credit. Both the Equal Credit Opportunity Act and Regulation B set out a basic rule for credit grantors: "A creditor shall not discriminate against any applicant on a prohibited basis with respect to any aspect of a credit transaction."

Regulation B is codified at 12 C.F.R. § 1002. The appropriate section numbers appear throughout this manual.

Equal Credit Opportunity Act Applicability

The Equal Credit Opportunity Act and Regulation B apply to all credit transactions, commercial as well as consumer, without regard to the nature or type of the credit or the creditor. If a transaction provides for the deferral of the payment of a debt, it is credit covered by Regulation B, even though it may not be a credit transaction covered by Regulation Z (Truth in Lending).

Further, the definition of creditor is not restricted to the party or person to whom the obligation is initially payable, as is the case under Regulation Z.

In addition, the act and regulation apply to all methods of credit evaluation, whether performed judgmentally or by use of a credit scoring system.

The regulation does provide for limited exceptions to its requirements for certain classes of loans. These are addressed later in this manual.

Section 2: Definitions [12 C.F.R. § 1002.2]

Account [§ 1002.2(a)]

Account means an extension of credit. When employed in relation to an account, the word "use" refers only to open-end credit.

Act [§ 1002.2(b)]

Refers to the Equal Credit Opportunity Act (Title VII of the Consumer Credit Protection Act).

Adverse Action [§ 1002.2(c)]

Adverse action is:

- A refusal to grant credit in substantially the amount or on substantially the terms requested in an application, unless a creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered. A refusal to refinance or extend the term of a business or other loan is adverse action if the applicant applied in accordance with the creditor's procedures;
- A termination of an account or an unfavorable change in the terms of an account that does not affect all or a substantial portion of a class of the creditor's accounts:
    - Move from service area. If a credit card issuer terminates the open-end account of a customer because the customer has moved out of the card issuer's service area, the termination is "adverse action" unless termination on this ground was explicitly provided for in the credit agreement between the parties;
    - Termination based on credit limit. If a creditor terminates credit accounts that have low credit limits (for example, under $400) but keeps open accounts with higher credit limits, the termination is adverse action; or
- A refusal to increase the amount of credit available to an applicant who has made an application for an increase.

Adverse action does not include:

- A change in the terms of an account expressly agreed to by an applicant;
- Any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account. A creditor's termination of an account when the account holder is currently in default or delinquent on that account is not considered adverse action. However, it would be considered adverse action if a creditor's action is based on a past delinquency or default on the account;
- A refusal or failure to authorize an account transaction at a point of sale or loan, except when the refusal is either a:
    - Termination or an unfavorable change in the terms of an account that does not affect all or a substantial portion of a class of a creditor's accounts; or

    - Denial of an application for an increase in the amount of credit available under the account;
- Point-of-sale transactions. Denial of credit at the point of sale is not adverse action except under the circumstances specified above. For example, denial at point of sale is not adverse action in the following situations:
    - A credit card holder presents an expired card or a card that has been reported to the card issuer as lost or stolen.
    - The amount of a transaction exceeds a cash advance or credit limit.
    - The circumstances (such as excessive use of a credit card in a short period of time) suggest that fraud is involved.
    - The authorization facilities are not functioning.
    - Billing statements have been returned to the creditor for lack of a forwarding address.
- A refusal to extend credit because applicable law prohibits a creditor from extending the credit requested;
- A refusal to extend credit because a creditor does not offer the type of credit or credit plan requested. However, when an applicant applies for credit and a creditor does not offer the credit terms requested by the applicant (for example, the interest rate, length of maturity, collateral, or amount of downpayment), a denial of the application for that reason is adverse action (unless the creditor makes a counteroffer that is accepted by the applicant).

Age [§ 1002.2(d)]

Age refers only to the age of natural persons and means the number of fully elapsed years from the date of an applicant's birth.

Applicant [§ 1002.2(e)]

An applicant is any person who requests or who has received an extension of credit from a creditor, and the term includes any person who is or may become contractually liable regarding an extension of credit. For the purposes of establishing when a creditor may require the signature of a spouse or other person, the term "applicant" also includes guarantors, sureties, endorsers, and similar parties.

Request to assume loan. If a mortgagor sells or transfers a mortgaged property and the buyer makes an application to the creditor to assume the mortgage loan, the mortgagee must treat the buyer as an applicant unless its policy is not to permit assumptions.

Application [§ 1002.2(f)]

An application is an oral or written request for an extension of credit that is made in accordance with procedures established by a creditor for the type of credit requested. A creditor has the latitude under the regulation to establish its own application process and to decide the type and amount of information it will require from credit applicants.

However, the term "procedures established" refers to the actual practices followed by a creditor for making credit decisions as well as its stated application procedures. For example, if a creditor's stated policy is to require all applications to be in writing on the creditor's application form, but the creditor also makes credit decisions based on oral requests, the creditor's established procedures are to accept both oral and written applications.

When an inquiry becomes an application. A creditor is encouraged to provide consumers with information about loan terms. However, if in giving information to the consumer a creditor also evaluates information about the applicant, decides to decline the request, and communicates this to the applicant, the creditor has treated the inquiry as an application and must then comply with the notification requirements of the regulation. Whether an inquiry becomes an application depends on how a creditor responds to the applicant, not on what the applicant says or asks.

The following are examples in which only an inquiry has taken place:

- When a consumer calls to ask about loan terms and an employee explains the creditor's basic loan terms, such as interest rates, loan-to-value ratio, and debt-to-income ratio
- When a consumer calls to ask about interest rates for car loans, and, in order to quote the appropriate rate, the loan officer asks for the make and sales price of the car and the amount of the downpayment, and then gives the consumer the rate
- When a consumer asks about terms for a loan to purchase a home and tells the loan officer her income and intended downpayment, but the loan officer explains only the creditor's loan-to-value ratio policy and other basic lending policies, without telling the consumer whether she qualifies for the loan
- When a consumer calls to ask about terms for a loan to purchase vacant land, states his income and the sale price of the property to be financed, and asks whether he qualifies for a loan, and the employee responds by describing the general lending policies, explaining that he would need to look at all of the applicant's qualifications before making a decision, and offering to send an application form to the consumer

The regulation defines a *completed application* in terms that give a creditor the latitude to establish its own information requirements. A completed application is an application in which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral).

Nevertheless, creditors must act with reasonable diligence to collect information needed to complete an application. For example, a creditor should request information from third parties, such as a credit report, promptly after receiving the application. If additional information is needed from the applicant, such as an address or telephone number needed to verify employment, a creditor should contact the applicant promptly, unless the creditor chooses the option to deny the application on the basis of incompleteness.

The term "application" does not include the use of an account or line of credit to obtain an amount of credit that is within a previously established credit limit.

Business Credit [§ 1002.2(g)]

Business credit refers to extensions of credit primarily for business or commercial (including agricultural) purposes.

The test for deciding whether a transaction qualifies as business credit is one of primary purpose. For example, an open-end credit account used for both personal and business purposes is not business credit unless the primary purpose of the account is business-related. A creditor may rely on an applicant's statement of the purpose for the credit requested.

Consumer Credit [§ 1002.2(h)]

Consumer credit is credit extended to a natural person primarily for personal, family, or household purposes.

Contractually Liable [§ 1002.2(i)]

Contractually liable means expressly obligated to repay all debts arising on an account by reason of an agreement to that effect.

Credit [§ 1002.2(j)]

Credit is the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefore.

Regulation B covers a wider range of credit transactions than Regulation Z (Truth in Lending). For purposes of Regulation B, a transaction is credit if there is a right to defer payment of a debt, regardless of whether the credit is for personal or commercial purposes, the number of installments required for repayment, or whether the transaction is subject to a finance charge.

Credit Card [§ 1002.2(k)]

A credit card is any card, plate, or other single credit device that may be used from time to time to obtain money, property, or services on credit.

Creditor [§ 1002.2(l)]

A creditor is a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit. The term includes a creditor's assignee, transferee, or subrogee. For example, an assignee or a potential purchaser of a loan who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated is considered to be a creditor.

For certain purposes, the term also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made. For example, the term "creditor" includes persons such as real estate brokers who do not participate in credit decisions but who regularly refer applicants to creditors or who select or offer to select creditors to whom credit requests can be made. These persons must comply with the regulation's general rules prohibiting discrimination and the discouragement of applications.

A person is not responsible for any violation of the ECOA or Regulation B committed by another creditor unless the person knew, or had reasonable notice, of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction.

The term also does not include a person whose only participation in a credit transaction involves honoring a credit card.

Credit Transaction [§ 1002.2(m)]

A credit transaction includes every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit including, but not limited to, the following:

- Information requirements
- Investigation procedures
- Standards of creditworthiness
- Terms of credit
- Furnishing of credit information
- Revocation, alteration, or termination of credit
- Collection procedures

Discriminate [§ 1002.2(n)]

To discriminate against an applicant is to treat an applicant less favorably than other applicants.

Elderly [§ 1002.2(o)]

Elderly means age 62 or older.

Empirically Derived and Other Credit Scoring Systems [§ 1002.2(p)]

Very few companies use this technique, and we have chosen to eliminate this lengthy definition.

Extend Credit / Extension of Credit [§ 1002.2(q)]

The terms "extend credit" and "extension of credit" refers to the granting of credit in any form, including, but not limited to, the following:

- Credit granted in addition to any existing credit or credit limit
- Credit granted according to an open-end credit plan
- The refinancing or other renewal of credit, including the issuance of a new credit card in place of an expiring credit card or in substitution for an existing credit card
- The consolidation of two or more obligations
- The continuance of existing credit without any special effort to collect at or after maturity

Good Faith [§ 1002.2(r)]

Good faith means honesty in fact in the conduct or transaction.

Inadvertent Error [§ 1002.2(s)]

An inadvertent error is a mechanical, electronic, or clerical error that a creditor demonstrates was not intentional and occurred despite the maintenance of procedures reasonably adapted to avoid such errors.

Judgmental System [§ 1002.2(t)]

A judgmental system of evaluating applicants is any system for evaluating the creditworthiness of an applicant other than an empirically derived, demonstrably and statistically sound credit scoring system.

Marital Status [§ 1002.2(u)]

Marital status is the state of being unmarried, married, or separated, as defined by applicable state law. The term "unmarried" includes persons who are single, divorced, or widowed. No other marital status terms are permissible.

Negative Factor or Value [§ 1002.2(v)]

Negative factor or value, in relation to the age of elderly applicants, means utilizing a factor, value, or weight that is either:

Less favorable regarding elderly applicants than the creditor's experience warrants

Less favorable than the factor, value, or weight assigned to the class of applicants that are not classified as elderly and are most favored by a creditor on the basis of age

Open-End Credit [§ 1002.2(w)]

Open-end credit is credit extended under a plan which allows an applicant to make purchases or obtain loans from time to time directly from the creditor or indirectly by use of a credit card, check, or other device.

The term "open-end credit" does not include negotiated advances under an open-end real estate mortgage or a letter of credit.

Person [§ 1002.2(x)]

The term "person" refers to a natural person, corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

Pertinent Element of Creditworthiness [§ 1002.2(y)]

In relation to a judgmental system of evaluating applicants, a pertinent element of creditworthiness is any information about applicants that a creditor obtains and considers and that has a demonstrable relationship to a determination of creditworthiness.

Prohibited Basis [§ 1002.2(z)]

"Prohibited basis" refers to the nine prohibited bases of ECOA.

State [§ 1002.2(aa)]

Any state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

Section 3: Exceptions to the Regulation [12 C.F.R. § 1002.3]

Regulation B provides limited exceptions to its requirements in order to relieve the compliance burden for certain types of transactions. However, all types of transactions remain subject to the regulation's general rules barring discrimination on a prohibited basis and to any other provision not specifically excepted.

As most banks will not participate in any of the exceptions, we have elected to eliminate most information regarding the exceptions from the manual. However, the specific exception types are:

- Public Utilities Credit [§ 1002.3(a)]
- Securities Credit [§ 1002.3(b)]
- Incidental Credit [§ 1002.3(c)]
- Government Credit [§ 1002.3(d)]

Section 4: Prohibition Against Discrimination [12 C.F.R. § 1002.4]

General Rule Prohibiting Discrimination [§ 1002.4(a)]

Regulation B contains a general rule prohibiting discrimination, which states: "A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction."

Prohibited bases include:

- Race
- Color
- Religion
- National origin
- Sex
- Marital status
- Age (provided that the applicant has the capacity to enter into a binding contract)
- The fact that all or part of the applicant's income derives from any public assistance program
- The fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act or any state law for which an exemption has been granted by the regulatory agencies

Any Federal, state, or local governmental assistance program that provides a continuing, periodic income supplement, whether premised on entitlement or need, is considered "public assistance." The term includes (but is not limited to) Aid to Families with Dependent Children, food stamps, rent and mortgage supplement or assistance programs, Social Security and Supplemental Security Income, and unemployment compensation. Only physicians, hospitals, and others to whom the benefits are payable need to consider Medicare and Medicaid as public assistance.

"Prohibited basis" refers not only to the characteristics of an applicant (or officers of an applicant in the case of a corporation) but also to the characteristics of individuals with whom an applicant is affiliated or with whom the applicant associates. This means, for example, that a creditor may not discriminate against an applicant because of that person's personal or business dealings with members of a certain religion, because of the national origin of any persons associated with the extension of credit (such as the tenants in the apartment complex being financed), or because of the race of other residents in the neighborhood where the property offered as collateral is located.

A creditor is not allowed to refuse to grant credit because an applicant comes from a particular country, but may take the applicant's immigration status into account. A creditor may also take into account any applicable law, regulation, or executive order that restricts dealings with citizens (or the government) of a particular country or that imposes limitations on extensions of credit to them.

Scope of General Rule

This general rule prohibiting discrimination in a credit transaction covers all dealings, without exception, between an applicant and a creditor, whether or not specifically addressed by the regulation. For example, the general rule covers application procedures, criteria used to evaluate creditworthiness, administration of accounts, and treatment of delinquent accounts. Thus, whether or not specifically prohibited in the regulation, a credit practice that treats applicants differently on a prohibited basis violates the law because it violates the general rule.

Discouraging Applications [§ 1002.4(b)]

Regulation B has a prohibition against making any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.

Generally, the regulation's protections apply only to persons who have requested or received an extension of credit. In keeping with the purpose of the ECOA — to promote the availability of credit on a nondiscriminatory basis, the prohibition against discouraging applications covers acts or practices directed at potential applicants. The following are examples of prohibited actions that would discourage applications:

- A statement that an applicant should not bother to apply after the applicant states that he is retired
- The use of words, symbols, models, or other forms of communication in advertising that express, imply, or suggest a discriminatory preference or a policy of exclusion
- The use of interview scripts that discourage applications on a prohibited basis

The regulation does not prohibit a creditor from affirmatively soliciting or encouraging members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that particular creditor.

Written Applications [§ 1002.4(c)]

The regulation includes a requirement for written applications for certain types of dwelling-related loans. An application for credit primarily for the purchase or refinancing of a dwelling, occupied or to be occupied by the applicant as a principal residence, which will be secured, by the principal residence must be in writing. The regulation does not mandate a written application for any other loan type, consumer or commercial purpose. However, it is generally a "best practice" to at least obtain a written application on consumer loan requests. Using a standardized application form creates consistency, which may prove useful in a fair lending examination.

Dwellings include residential structures that contain one to four units, whether or not the structure is attached to real property. The term includes, but is not limited to, an individual condominium or cooperative unit and a mobile or other manufactured home.

This requirement for written applications for certain types of dwelling-related loans is intended to assist the Federal supervisory agencies in monitoring compliance with the ECOA

and the Fair Housing Act.

The use of a printed application form of any kind is not required by this regulation. A creditor may satisfy this requirement by writing down the information that is normally considered in making a credit decision or may complete the application on behalf of an applicant. In addition, Regulation B does not require the applicant to sign the application. Keep in mind, however, that the use of a regulator-approved consumer loan application form that is dated and signed by all parties requesting credit is the most expeditious manner to assure that the necessary information to make a safe and sound credit decision is obtained and that no prohibited information is requested.

Telephone Applications

A creditor that accepts applications by telephone for dwelling-related credit covered by the monitoring section of Regulation B can meet the requirement for written applications by writing down pertinent information that is provided by the applicant(s). This includes any monitoring information required either by this regulation or, if the bank is subject to Regulation C (Home Mortgage Disclosure), the monitoring information required by that regulation.

Computerized Entry

Information entered directly into and retained by a computerized system qualifies as a written application under this paragraph.

Form of Disclosures [§ 1002.4(d)]

Any creditor that provides written disclosures required by the regulation must provide them in a clear and conspicuous manner and in a form the applicant may retain.

Electronic Disclosures

Disclosures required by the regulation may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act).

Foreign Language Disclosures [§ 1002.4(e)]

Disclosures can be made in languages other than English, provided English disclosures are available.

Section 5: Requests for Information [12 C.F.R. § 1002.5]

General Rule [§ 1002.5(a)(1)]

The general rule concerning requests for information from a credit applicant states that a creditor may request any information in connection with an application that is not specifically prohibited by the regulation. These guidelines do not in any way limit or annul any Federal or state law regarding privacy, privileged information, credit reporting limitations, or similar restrictions on obtainable information.

Required Collection of Information [§ 1002.5(a)(2)]

In addition, a creditor may obtain information required by a regulation, order, or agreement issued by, or entered into with, a court or an enforcement agency to monitor or enforce compliance with the ECOA, Regulation B, or any other Federal or state statute or regulation.

For example, Regulation C generally requires creditors covered by the Home Mortgage Disclosure Act (HMDA) to collect and report information about the race, ethnicity, and sex of applicants for home improvement loans and home purchase loans, including some types of loans not covered by the monitoring information requirements of Regulation B. The collection of monitoring data to meet the requirements of HMDA does not violate the ECOA or Regulation B.

Loan brokers, correspondents, or other persons also do not violate the ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, as long as the purpose of collecting the information is to provide it to a creditor that is subject to the Home Mortgage Disclosure Act or another Federal or state statute or regulation requiring data collection.

Special Purpose Credit [§ 1002.5(a)(3)]

A creditor may obtain information that is otherwise restricted to determine eligibility for a special purpose credit program.

Race, Color, Religion, National Origin, or Sex [§ 1002.5(b)]

Inquiries about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction are also prohibited, except as discussed below under Self-Test and Sex. A creditor may inquire about an applicant's permanent residence and immigration status.

Self-Test [§ 1002.5(b)(1)]

A creditor may inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction for the purpose of conducting a self-test that meets the requirements of § 1002.15.

A creditor that makes such an inquiry must disclose orally or in writing, at the time the information is requested, that:

- The applicant will not be required to provide the information.
- The creditor is requesting the information to monitor its compliance with the Federal Equal Credit Opportunity Act.
- Federal law prohibits the creditor from discriminating on the basis of this information, or on the basis of an applicant's decision not to furnish the information.
- If applicable, certain information will be collected based on visual observation or surname if not provided by the applicant or other person.

Sex [§ 1002.5(b)(2)]

Inquiries about the sex of an applicant are also prohibited. An applicant may be requested to designate a title on an application form (such as Ms., Miss, Mr., or Mrs.) if the form discloses that the designation of a title is optional. An application form must otherwise use only terms that are neutral as to sex.

Inquiries about the sex of an applicant are generally prohibited in order to discourage sex discrimination in the lending process. The following are some of the situations that may be encountered which constitute sex discrimination, a prohibited consideration under the Fair Housing Act as well as the ECOA:

- Discounting or disregarding the income of a working wife or single woman
- Refusing to grant a loan, or granting a loan on different terms and conditions, because of sex
- Requiring more or different information from a female applicant than a male applicant (for example, birth control arrangements or a family plan)
- Subjecting a female applicant to a different or more extensive credit check than that which is usually required for males
- Refusing to include alimony or child support as viable income where evidence is provided of a history of consistent prior payment and indicates that payments are likely to continue
- Basing any aspect of a lending decision on general presumptions about women (for example, that women of childbearing age are poor risks)
- Treating single working parents differently from married working parents
- Requiring a cosigner for women but not for men

Information About a Spouse or Former Spouse [§ 1002.5(c)]

A creditor may not request any information concerning the spouse or former spouse of an applicant unless at least one of the following apply:

- The spouse will be permitted to use the account.
- The spouse will be contractually liable on the account.

- The applicant is relying on the spouse's income as a basis for repayment of the credit requested.
- The applicant resides in a community property state or the property on which the applicant is relying as a basis for repayment of the credit requested is located in a community property state.
- The applicant is relying on alimony, child support, or separate maintenance payments from a spouse or former spouse as a basis for repayment of the credit requested.

Other Accounts of the Applicant [§ 1002.5(c)(3)]

A creditor may request an applicant to list any account upon which the applicant is liable and to provide the name and address in which the account is carried. A creditor may also ask the names in which an applicant has previously received credit.

Other Limitations on Information Requests [§ 1002.5(d)]

Marital Status [§ 1002.5(d)(1)]

If an applicant applies for individual unsecured credit, a creditor is not allowed to inquire about the applicant's marital status unless the applicant resides in a community property state or is relying on property located in a community property state as a basis for repayment of the credit requested.

If an application is for other than individual unsecured credit, a creditor may inquire about the applicant's marital status, but may use only the terms "married," "unmarried," and "separated." A creditor may explain that the category "unmarried" includes single, divorced, and widowed persons.

The fact that certain credit-related information may indirectly disclose marital status does not bar a creditor from seeking this information. For example, a creditor may ask about the following:

- The applicant's obligation to pay alimony, child support, or separate maintenance
- The source of income to be used as the basis for repaying the loan, which could disclose that it is the income of a spouse
- Whether any obligation disclosed by the applicant has a co-obligor, which could disclose that the co-obligor is a spouse or former spouse
- The ownership of assets, which could disclose the interest of a spouse

Income from Alimony, Child Support, or Separate Maintenance [§ 1002.5(d)(2)]

Inquiries as to whether income stated in an application is derived from alimony, child support, or separate maintenance payments are also prohibited, unless a creditor discloses to the applicant that such income does not need to be revealed if the applicant does not want the creditor to consider it in determining the applicant's creditworthiness.

Since a general inquiry about the source of income may lead an applicant to disclose alimony, child support, or separate maintenance, a creditor may not make such an inquiry on an application form without prefacing the request with this disclosure.

The only circumstances in which this disclosure would not be required are inquiries about income that are specific and worded in a way that is unlikely to lead the applicant to disclose the fact that income is derived from alimony, child support, or separate maintenance payments. For example, an application form that asks about specific types of income such as salary, wages, or investment income does not need to include the disclosure.

Childbearing and Childrearing [§ 1002.5(d)(3)]

Creditors are not allowed to inquire about birth control practices, intentions concerning the bearing or rearing of children, or capability to bear children. A creditor may inquire about the number and ages of an applicant's dependents or about dependent-related financial obligations or expenditures, provided such information is requested without regard to sex, marital status, or any other prohibited basis.

Permanent-Residency and Immigration Status [§ 1002.5(e)]

A creditor may inquire about the permanent-residency and immigration status of an applicant or any other person in connection with a credit transaction.

Section 6: Evaluating Applications [12 C.F.R. § 1002.6]

General Rule Concerning Use of Information [§ 1002.6(a)]

Generally, the bank may consider any information collected as long as it is not discriminatory or used to discriminate against an applicant on a prohibited basis.

The legislative history of the Equal Credit Opportunity Act (ECOA) indicates that Congress intended an "effects test" concept to be applied to the process a creditor uses to determine the creditworthiness of an applicant. The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964. The burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991. Congressional intent that this doctrine apply to the credit area is documented in Congressional rulings.

As a result, the ECOA and Regulation B may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face. If such a practice exists, it must meet a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.

For example, requiring that applicants have incomes in excess of a certain amount to qualify for an overdraft line of credit could mean that women and minority applicants will be rejected at a higher rate than men and nonminority applicants. The use of the income standard would likely be permissible only if there is a demonstrable relationship between the income requirement and creditworthiness for the level of credit involved.

Specific Rules Concerning Use of Information [§ 1002.6(b)]

General Rule [§ 1002.6(b)(1)]

Except as provided in the ECOA and Regulation B, a lender must not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants.

The following are specific guidelines that address the proper use of information during the credit evaluation process.

Age and Receipt of Public Assistance [§ 1002.6(b)(2)]

Creditors are prohibited from the use of an applicant's age (provided that the applicant has the capacity to enter into a binding contract) or whether an applicant's income derives from any public assistance program as a consideration for credit. There are some exceptions to these rules:

- An empirically derived, demonstrably and statistically sound credit scoring system may use an applicant's age as a predictive variable, provided that the age of an elderly

applicant is not assigned a negative factor or value. An applicant who is 62 years old or older must be treated at least as favorably as anyone who is under age 62.

- A judgmental system of evaluating creditworthiness may consider an applicant's age only for the purpose of determining a pertinent element of creditworthiness. For example, a creditor may not reject an application or terminate an account because the applicant is 60 years old. However, a creditor that uses a judgmental system may relate the applicant's age to other information about the applicant that the creditor considers in evaluating creditworthiness. For example:
  - A creditor may consider the applicant's occupation and length of time to retirement to ascertain whether the applicant's income (including retirement income) will support the extension of credit to its maturity.
  - A creditor may consider the adequacy of any security offered when the term of the credit extension exceeds the life expectancy of the applicant and the cost of realizing on the collateral (liquidating it) could exceed the applicant's equity. (An elderly applicant might not qualify for a 5.0 percent down, 30-year mortgage loan but might qualify with a larger downpayment or a shorter loan maturity.)
  - A creditor may consider the applicant's age to assess the significance of the length of the applicant's employment (a young applicant may have just entered the job market) or length of time at an address (an elderly applicant may recently have retired and moved from a long-term residence).

As the examples above illustrate, the evaluation must be made in an individualized, case-by-case manner. It is impermissible for a creditor, in deciding whether to extend credit or in setting the terms and conditions, to base its decision on age or information related exclusively to age. Age or age-related information may be considered only in evaluating other "pertinent elements of creditworthiness" that are drawn from the particular facts and circumstances concerning the applicant.

- A judgmental system of evaluating creditworthiness may consider whether an applicant's income derives from any public assistance program only for the purpose of determining a pertinent element of creditworthiness. When considering income derived from a public assistance program, a creditor may take into account, for example, the following:
  - The length of time an applicant will likely remain eligible to receive such income
  - Whether the applicant will continue to qualify for benefits based on the status of the applicant's dependents (such as Aid to Families with Dependent Children or Social Security payments to a minor)
  - Whether the creditor can attach or garnish the income to assure payment of the debt in the event of default
- Any system of evaluating creditworthiness may consider the age of an elderly applicant when used to favor the elderly applicant. Therefore, a credit program that offers more favorable credit terms to applicants age 62 or older is permissible. A program that offers more favorable credit terms to applicants at an age lower than 62 is permissible only if it qualifies as a special purpose credit program. As a special note, banks should beware of developing "seniors account" packages that offer advantageous credit incentives when the minimum age to have the package is less than 62.

Childbearing and Childrearing [§ 1002.6(b)(3)]

Assumptions or aggregate statistics relating to the likelihood that any group of persons will bear or rear children or will, for that reason, receive diminished or interrupted income in the future must not be used in the credit evaluation process.

Telephone Listing [§ 1002.6(b)(4)]

Whether there is a telephone listing in the name of an applicant for consumer credit cannot be considered. Whether there is a telephone in the applicant's residence may be taken into account.

Income [§ 1002.6(b)(5)]

The regulation prohibits the discounting or exclusion of certain types of an applicant's (or the spouse of an applicant's) income because of a prohibited basis or because the income is derived from part-time employment or is an annuity, pension, or other retirement benefit. Similarly, alimony, child support, or separate maintenance payments must be considered income to the extent that they are likely to be consistently made.

Generally, a creditor may consider the amount and probable continuance of any income in evaluating an applicant's creditworthiness. Income derived from part-time employment, alimony, child support, separate maintenance, retirement benefits, or public assistance (all referred to as "protected income") must be evaluated on an individual basis, not on the basis of aggregate statistics. The reliability or unreliability of the protected income must be assessed by analyzing the applicant's actual circumstances, not by analyzing statistics derived from a group.

In determining the likelihood of consistent payments of alimony, child support, or separate maintenance, a creditor may consider factors such as these:

- Whether payments are received pursuant to a written agreement or court decree
- The length of time that the payments have been received
- Whether the payments are regularly received by the applicant
- The availability of court or other procedures to compel payment
- The creditworthiness of the payor, including the credit history of the payor (when it is available to the creditor)

A creditor may take into account the fact that an individual applicant has more than one source of earned income (e.g., a full-time and a part-time job or two part-time jobs). A creditor may also score or treat earned income from a secondary source differently than earned income from a primary source. However, a creditor may not otherwise take into account the number of sources for protected income (e.g., retirement income, Social Security, alimony). Nor may a creditor treat negatively the fact that an applicant's only earned income is derived from a part-time job.

Creditors are also obligated to consider whether a source of income is taxable under Federal law. For example, if a customer is in a 20 percent bracket for income tax purposes, $1,000 in non-taxable income equates to $1,200 in taxable income. Each institution must determine a factor for conversion of non-taxable income into taxable income equivalent. This process is known as "grossing up" the income. As income must be treated consistently by each institution, grossing up must occur before the calculation of any debt-to-income ratios.

Credit History [§ 1002.6(b)(6)]

A creditor may restrict the types of credit history and credit references that it will consider, provided that the restrictions are applied to all credit applicants without regard to sex, marital status, or any other prohibited basis. However, on the applicant's request, a creditor must consider credit information not reported through a credit bureau when the information relates to the same types of credit references and history that would be considered if reported through a credit bureau.

Guidelines addressing the proper use of credit history require consistency in evaluating the creditworthiness of similarly qualified applicants for a similar type and amount of credit. In evaluating an applicant's creditworthiness, a creditor must consider the following:

- The credit history, when available, of accounts designated as accounts that the applicant and the applicant's spouse are permitted to use or for which both are contractually liable
- On the applicant's request, any information the applicant may present that tends to indicate that the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness
- On the applicant's request, the credit history, when available, of any account reported in the name of the applicant's spouse or former spouse that the applicant can demonstrate accurately reflects the applicant's creditworthiness

Immigration Status [§ 1002.6(b)(7)]

A creditor may consider whether an applicant is a permanent resident of the United States, the applicant's immigration status, and any additional information that may be necessary to ascertain the creditor's rights and remedies regarding repayment. The applicant's immigration status and ties to the community (such as employment and continued residence in the area) could have a bearing on a creditor's ability to obtain repayment.

Accordingly, the creditor may consider and differentiate, for example, between a noncitizen who is a long-time resident with permanent resident status and a noncitizen who is temporarily in this country on a student visa.

A denial of credit on the grounds that an applicant is not a United States citizen is not, per se, discrimination based on national origin.

Marital Status [§ 1002.6(b)(8)]

A creditor may not use marital status as a basis for determining an applicant's creditworthiness. However, a creditor may consider an applicant's marital status for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit. For example, in a secured transaction involving real property, a creditor could take into account whether state law gives the applicant's spouse an interest in the property being offered as collateral.

Likewise, creditors that offer joint credit may not take the applicants' marital status into account except to the extent necessary to determine the rights and remedies for a specific credit transaction. Creditors are barred from applying different standards in evaluating married and unmarried applicants.

Race, Color, Religion, National Origin, Sex [§ 1002.6(b)(9)]

Except as otherwise permitted or required by law, a creditor must not consider race, color, religion, national origin, or sex (or an applicant's or other person's decision not to provide the information) in any aspect of a credit transaction.

State Property Laws [§ 1002.6(c)]

A creditor's consideration or application of state property laws directly or indirectly affecting creditworthiness does not constitute unlawful discrimination under the ECOA or Regulation B.

Section 7: Regulation B: Extensions of Credit [12 C.F.R. § 1002.7]

Individual Accounts [§ 1002.7(a)]

The regulation includes a strict prohibition against refusing to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis. Therefore, a creditor may not require a creditworthy applicant seeking an individual credit account to provide additional signatures.

A creditor that permits an account holder to designate an authorized user on an open-end credit account (such as a credit card or an overdraft line of credit) may not restrict this designation on a prohibited basis. For example, if a creditor allows the designation of spouses as authorized users, a nonspouse may not be refused as an authorized user.

However, a creditor may condition the designation of an authorized user on an open-end credit on the authorized user's becoming contractually liable for the account. A creditor cannot differentiate on any prohibited basis in imposing this requirement.

Designation of Name [§ 1002.7(b)]

Creditors are prohibited from refusing to allow an applicant to open or maintain an account in a birth-given first name and a surname that is the applicant's birth-given surname, the spouse's surname, or a combined surname.

A creditor may require that joint applicants on an account designate a single name for purposes of administering the account and that a single name be embossed on any credit card(s) issued on the account. However, a creditor may not require that the name be the husband's name.

Action Concerning Existing Open-End Accounts [§ 1002.7(c)]

There are several rules that apply to open-end accounts, such as credit cards and lines of credit.

Limitations [§ 1002.7(c)(1)]

Unless there is evidence of an applicant's inability or unwillingness to repay, a creditor cannot take any of the following actions because a contractually liable applicant reaches a certain age, retires, or has a name or marital status change:

- Require a reapplication (except as provided below)
- Change the terms of the account
- Terminate an existing open-end account

Nevertheless, a creditor may terminate an account on which both spouses are jointly liable, even if the action coincides with a change in marital status, when one or both spouses take one of the following actions:

- Repudiate responsibility for future charges on the joint account
- Request separate accounts in their own names
- Request that the joint account be closed

In addition, a creditor may periodically request updated information from applicants but may not use events related to a prohibited basis – such as an applicant's retirement, reaching a particular age, or change in name or marital status – to trigger such a request.

Requiring Reapplication [§ 1002.7(c)(2)]

A creditor may require a reapplication from a contractually liable party, even when there is no evidence of unwillingness or inability to repay, if both of the following criteria are met:

- The credit was based on the qualifications of a person who is no longer available to support the credit.
- The creditor has information indicating that the account holder's income by itself may be insufficient to support the credit.

While a reapplication is pending, the creditor must allow the account holder full access to the account under the existing contract terms. The creditor may specify a reasonable time period within which the account holder must submit the required information.

Signature of Spouse or Other Person [§ 1002.7(d)]

Rule for Qualified Applicant [§ 1002.7(d)(1)]

The signature of an applicant's spouse or other person, other than a joint applicant, must not be required on any credit instrument if the applicant qualifies under a creditor's standards of creditworthiness for the amount and terms of the credit requested.

The term "joint applicant" refers to someone who applies contemporaneously with the applicant for shared or joint credit. A person's intent to be a joint applicant must be evidenced at the time of application. Submission of a joint personal financial statement or other evidence of jointly held assets cannot be treated as a "de facto" joint application. Likewise, signatures on a promissory note may not be used to show intent to apply for joint credit. On the other hand, signatures or initials on a credit application affirming applicants' intent to apply for joint credit may be used to establish intent to apply for joint credit. The method used to establish intent must be distinct from the means used by individuals to affirm the accuracy of information.

This signature rule assures that qualified applicants are able to obtain credit in their own names. Thus, when an applicant requests individual credit, a creditor generally may not require the signature of another person unless it has first been determined that the applicant alone does not qualify for the credit requested.

When an applicant applies for individual credit but does not alone meet a creditor's standards, a cosigner, guarantor, or the like may be required, but a creditor cannot require that it be the spouse or any other specific person.

Unsecured Credit [§ 1002.7(d)(2)]

If an applicant requests credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness (for example, net worth considerations), the signature of the other person may be required only on the necessary collateral instrument(s). These would include only those instruments necessary under the law of the state in which the property is located that enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

In determining the value of the applicant's interest in jointly owned property, a creditor may consider factors such as the form of ownership and the property's susceptibility to attachment, execution, severance, or partition, and the cost of such actions. If the applicant's interest in the property does not support the amount and terms of credit sought, some other option of providing additional support for the extension of credit may be provided to the applicant. Examples of such additional support are:

- Requiring the liability of a qualified additional party
- Offering to grant the applicant's request on a secured credit basis
- Asking for the signature of the co-owner of the property on an instrument that assures access to the property but does not impose personal liability, unless necessary under state law

Unsecured Credit – Community Property States [§ 1002.7(d)(3)]

If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if both of the following apply:

- Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness.
- The applicant does not have sufficient separate property to qualify for the credit requested without regard to community property.

Secured Credit [§ 1002.7(d)(4)]

If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary (or reasonably believed by the creditor to be necessary) under applicable state law to make the property being offered as

security available to satisfy the debt in the event of default. Examples are instruments to create a valid lien, pass a clear title, or waive inchoate rights.

Generally, a signature to make the secured property available will be needed only on a security agreement. A creditor's reasonable belief that, to assure access to the property, the spouse's signature is needed on an instrument that imposes personal liability should be supported by a thorough review of pertinent statutory and decisional law or an opinion of counsel.

Some state laws require that both spouses sign any instrument that encumbers real property. A creditor may not require the spouse to sign the note evidencing the credit obligation if signing only the mortgage or other security agreement is sufficient to make the property available to satisfy the debt in the event of default. However, if under state law both spouses must sign the note to create an enforceable lien, the creditor may require them to do so.

When a creditor uses an integrated instrument that combines the note and the security agreement, a spouse cannot be required to sign the integrated instrument if the signature is needed only to grant a security interest. But the spouse could be asked to sign an integrated instrument that makes clear (for example, by a legend placed next to the spouse's signature) that the spouse's signature is only to grant a security interest and that signing the instrument does not impose personal liability.

Additional Parties [§ 1002.7(d)(5)]

If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested, a creditor may request a cosigner, guarantor, or the like. The applicant's spouse may serve as an additional party, but the creditor must not require that the spouse be the additional party.

In establishing guidelines for eligibility of guarantors, cosigners, or similar additional parties, a creditor may restrict the applicant's choice of additional parties but may not discriminate on the basis of any prohibited basis. However, a creditor could require that the additional party live in the creditor's market area.

An applicant who requests individual credit relying on the income of another person (including a spouse in a non-community property state) may be required to provide the signature of the other person to make the income available to pay the debt.

Rights of Additional Parties [§ 1002.7(d)(6)]

Creditors must not impose any requirements upon an additional party that they are prohibited from imposing upon an applicant.

Keep in mind that a guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation. The rules bar a creditor from requiring the signature of a guarantor's spouse just as they bar a creditor from requiring the signature of an applicant's spouse. For example, when all officers of a closely held corporation are required to personally guarantee a corporate loan, a creditor may not automatically require that spouses of married officers also sign. However, an evaluation of the financial circumstances of an officer may indicate that an additional signature is necessary. This may be the signature of a spouse or another qualified guarantor in appropriate circumstances.

Insurance [§ 1002.7(e)]

A creditor may obtain information about an applicant's age, sex, or marital status for insurance purposes. The information may be used, however, only for determining eligibility and premium rates for insurance, and not in making the credit decision.

The regulation specifically prohibits the refusal to extend credit and the termination of an account because credit life, health, accident, disability, or other credit-related insurance is not available on the basis of the applicant's age. Differences in the availability, rates, and other terms on which credit-related casualty insurance or credit life, health, accident, or disability insurance is offered or provided to an applicant does not violate Regulation B.

Section 8: Regulation B: Special Purpose Credit Programs [12 C.F.R. § 1002.8]

Standards for Programs [§ 1002.8(a)]

Creditors are permitted to extend special purpose credit to applicants who meet the eligibility requirements of the following types of credit programs:

- Any credit assistance program expressly authorized by Federal or state law for the benefit of an economically disadvantaged class of persons
- Any credit assistance program offered by a not-for-profit organization for the benefit of its members or for the benefit of an economically disadvantaged class of persons
- Any special purpose credit program offered by a for-profit organization or in which a for-profit organization participates to meet special social needs, if all of the following apply:
  - The program is established and administered according to written plans that both:
    - Identify the class of persons that the program is designed to benefit
    - Establish the procedures and standards for extending credit under the program, and
  - The program is established and administered to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, would otherwise be denied credit or would receive it on less favorable terms than those ordinarily available to other applicants for similar types and amounts of credit.

Rules in Other Sections [§ 1002.8(b)]

General Applicability. All of the provisions of Regulation B apply to any special purpose credit program, except as modified by this section of the regulation.

Common Characteristics. Programs offered by not-for-profit and for-profit organizations qualify as special purpose credit programs only if they are established and administered so as not to discriminate against an applicant on any prohibited basis. However, all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) as long as the program was not established and is not administered with the purpose of evading the requirements of the ECOA or Regulation B.

Special Rule Concerning Requests and Use of Information [§ 1002.8(c)]

If participants in a special purpose credit program are required to possess one or more common characteristics (e.g., race, national origin, or sex), a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program. This special rule permits a creditor to request and consider certain information that would otherwise be prohibited to determine an applicant's eligibility for a particular program.

The following are examples of programs under which the creditor can ask for and consider information related to a prohibited basis:

- Energy conservation programs to assist the elderly, for which the creditor must consider the applicant's age
- Programs under a Minority Enterprise Small Business Investment Corporation, for which a creditor must consider the applicant's minority status

Special Rule in the Case of Financial Need [§ 1002.8(d)]

If financial need is one of the qualifying criteria of a special purpose program, a creditor may request and consider (in order to determine an applicant's eligibility for the program) information regarding the applicant's marital status; alimony, child support, and separate maintenance income; and the spouse's financial resources. In addition, a creditor may obtain the signature of an applicant's spouse or other person on an application or credit instrument relating to a special purpose program if the signature is required by Federal or state law.

Examples of programs in which financial need is a criterion include these:

- Subsidized housing programs for low- to moderate-income households, for which a creditor may have to consider the applicant's receipt of alimony or child support, the spouse's or parents' income, etc.
- Student loan programs based on the family's financial need, for which a creditor may have to consider the spouse's or parents' financial resources

In addition, in a guaranteed student loan program, a creditor may obtain the signature of a parent as a guarantor in either of the following circumstances:

- When required by Federal or state law or agency regulation
- When the student does not meet the creditor's standards of creditworthiness

However, a creditor may not require an additional signature when a student has a work or credit history that satisfies the creditor's standards.

Section 9: Notification Requirements [12 C.F.R. § 1002.9]

General Rule [§ 1002.9(a)]

Creditors are required to meet specific notification requirements to assure timely action on a credit application, to provide alternative ways to assure that the information needed to evaluate the application is obtained, and to prevent an indirect means of discriminating through lack of action.

When Notification Is Required [§ 1002.9(a)(1)]

Creditors are required to notify an applicant of action taken within:

- 30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application;
- 30 days after taking adverse action on an incomplete application, unless an alternative notice of incompleteness (discussed below) is provided within 30 days after receiving the application;
- 30 days after taking adverse action on an existing account; or
- 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered. Alternatively, a creditor may provide a combined counteroffer and adverse action notice within 30 days after receiving a completed application. If the alternative combined notice is provided, a second adverse action notice is not required if the applicant does not accept the counteroffer.

Notification occurs when a creditor delivers or mails a notice to the applicant's last known address. In the case of an oral notification, notification occurs when the creditor communicates the credit decision to the applicant.

When an application is taken over the telephone and adverse action is taken, a creditor must request the applicant's name and address in order to provide written notification. If the applicant declines to provide that information, then the creditor has no further notification responsibility.

Notification of approval may be express or by implication. For example, a creditor satisfies the notification requirement when it gives the applicant the credit card, money, property, or services requested.

Prequalification and Preapproval Programs

Whether a creditor must provide a notice of action taken for a prequalification or preapproval request depends on the creditor's response to the request. For instance, a creditor may treat the request as an inquiry if the creditor provides general information such as loan terms and the maximum amount a consumer could borrow under various loan programs and explains the process the consumer must follow to submit a mortgage application and the information that will be analyzed to reach a credit decision.

On the other hand, a creditor has treated a request as an application and is subject to the adverse action notice requirements if, after evaluating information, the creditor decides that it will not approve the request and communicates that decision to the consumer. For example, if in reviewing a request for prequalification, a creditor tells the consumer that it would not approve an application for a mortgage because of a bankruptcy in the consumer's record, the creditor has denied an application for credit.

Content of Notification When Adverse Action Is Taken [§ 1002.9(a)(2)]

The notification given to an applicant when adverse action is taken must be in writing and must contain the following:

- A statement of the action taken
- The name and address of the creditor
- A statement of the provisions of section 701(a) of the ECOA
- The name and address of the Federal agency that administers compliance for the creditor
- Either of the following:
  - A statement of specific reasons for the action taken, or
  - A disclosure of the applicant's right to a statement of specific reasons within 30 days, if the statement is requested within 60 days of the creditor's notification. This disclosure must include the name, address, and telephone number of the person or office from which the statement of reasons can be obtained. If the creditor chooses to provide the reasons orally, the creditor must also disclose the applicant's right to have them confirmed in writing within 30 days of receiving a written request for confirmation from the applicant.

Notification to Business Credit Applicants [§ 1002.9(a)(3)]

The regulation also includes a requirement that creditors notify business credit applicants of action taken. The type and content of the notification required depends upon the size of the business.

Businesses with gross revenues of $1,000,000 or less in the preceding fiscal year. Generally, creditors must comply with the notification requirements specified above for business applicants that had gross revenues of $1,000,000 or less in the preceding fiscal year (the same as for consumer applicants). Some relief from these requirements is provided by allowing both:

- The statement of the action taken to be given orally or in writing when adverse action is taken
- The disclosure of an applicant's right to a statement of reasons to be given at the time of application, instead of when adverse action is taken. This disclosure must be in a form the applicant may retain and contain the same information required to be delivered to a consumer applicant. In addition, this disclosure must contain the ECOA notice.

If an application is made solely by telephone, a creditor can satisfy the notification requirements with an oral statement of the action taken and of the applicant's right to a statement of reasons for adverse action.

Businesses with gross revenues in excess of $1,000,000 in the preceding fiscal year (or an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit). Even greater relief from the notification requirements is provided for larger business applicants and certain types of business credit applications. The only action notification required for businesses that had gross revenues in excess of $1,000,000 in the preceding fiscal year or an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit includes both:

- Notifying the applicant, orally or in writing, within a reasonable time of the action taken
- Providing a written statement of the reasons for adverse action and the specified ECOA notice if the applicant makes a written request for the reasons within 60 days of being notified of the adverse action

Form of ECOA Notice [§ 1002.9(b)]

ECOA Notice [§ 1002.9(b)(1)]

The ECOA notice must be substantially similar to the following:

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

Until January 1, 2013, a creditor could comply with the above paragraph by including in the notice the "name and address as specified by the appropriate agency listed in Appendix A of the regulation" that was in effect on October 1, 2011.

Statement of Specific Reasons [§ 1002.9(b)(2)]

Statements of reasons for adverse action must be specific and indicate the principal reason(s) for the adverse action. Statements that the adverse action was based on a creditor's internal standards or policies or that the applicant failed to achieve the qualifying score on a credit scoring system are insufficient.

The specific reasons given for the adverse action must relate to and accurately describe the factors actually considered or scored by a creditor. If a creditor uses a judgmental system, the reasons for the denial or other adverse action must relate to the factors in the applicant's record actually reviewed by the person making the decision.

If a creditor bases the denial or other adverse action on a credit scoring system, the reasons disclosed must relate only to those factors actually scored in the system. In addition, no factor that was a principal reason for adverse action may be excluded from disclosure. The creditor must disclose the actual reasons for denial (for example, "age of automobile") even if the relationship of that factor to predicting creditworthiness may not be clear to the applicant.

Automatic Denials

Some credit-decision methods contain features that call for automatic denial because of one or more negative factors in the applicant's record (such as the applicant's previous bad credit history with that creditor, the applicant's declaration of bankruptcy, or the fact that the applicant is a minor). When a creditor denies a credit request because of an automatic-denial factor, that specific factor must be disclosed as a specific reason for adverse action.

Description of Reasons

A creditor does not need to describe how or why a factor adversely affected an applicant. For example, the notice may say "length of residence" rather than "too short a period of residence."

Number of Specific Reasons

A creditor must disclose the principal reasons for denying an application or taking other adverse action. The regulation does not require a specific number of reasons to be disclosed. However, the commentary to the regulation states that the disclosure of more than four reasons is not likely to be helpful to the applicant. The intent is to focus the disclosure on the primary shortcoming in the applicant's credit standing.

Combined ECOA/FCRA Disclosures

The ECOA requires disclosure of the principal reasons for denying or taking other adverse action on an application for an extension of credit. The Fair Credit Reporting Act (FCRA) requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or from its own files. Disclosing that a credit report was obtained and used to deny the application, as the FCRA requires, does not satisfy the ECOA requirement to disclose specific reasons.

For example, if the applicant's credit history reveals delinquent credit obligations and the application is denied for that reason, the creditor must disclose that the application was denied because of the applicant's delinquent credit obligations. To satisfy the FCRA requirement, the creditor must also disclose, as applicable, a credit score it used in taking adverse action along with related information, including up to four key factors that adversely affected the consumer's credit score (or up to five factors if the number of inquiries made with respect to that consumer report is a key factor). Disclosing the key factors that adversely affected the consumer's credit score does not satisfy the ECOA requirement to disclose specific reasons for denying or taking other adverse action on an application or extension of credit. Sample forms C–1 through C–5 of Appendix C of the regulation provide for both the ECOA and FCRA disclosures.

Incomplete Applications [§ 1002.9(c)]

Notice Alternatives [§ 1002.9(c)(1)]

As stated above, there are two alternatives to properly notify an applicant that an application is incomplete and requires additional information from the applicant. Within 30 days after receiving an incomplete application, the creditor can notify the applicant of either:

- Adverse action taken on the incomplete application, or
- The incompleteness, as described below.

Notice of Incompleteness [§ 1002.9(c)(2)]

If additional information is needed from an applicant, the creditor can send a written notice to the applicant:

- Specifying the information needed;
- Designating a reasonable period of time for the applicant to provide the information; and
- Informing the applicant that failure to provide the information requested will result in no further consideration being given to the application.

A creditor has no further notification obligation if the applicant fails to respond within the designated time period. In addition, if the information requested is submitted after the expiration of the designated time period, a creditor may require the applicant to make a new application.

If the applicant supplies the requested information within the designated time period, a creditor is required to take timely action on the application and properly notify the applicant of the action taken.

Oral Request for Information [§ 1002.9(c)(3)]

A creditor may orally inform the applicant of the need for additional information. However, if the creditor chooses this option and the application remains incomplete, the creditor must send a written notice within the specified 30-day period.

Oral Notifications by Small-Volume Creditors [§ 1002.9(d)]

In the case of a creditor that did not receive more than 150 applications during the preceding calendar year, the requirements of this section (including statements of specific reasons) are satisfied by oral notifications.

Withdrawal of Applications [§ 1002.9(e)]

Expressly Withdrawn Applications

When an applicant expressly withdraws a credit application, a creditor is not required to

comply with the notification requirements of the regulation. The creditor must, however, comply with the record-retention requirements of the regulation.

Withdrawal of Approved Applications

In some cases, an applicant submits an application and it is understood that the applicant will inquire about its status. If a creditor approves such an application and the applicant has not inquired within 30 days after applying, the creditor may treat the application as withdrawn and does not need to provide any notification.

Multiple Applicants [§ 1002.9(f)]

When an application involves more than one applicant, notification needs to be given only to one of them. However, the notification must be given to the primary applicant if one is readily apparent.

Privacy for Multiple Applicants

Many commenters to the FRB's 2003 rulemaking that amended Regulation B and its Commentary were concerned about a co-applicant's or guarantor's privacy when the reasons for adverse action pertaining to creditworthiness – particularly, that of the co-applicant or guarantor – are given to the primary applicant. The FRB's response was that when a person agrees to be a co-applicant, guarantor, or similar party, there is – or should be – a general understanding that information will be shared.

Therefore, according to the FRB, there is no expectation of privacy between co-applicants or applicants and guarantors. One statement of reasons for adverse action that combines any negative information about the multiple parties is permissible.

Applications Submitted Through a Third Party [§ 1002.9(g)]

When an application is made on behalf of an applicant to more than one creditor and the applicant accepts or uses credit offered by one of the creditors, notification of action taken by any of the other creditors is not required.

If no credit is offered or if the applicant does not expressly accept or use any credit offered, each creditor taking adverse action must properly notify the applicant either directly or through a third party. A notice given by a third party must disclose the identity of each creditor on whose behalf the notice is given.

Adverse Action Notices

Introduction

The Dodd-Frank Act amended section 615(a) of the FCRA to require that creditors disclose additional information on FCRA adverse action notices. The statute generally requires that a FCRA adverse action notice include:

- a numerical credit score used in making the credit decision;
- the range of possible scores under the model used;
- up to four key factors that adversely affected the consumer's credit score (or up to five factors if the number of inquiries made with respect to that consumer report is a key factor);
- the date on which the credit score was created; and
- the name of the person or entity that provided the credit score.

Model Notices C-1 Through C-5

Model notices C-1 through C-5 may be used to comply with the adverse action provisions of both the ECOA and the FCRA. The Board amended these notices to incorporate the additional content requirements prescribed by the Dodd-Frank Act.

Contact Information for the Entity that Provided the Credit Score

The Board added optional language to the model forms that creditors may use to direct the consumer to the entity (which may be a consumer reporting agency or the creditor itself, for a proprietary score that meets the definition of a credit score) that provided the credit score for any questions about the credit score, along with the entity's contact information. Because this language is optional, creditors may use or not use the additional language without losing the safe harbor provided under Regulation B and the ECOA. Paragraph 2 of Appendix C is revised to clarify that the disclosure of the entity's contact information is optional.

Use of a Credit Score

In some cases, a creditor that is required to provide an adverse action notice under the FCRA may use a consumer report, but not a credit score, in taking the adverse action. The Dodd-Frank Act requires disclosure if a credit score was used in taking adverse action. A creditor that obtains a credit score and takes adverse action is required to disclose that score, unless the credit score played no role in the adverse action determination. If the credit score was a factor in the adverse action decision, even if it was not a significant factor, the creditor will have used the credit score for purposes of the regulation.

Disclosure that No Credit Score is Available

In some cases, a creditor may try to obtain a credit score for an applicant, but the applicant may have insufficient credit history for the consumer-reporting agency to generate a credit score. This change only applies when a creditor uses a credit score in taking adverse action. The creditor cannot disclose credit score information if an applicant has no credit score. Nothing in the Dodd-Frank Act prevents a creditor, however, from providing the applicant notice that no credit score was available from a consumer-reporting agency, although this is not required.

Key Factors

The Dodd-Frank Act expressly requires disclosure of the top key factors that adversely affected the credit score, whether or not the effect was substantial. A person taking adverse action must provide the consumer the required information. The FCRA requires disclosure of all of the key factors that adversely affected the credit score in the model used, up to four, subject to the FCRA, which states that if the key factors that adversely affected the credit score include the number of inquiries made with respect to the consumer report, the "number of inquiries" must be disclosed as a key factor.

The person taking adverse action is responsible for providing the credit score disclosure, including the key factors adversely affecting the credit score. If a creditor is using a credit score purchased from a consumer-reporting agency, the consumer-reporting agency is in the best position to identify the key factors that affected the score, and the creditor could rely on that information in its disclosure to consumers. The Board acknowledges, however, that the contractual arrangements between creditors and consumer reporting agencies may vary as to how creditors will receive the credit score information necessary to comply. The imposition of requirements on consumer reporting agencies is not within the scope of this rulemaking under the ECOA.

Disclosing Credit Score Information on a Separate Document

The FCRA requires a creditor to provide notice of adverse action to consumers against whom it takes adverse action based in whole or in part on information contained in a consumer report. The Dodd-Frank Act amended FCRA to require a creditor to provide such consumers credit score information. Providing a form with credit score information separately from an adverse action notice does not appear to be consistent with the legislation.

Co-applicants

Section 1002.9(f) of Regulation B permits a creditor to provide an adverse action notice to only one applicant, and requires a creditor to provide an adverse action notice to the primary applicant, when a primary applicant is readily apparent. In contrast, section 615(a) of the FCRA requires a creditor to provide the disclosures mandated by that section to "any consumer" against whom adverse action is taken, if the adverse action is based in whole or in part on information from a consumer report. The FCRA's reference to "any consumer" would seem to include co-applicants. Given privacy and customer relations concerns, the Board expects that creditors would generally provide separate FCRA adverse action notices to each applicant with only the individual's credit score on each notice.

Guarantors and Co-Signers

An application may involve a guarantor or co-signer. Under Regulation B, only an applicant can experience adverse action. Further, a guarantor or co-signer is not deemed an applicant. The FCRA provides that adverse action has the same meaning for purposes of the FCRA as is provided in the ECOA and Regulation B in the context of a credit application. Therefore, a guarantor or co-signer would not receive an adverse action notice under the ECOA or the FCRA. The credit applicant would, however, receive an adverse action notice, even if the adverse action decision is made solely based on information in the guarantor's or co-signer's consumer report.

The Dodd-Frank Act does not address whether, in this circumstance, the adverse action notice received by an applicant under the FCRA should include a guarantor or co-signer's credit score. The Board does not believe, however, that Congress intended for an individual to receive another individual's credit score. The FCRA associates a credit score with a particular individual. The Board accordingly believes that a guarantor or co-signer's credit score should not be disclosed to an applicant in an adverse action notice.

Multiple Scores

Some creditors may obtain multiple credit scores from consumer reporting agencies in connection with their underwriting processes. A creditor may use one or more of those scores in taking adverse action. The Dodd-Frank Act only requires a person to disclose a single credit score used in taking adverse action.

When a creditor obtains multiple scores but only uses one in making the decision, the creditor must disclose the credit score that it used. The Dodd-Frank Act does not specify what credit score should be disclosed in such cases, but only requires a person to disclose a single credit score that is used by the person in making the credit decision. A creditor would comply with the statute by disclosing any of the credit scores that it used. The Board expects that creditors will have policies and procedures to determine which of the multiple credit scores was used in taking adverse action. For instance, a creditor could have policies and procedures specifying that:

- when the creditor obtains or creates multiple credit scores but only uses one of those credit scores in taking adverse action, for example, by using the low, middle, high, or most recent score, the creditor would disclose that credit score and information relating to that credit score; and
- when a creditor uses multiple credit scores in taking adverse action, for example, by computing the average of all the credit scores obtained, the creditor would disclose any one of those credit scores and information relating to the credit score.

Because credit-scoring models may differ considerably in nature and the range of scores used, consumers would not necessarily benefit if they receive and try to compare multiple scores. Disclosing multiple credit scores could confuse consumers who do not understand the differences, which might lessen the value of the disclosures. Moreover, the Dodd-Frank Act requires the Consumer Financial Protection Bureau (CFPB) to conduct a study of the different credit scoring systems, and whether these variations disadvantage consumers. The CFPB's study might develop a record that could serve as the basis for reconsidering this issue in a future rulemaking.

Adverse Actions Not Limited to Credit

Section 1002.2(c) of the ECOA limits the definition of adverse action to decisions regarding credit. The FCRA, however, does not include such a limitation. The FCRA therefore applies to adverse action decisions related to credit, but also decisions regarding, for example, a deposit account, insurance product, or employment. Although a credit score may generally be used in making or arranging loans, a credit score may also be used in taking adverse action not related to credit. The Board believes that a person would need to disclose a credit score obtained from a consumer reporting agency as part of the adverse action notice as set forth in the Dodd Frank

Act, even if the person used the credit score to take adverse action for a non-lending product. In requiring credit score disclosures, the Dodd-Frank Act does not state that the credit score disclosures are only required for adverse action decisions related to credit.

FORM C-1—SAMPLE NOTICE OF ACTION TAKEN AND STATEMENT OF REASONS
Statement of Credit Denial, Termination or Change

Date: ____________________

Applicant's Name: ____________________
Applicant's Address:____________________
Description of Account, Transaction, or Requested Credit: ____________________
Description of Action Taken:____________________

Part I – PRINCIPAL REASON(S) FOR CREDIT DENIAL, TERMINATION, OR OTHER ACTION TAKEN CONCERNING CREDIT.

This section must be completed in all instances.

____________________Credit application incomplete
____________________Insufficient number of credit references provided
____________________Unacceptable type of credit references provided
____________________Unable to verify credit references
____________________Temporary or irregular employment
____________________Unable to verify employment
____________________Length of employment
____________________Income insufficient for amount of credit requested
____________________Excessive obligations in relation to income
____________________Unable to verify income
____________________Length of residence
____________________Temporary residence
____________________Unable to verify residence
____________________No credit file
____________________Limited credit experience
____________________Poor credit performance with us
____________________Delinquent past or present credit obligations with others
____________________Collection action or judgment
____________________Garnishment or attachment
____________________Foreclosure or repossession
____________________Bankruptcy
____________________ Number of recent inquiries on credit bureau report
____________________Value or type of collateral not sufficient
____________________Other, specify:____________________

Part II— DISCLOSURE OF USE OF INFORMATION OBTAINED FROM AN OUTSIDE SOURCE.

This section should be completed if the credit decision was based in whole or in part on information that has been obtained from an outside source.

____________________Our credit decision was based in whole or in part on information obtained in a report from the consumer-reporting agency listed below. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer-reporting agency. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency.

Name:____________________
Address: ____________________
[Toll-free] Telephone number: ____________________

___ [We also obtained your credit score from this Consumer-reporting agency and used it in making our credit decision. Your credit score is a number that reflects the information in your consumer report. Your credit score can change, depending on how the information in your consumer report changes.

Your credit score: ____________________

Date: ____________________

Scores range from a low of ______________ to a high of _______________

Key factors that adversely affected your credit score:

____

____

____

____

[Number of recent inquiries on consumer report, as a key factor]

[If you have any questions regarding your credit score, you should contact [entity that provided the credit score] at:

Address: ____

____

[Toll-free] Telephone number:____]]

____Our credit decision was based in whole or in part on information obtained from an affiliate or from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, no later than 60 days after you receive this notice, for disclosure of the nature of this information.

If you have any questions regarding this notice, you should contact:
Creditor's name:____________________
Creditor's address:____________________
Creditor's telephone number:____________________

NOTICE

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

Section 10: Miscellaneous Issues
[12 C.F.R. §§ 1002.10, 1002.11 and 1002.12]

Furnishing of Credit Information [§ 1002.10]

Designation of Accounts [§ 1002.10(a)]

A creditor that furnishes credit information to credit bureaus or to other creditors must follow these guidelines:

- Any new account must be designated to reflect the participation of both spouses if the applicant's spouse is permitted to use or is contractually liable on the account (other than as a guarantor, surety, endorser, or similar party).
- Any existing account must be designated to reflect the participation of both spouses if the applicant's spouse is permitted to use or is contractually liable on the account, within 90 days after receiving a written request to do so from one of the spouses.

The above requirements apply only to accounts held or used by spouses. However, a creditor has the option to designate all joint accounts (or all accounts with an authorized user) to reflect the participation of both parties, whether or not the accounts are held by persons married to each other.

In designating accounts and reporting credit information, a creditor does not need to distinguish between accounts on which the spouse is an authorized user and accounts on which the spouse is a contractually liable party. A request to change the manner in which information concerning an account is furnished does not alter the legal liability of either spouse upon the account and does not require a creditor to change the name in which the account is maintained.

File and Index Systems

The regulation does not require the creation or maintenance of separate files in the name of each participant on a joint or user account, or require any other particular system of recordkeeping or indexing. It requires only that a creditor be able to report information in the name of each spouse on applicable accounts. Thus, if a creditor receives a credit inquiry about the wife, it should be able to locate her credit file without asking the husband's name.

Routine Reports to Consumer Reporting Agency [§ 1002.10(b)]

If a creditor furnishes credit information to a consumer-reporting agency on joint spousal accounts, it must furnish the information in a manner that will enable the agency to provide access to the information in the name of each spouse.

Reporting in Response to Inquiry [§ 1002.10(c)]

If a creditor furnishes credit information in response to an inquiry concerning a joint spousal account, it must furnish the information in the name of the spouse about whom the information is requested.

Relation to State Law [§ 1002.11]

Inconsistent State Laws [§ 1002.11(a)]

Regulation B alters, affects, or preempts only those state laws that are inconsistent with the ECOA and this regulation and then only to the extent of the inconsistency. A state law is not inconsistent if it is more protective of an applicant.

Preempted Provisions of State Law [§ 1002.11(b)]

A state law is deemed to be inconsistent with the requirements of the ECOA and Regulation B and less protective of an applicant to the extent that the law:

- Requires or permits a practice or act prohibited by the ECOA or this regulation;
- Prohibits the individual extension of consumer credit to both parties to a marriage if each spouse individually and voluntarily applies for such credit;
- Prohibits inquiries or collection of data required to comply with the ECOA or this regulation;
- Prohibits asking or considering age in an empirically derived, demonstrably and statistically sound credit scoring system to determine a pertinent element of creditworthiness, or to favor an elderly applicant; and/or
- Prohibits inquiries necessary to establish or administer a special purpose credit program.

A creditor, state, or other interested party may request that the Bureau determine whether a state law is inconsistent with the requirements of the ECOA and this regulation.

Laws on Finance Charges and Loan Ceilings [§ 1002.11(c)]

If married applicants voluntarily apply for and obtain individual accounts with the same creditor, the accounts must not be aggregated or otherwise combined for purposes of determining permissible finance charges or loan ceilings under any Federal or state law. Permissible loan ceiling laws must be construed to permit each spouse to become individually liable up to the amount of the loan ceilings, less the amount for which the applicant is jointly liable.

State and Federal Laws Not Affected [§ 1002.11(d)]

This section does not alter or annul any provision of state property laws, laws relating to the disposition of decedents' estates, or Federal or state banking regulations directed only toward insuring the solvency of financial institutions.

Exemption for State-Regulated Transactions [§ 1002.11(e)]

Applications. A state may apply to the Bureau for an exemption from the requirements of the act and this regulation for any class of credit transactions within the state. The Bureau will grant such an exemption if it determines that both of the following criteria are met:

- The class of credit transactions is subject to state law requirements substantially similar to the act and this regulation or that applicants are afforded greater protection under state law.
- There is adequate provision for state enforcement.

Liability and Enforcement. No exemption will extend to the civil liability provisions of section 706 or the administrative enforcement provisions of section 704 of the ECOA.

After an exemption has been granted, the requirements of the applicable state law (except for additional requirements not imposed by Federal law) will constitute the requirements of the ECOA and this regulation.

Record Retention [§ 1002.12]

Retention of Prohibited Information [§ 1002.12(a)]

A creditor may retain prohibited information without violating the ECOA or this regulation only if the information was obtained in the following circumstances:

- From any source prior to March 23, 1977
- From consumer reporting agencies, an applicant, or others without the specific request of the creditor
- As required to monitor compliance with the ECOA and this regulation or other Federal or state statutes or regulations

Although a creditor may keep prohibited information in these circumstances, it may use the information in evaluating credit applications only if permitted to do so by the regulation.

Preservation of Records [§ 1002.12(b)]

Applications. The following information must be retained either in original or copy form for 25 months (12 months for business credit) after the date of notification of action taken on an application or of incompleteness:

- Any application that has been received, any information required to be obtained concerning characteristics of the applicant to monitor compliance with the ECOA and this regulation or other similar law, and any other written or recorded information used in evaluating the application and not returned to the applicant at the applicant's request
- A copy of the following documents if furnished to the applicant in written form (or, if furnished orally, any notation or memorandum made by the creditor):
  - The notification of action taken
  - The statement of specific reasons for adverse action

- Any written statement submitted by the applicant alleging a violation of the ECOA or this regulation

Existing Accounts. The following information must be retained either in original or copy form for 25 months (12 months for business credit) after the date of adverse action notification on an existing account:

- Any written or recorded information concerning the adverse action, and
- Any written statement submitted by the applicant alleging a violation of the ECOA or this regulation

Other Applications. Even if adverse action notification is not required on a particular application, all written or recorded information in a creditor's possession concerning the applicant (including any notation of action taken) must be retained for 25 months (12 months for business credit) after the date that the application was received.

Enforcement Proceedings and Investigations. A creditor must retain the information specified above beyond 25 months (12 months for business credit) if it has been notified that it is under investigation or is subject to an enforcement proceeding for an alleged violation of the act or this regulation. It must also retain this information beyond 25 months (12 months for business credit) if it has been served with a notice of an action filed for violating the ECOA or Regulation B. In these cases, the creditor must retain the information until final disposition of the matter, unless an earlier time is allowed by order of the agency or court.

Special Rule for Certain Business Credit Applications. Records regarding business credit applications from a business with gross revenues in excess of $1 million in the preceding fiscal year or applications for an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit must be retained for at least 60 days after notifying the applicant of the action taken. If within that time period the applicant requests, in writing, the reasons for adverse action or that records be retained, the creditor shall retain the records for 12 months.

Self-Tests. For 25 months after a self-test (as defined in section 1002.15) has been completed, the creditor must retain all written or recorded information about the self-test. A creditor must retain information beyond 25 months if it has actual notice that it is under investigation or is subject to an enforcement proceeding for an alleged violation, or if it has been served with notice of a civil action. In such cases, the creditor must retain the information until final disposition of the matter, unless an earlier time is allowed by the appropriate agency or court order.

Prescreened Solicitations. For 25 months after the date on which an offer of credit is made to potential customers (12 months for business credit, except as provided in paragraph (b)(5) of this section), the creditor must retain in original form or a copy thereof all of the following:

- The text of any prescreened solicitation
- The list of criteria the creditor used to select potential recipients of the solicitation
- Any correspondence related to complaints (formal or informal) about the solicitation

FCRA and FACT Act Implications

As a part of the Fair and Accurate Credit Transactions Act (FACT Act) of 2003, creditors can be sued for an FCRA violation up to five years after the date of the adverse action notice. Bankers may wish to consult appropriate legal counsel regarding retention of adverse action notices beyond the 25 months stipulated by Regulation B.

Section 11: Information for Monitoring Purposes [12 C.F.R. § 1002.13]

Information to Be Requested [§ 1002.13(a)]

The information collection requirements of this section of the regulation apply to creditors who receive an application for credit that meets both of the following criteria:

- Primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence; and
- The extension of credit will be secured by the dwelling.

Creditors must request, as part of the application, the following information regarding the applicant(s):

- Ethnicity, using the categories Hispanic or Latino, and not Hispanic or Latino
- Race, using the categories American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White
- Sex
- Marital status, using the categories Married, Unmarried, and Separated, and
- Age

A dwelling is a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes, but is not limited to, an individual condominium or cooperative unit and a mobile or other manufactured home.

Temporary Financing. An application for temporary financing to construct a dwelling is not subject to § 1002.13. But an application for both a temporary loan to finance construction of a dwelling and a permanent mortgage loan to take effect upon the completion of construction is subject to § 1002.13.

Other Transactions Not Covered. As stated above, the monitoring information collection requirements apply to applications for credit primarily for the purchase or refinancing of a dwelling that is or will become the applicant's principal residence. Therefore, applications for credit secured by the applicant's principal residence but made primarily for a purpose other than the purchase or refinancing of the principal residence (such as loans for home improvement and debt consolidation) are not subject to the information collection requirements.

An application for an open-end home equity line of credit is also not subject to the monitoring information collection requirements unless it is readily apparent to the creditor when the application is taken that the primary purpose of the line is for the purchase or refinancing of a principal dwelling.

Refinancing. A refinancing occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same borrower. A creditor that receives an application to refinance an existing extension of credit made by that creditor for the purchase of the applicant's dwelling may request the monitoring information again but is not required to do so if it was obtained in the earlier transaction.

Obtaining of Information [§ 1002.13(b)]

Questions regarding ethnicity, race, sex, marital status, and age may be listed, at the creditor's option, on the application form or on a separate form that refers to the application. The applicant(s) must be asked, but not required, to supply the requested information.

If the applicant(s) chooses not to provide the information or any part of it, that fact should be noted on the form. The creditor must then also note on the form, to the extent possible, the ethnicity, race, and sex of the applicant(s) on the basis of visual observation or surname.

Written Applications. The regulation requires written applications for the types of credit covered by § 1002.13. The creditor can satisfy this requirement by recording on paper or by means of computer the information that the applicant provides orally and that the creditor normally considers in a credit decision.

Telephone and Mail Applications. A creditor that accepts an application by telephone or mail must request the monitoring information.

A creditor that accepts an application by mail need not make a special request for the monitoring information if the applicant has failed to provide it on the application form returned to the creditor. If it is not evident on the face of an application that it was received by mail, telephone, or via an electronic medium, the creditor should indicate on the form or other application record how the application was received.

Failure to indicate the process under which the application was received can place the bank at a disadvantage during regulatory examinations or legal actions. Therefore, all lenders should be trained to complete the "application received by" information for every loan, every time.

Video and Other Electronic Application Processes. If a creditor takes an application through an electronic medium that allows the creditor to see the applicant, the creditor must treat the application as taken in person. The creditor must note the monitoring information on the basis of visual observation or surname, if the applicant chooses not to provide the information.

If an applicant applies through an electronic medium without video capability, the creditor treats the application as if it were received by mail.

> ***Applications through loan-shopping services.*** When a creditor receives an application through an unaffiliated loan shopping service, it does not have to request the monitoring information for purposes of the ECOA or Regulation B. Creditors subject to the Home Mortgage Disclosure Act should be aware, however, that data collection may be called for under Regulation C (12 CFR part 1003), which generally requires creditors to report, among other things, the sex and race of an applicant on brokered applications or applications received through a correspondent.

Inadvertent Notation. If a creditor (or a customer, in a mail application) inadvertently obtains the monitoring information in a dwelling-related transaction, which does not require the collection of this information, the creditor may process and retain the application without violating the regulation.

Disclosure to Applicant(s) [§ 1002.13(c)]

Creditors must inform the applicant(s) that the information regarding ethnicity, race, sex, marital status, and age is being requested by the Federal Government for the purpose of monitoring compliance with Federal statutes that prohibit creditors from discriminating against applicants on those bases. The creditor must also inform the applicant(s) that if the applicant(s) chooses not to provide the information, the creditor is required to note the ethnicity, race, and sex on the basis of visual observation or surname.

The disclosures to an applicant regarding the monitoring information may be provided in writing. Appendix B of Regulation B contains a sample disclosure. A creditor may devise its own disclosure so long as it is substantially similar. The creditor need not orally request the monitoring information if it is requested in writing. The suggested sample that appears in the Uniform Residential Loan Application Form appears below:

> *The following information is requested by the Federal Government for certain types of loans related to a dwelling in order to monitor the lender's compliance with equal credit opportunity, fair housing and home mortgage disclosure laws. You are not required to furnish this information, but are encouraged to do so. The law provides that a lender may discriminate neither on the basis of this information, nor on whether you choose to furnish it. If you furnish the information, please provide both ethnicity and race. For race, you may check more than one designation. If you do not furnish ethnicity, race, or sex, under Federal regulations, this lender is required to note the information on the basis of visual observation or surname. If you do not wish to furnish the information, please check the box below. (Lender must review the above material to assure that the disclosures satisfy all requirements to which the lender is subject under applicable state law for the particular type of loan applied for.)*

BORROWER ❑ I do not wish to furnish this information.	**CO-BORROWER** ❑ I do not wish to furnish this information.
Ethnicity: ❑ Hispanic or Latino ❑ Not Hispanic or Latino	**Ethnicity:** ❑ Hispanic or Latino ❑ Not Hispanic or Latino
Race: ❑ American Indian or Alaska Native ❑ Asian ❑ Black or African American ❑ Native Hawaiian or Other Pacific Islander ❑ White	**Race**: ❑ American Indian or Alaska Native ❑ Asian ❑ Black or African American ❑ Native Hawaiian or Other Pacific Islander ❑ White
Sex: ❑ Female ❑ Male	**Sex:** ❑ Female ❑ Male

Substitute Monitoring Program [§ 1002.13(d)]

An enforcement agency may adopt, under its established rulemaking or enforcement procedures, a program requiring creditors under its jurisdiction to collect information in addition to that required by this section of the regulation, as well as additional information.

Section 12: Rules on Providing Appraisal Reports [12 C.F.R. § 1002.14]

Introduction and Summary of the Final Rule

The Bureau of Consumer Financial Protection (CFPB) amended Regulation B and the CFPB's official interpretations of the regulation, to implement the amendment that was enacted as part of the Dodd-Frank Act. The revisions require creditors to provide to applicants free copies of all appraisals and other written valuations developed in connection with an application for a loan to be secured by a first lien on a dwelling, and require creditors to notify applicants in writing that copies of appraisals will be provided to them promptly.

There are four main elements:

- Requires creditors to notify applicants within three business days of receiving an application of their right to receive a copy of appraisals used in connection with the application.
- Requires creditors to provide applicants a copy of each appraisal and other written valuation promptly upon its completion or three business days before consummation (for closed-end credit) or account opening (for open-end credit), whichever is earlier.
- Permits applicants to waive the timing requirement for providing these copies. However, applicants who waive the timing requirement must be given a copy of all appraisals and other written valuations at or prior to consummation or account opening, or, if the transaction is not consummated or the account is not opened, no later than 30 days after the creditor determines the transaction will not be consummated or the account will not be opened.
- Prohibits creditors from charging for the copy of appraisals and other written valuations, but permits creditors to charge applicants reasonable fees for the cost of the appraisals or other written valuations unless applicable law provides otherwise.

General Rules on Providing Disclosure in Electronic Form [§ 1002.4(d)]

The CFPB updated the cross-reference in § 1002.4(d) to § 1002.14, to reflect that the new disclosure requirement is cited as § 1002.14(a)(2). This change will ensure that electronic disclosure standards in Regulation B apply to the new notice requirement to the same extent as they have applied in the past. The language of the new disclosure is described in detail below.

Providing Copies of Appraisals and Other Written Valuations [§ 1002.14(a)]

If there is more than one applicant, the written disclosure about written appraisals, and the copies of appraisals and other written valuations, need only be given to one applicant. However, these materials must be given to the primary applicant where one is readily apparent. Similarly, if there is more than one applicant for credit in the transaction, one applicant may provide a waiver, but it must be the primary applicant where one is readily apparent.

In General [§ 1002.14(a)(1)]

A creditor must provide an applicant a copy of all appraisals and other written valuations developed in connection with an application for credit that is to be secured by a first lien on a dwelling. This rule applies to credit for both consumer and business purposes.

A "written" appraisal or other valuation would include an appraisal or valuation received or developed by the creditor in any of the following manners: in paper form (hard copy); electronically, such as by CD or e-mail; or by any other similar media.

The term "developed in connection with the application" indicates that when a creditor uses appraisals or other valuation that was previously developed in connection with a prior extension of credit to evaluate a renewal request, these rules do not apply.

Creditors must consider whether there is an "applicant" or "application" for an "extension of credit. While some loan modifications can be subject to the provisions of Regulation B, there is variation between different types of loss mitigation programs. The particulars of the program must be considered in evaluating whether there is an application or applicant for an extension of credit within the meaning of Regulation B. Accordingly, if those transactions would otherwise be covered by Regulation B, the requirements of this section would apply.

If a creditor receives multiple versions of a particular appraisal or other written valuation, the creditor is required to provide a copy of only the latest version. If a creditor provides a version of an appraisal or other written valuation that is later superseded, the creditor still must provide the latest version. When there is only one version of a particular appraisal or other written valuation, a copy must be provided to the applicant regardless of whether the creditor relied on it or viewed it as being preliminary.

Timing and Waiver

Creditors must provide copies of each appraisal or other written valuation "promptly upon completion," but not later than three business days prior to the closing of the loan, (for closed-end credit) or account opening (for open-end credit), whichever is earlier.

The "promptly upon completion" standard is applied based upon the facts and circumstances. Appraisals and other valuations may undergo review and revision. Therefore, there is no requirement to use the date of receipt as a gauge for the "promptly" standard.

An applicant may agree to waive the timing requirement, except where otherwise prohibited by law. The applicant may make the waiver by making an affirmative oral or written statement (which can be made by any one applicant in the case of a multiple-applicant transaction). If waived, the creditor is required to provide the copies of all appraisals and other written valuations at or before consummation.

Waivers do not extend to the requirement that copies of appraisals and other written valuations be provided in the case of an application that is withdrawn, incomplete, or denied. In situations where the applicant has provided a waiver, but no consummation or account opening occurs, the copy must be provided no later than 30 days after the creditor determines the transaction will not be consummated or the account will not be opened. This timeframe uses familiar longstanding timing requirements for providing copies of appraisals under existing regulation.

Delivery of Copies of Appraisals and Other Written Valuations

Creditors must provide copies of appraisals and other written valuations regardless of whether the consumer affirmatively requests such copies. The requirement to "provide" copies of appraisals or valuations is interpreted to mean delivery to the applicant. Delivery occurs three business days after mailing or delivering the copy to the last-known address of the applicant, or when evidence indicates the applicant actually received the copies, whichever is earlier. The creditor is required to deliver the materials only to one applicant in a multiple-applicant transaction.

Disclosure [§ 1002.14(a)(2)]

Content

There are two new appraisal-related disclosure requirements for consumers. In the absence of regulatory action to harmonize the two provisions, creditors would be required to provide two appraisal-related disclosures to consumers for certain loans (i.e., a TILA and an ECOA disclosure for higher-risk mortgage loans secured by a first lien on a consumer's principal dwelling) and just one for certain others (i.e., an ECOA disclosure for first-lien, dwelling-secured loans that are not higher-risk mortgage loans, or a TILA disclosure for higher-risk mortgage loans secured by a subordinate lien).

As both disclosures were created by the same legislation to address overlapping subject matter, the CFPB revised the sample disclosure form C-9 for appraisals in Regulation B to include language to satisfy the new appraisal-related disclosure requirements of both ECOA and TILA. Thus, one disclosure satisfies both statutory requirements. The disclosure is as follows:

> *"We may order an appraisal to determine the property's value and charge you for this appraisal. We will promptly give you a copy of any appraisal, even if your loan does not close. You can pay for an additional appraisal for your own use at your own cost."*

Creditors may amend the language of form C-9 to reflect their individual policies and procedures. For example, a creditor may add a telephone number that applicants may call to provide information for appraisal mailing, or a notice of the cost the applicant will be required to pay the creditor for the appraisal or other valuation.

Timing of Disclosure

The disclosure must be given not later than the third business day after a creditor receives an application for credit that is to be secured by a first lien on a dwelling, of the right to receive a copy of all appraisals and other written valuations developed in connection with such application.

The final rule includes an exception to this requirement, however. In the case of an application for credit that is not to be secured by a first lien on a dwelling at the time of application, if the creditor later determines the credit will be secured by a first lien on a dwelling, the notice must be mailed or delivered within three business days of making that determination.

Reimbursement [§ 1002.14(a)(3)]

Creditors are not prohibited from charging a fee reasonably designed to reimburse costs incurred in connection with obtaining appraisal and other valuation services, but are prohibited from increasing the fee for the appraisal or other valuation to cover costs of providing documentation. The appraisal fees must be reasonable and customary in the market area where the property is located. Accordingly, the CFPB stated that it believed that the applicable TILA section is simply designed to prevent direct or indirect "upcharging" related to the provision of documents.

The CFPB included a clarifying comment that other laws may separately prohibit creditors from charging fees to reimburse the costs of appraisals, and these laws are not overridden by TILA. The Dodd-Frank Act requires creditors to obtain a second interior appraisal in connection with certain higher-risk mortgages, but prohibits creditors from charging applicants for the cost of the second appraisal.

The specific types of charges that are prohibited under the regulation include charges such as photocopying fees and postage for mailing a copy of appraisals or other written valuations. The regulation does not limit the recoverability of Appraisal Management Company (AMC) charges. Creditors may not increase the base cost of obtaining an appraisal or valuation to cover the cost of providing the copy to the applicant/borrower.

The final rule does not affect the ability of creditors to request up-front payment from applicants before appraisals or other written valuations are ordered (which would protect creditors even if the application is withdrawn, incomplete, or denied), to collect payment at consummation or account opening, or to undertake other efforts to collect the fee if the transaction is not consummated or the account is not opened.

Withdrawn, Denied, or Incomplete Applications [§ 1002.14(a)(4)]

ECOA requires providing copies of the appraisals or other written valuations "whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn." Therefore, this section indicates that provision of copies of appraisals or valuations applies whether credit is extended or denied or if the application is incomplete or withdrawn. Specifically, creditors would be required to provide copies of appraisals and other written valuations even in situations where an applicant provides only an incomplete application.

Copies in Electronic Form [§ 1002.14(a)(5)]

Creditors may provide applicants with copies of appraisals and other written valuations in electronic form if the applicant consents to receiving the copies in such form. This is subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act)

Definitions [§ 1002.14(b)]

Consummation [§ 1002.14(b)(1)]

The final rule uses the term “consummation” in place of the statutory term “closing.” The term “consummation” means the time that a consumer becomes contractually obligated on a credit transaction. This definition mirrors the definition of the term provided in Regulation Z.

The question of when a contractual obligation on the consumer’s part is created is a matter to be determined under applicable law. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless applicable law holds otherwise. Consummation does not occur when the consumer becomes contractually committed to a sale transaction, unless the consumer also becomes legally obligated to accept a particular credit arrangement.

Dwelling 12 CFR [§ 1002.14(b)(2)]

The term “dwelling” means a residential structure that contains one to four units whether or not that structure is attached to real property, and includes an individual condominium or cooperative unit, and a mobile or other manufactured home.

It does not include transactions secured solely by motor vehicles as defined in the U.S.C. – a term that includes boats, motor homes, recreational vehicles, and other vehicles. The motor vehicle exclusion is limited to this section and is not a pronouncement on whether boats, trailers, recreational vehicles, campers, or motor vehicles would otherwise fall within the definition of “dwelling” in other provisions of Regulation B.

The definition of “dwelling” in this section requires that the unit be a “residential structure”, but does not require that it be “owner-occupied.” As a result, the requirements of the final rule can apply to transactions involving one-to-four-unit residential structures that may be business or commercial in nature, including for investment purposes.

Valuation [§ 1002.14(b)(3)]

The term “valuation” means any estimate of the value of a dwelling developed in connection with an application for credit.

Examples of what constitute a valuation include, but are not limited to:

- A report prepared by an appraiser (whether or not licensed or certified) including the appraiser’s estimate or opinion of the property’s value.
- A document prepared by the creditor’s staff that assigns value to the property.
- A report approved by a government-sponsored enterprise (GSE) for describing to the applicant the estimate of the property’s value developed pursuant to the proprietary methodology or mechanism of the GSE.
- A report generated by use of an automated valuation model (AVM) to estimate the property’s value.

  - The methodology utilized is not required information, only the report itself. Creditors are free to provide additional explanatory information to the applicant at the time the AVM is provided or request that the AVM generate the information, but it is not required.
- A broker price opinion prepared by a real estate broker, agent, or sales person to estimate the property's value.

Included in the valuation definition are any attachments or exhibits that are part of an integrated valuation report, for example, a list of comparable properties included in an AVM report. Drafts or other non-final materials need not be provided if they have been superseded by later versions.

For clarity and consistency, the CFPB makes clear that an internal creditor valuation must be disclosed, regardless of whether a third-party appraisal report is prepared.

The list of examples that do not qualify as valuations, even though they may restate a property's value, include but are not limited to:

- Internal documents that merely restate the estimated value of the dwelling contained in an appraisal or written valuation being provided to the applicant.
  - Examples include quality checks, fraud checks, automated underwriting determinations that do not estimate the value of the dwelling, and expressions of criticism of a valuation.
- Governmental agency statements of appraised value that are publically available.
- Publicly-available lists of valuations (such as published sales prices or mortgage amounts, tax assessments, and retail price ranges).
- Manufacturers' invoices for manufactured homes.
  - Includes mobile homes but not motor vehicles, which are excluded from the rule's requirements.
- Reports reflecting property inspections that do not provide an estimate or opinion of the value of the property and are not used to develop an estimate or opinion of the value of the property.

Section 13: Incentives for Self-Testing and Self-Correction [12 C.F.R. § 1002.15]

Incentives for Self-Testing [§ 1002.15(a)]

Incentive has been added in recent years to encourage banks to complete their own self-tests for fair lending compliance without fear of examiner reprisal.

Voluntary Self-Testing and Correction [§ 1002.15(a)(1)]

The report or results of the self-test that a creditor voluntarily conducts (or authorizes) are privileged as provided in this section. Data collection required by law or by any governmental authority is not a voluntary self-test.

Activities required by any governmental authority are not voluntary self-tests. A governmental authority includes both administrative and judicial authorities for Federal, state, and local governments.

Corrective Action Required [§ 1002.15(a)(2)]

The privilege in this section applies only if the creditor has taken or is taking appropriate corrective action.

To qualify for the privilege, appropriate corrective action is required when the results of a self-test show that it is more likely than not that there has been a violation of the ECOA or this regulation. A self-test is also privileged when it identifies no violations.

In some cases, the issue of whether certain information is privileged may arise before the self-test is complete or corrective actions are fully under way. This would not necessarily prevent a creditor from asserting the privilege. In situations where the self-test is not complete, for the privilege to apply the lender must satisfy the regulation's requirements within a reasonable period of time. To assert the privilege where the self-test shows a likely violation, the rule requires, at a minimum, that the creditor establish a plan for corrective action and a method to demonstrate progress in implementing the plan. Creditors must take appropriate corrective action on a timely basis after the results of the self-test are known.

A creditor's determination about the type of corrective action needed, or a finding that no corrective action is required, is not conclusive in determining whether the requirements of this paragraph have been satisfied. If a creditor's claim of privilege is challenged, an assessment of the need for corrective action or the type of corrective action that is appropriate must be based on a review of the self-testing results, which may require an in camera inspection of the privileged documents.

Other Privileges [§ 1002.15(a)(3)]

The privilege created by this section does not preclude the assertion of any other privilege that may also apply.

A creditor may assert the privilege established under this section in addition to asserting any other privilege that may apply, such as the attorney-client privilege or the work-product privilege. Self-testing data may still be privileged under this section whether or not the creditor's assertion of another privilege is upheld.

Self-Test Defined [§ 1002.15(b)]

Definition. A self-test is any program, practice, or study that both:

- Is designed and used specifically to determine the extent or effectiveness of a creditor's compliance with the act or this regulation
- Creates data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions

To qualify for the privilege, a self-test must be sufficient to constitute a determination of the extent or effectiveness of the creditor's compliance with the ECOA and Regulation B. Accordingly, a self-test is only privileged if it was designed and used for that purpose. A self-test that is designed or used to determine compliance with other laws or regulations or for other purposes is not privileged under this rule. For example, a self-test designed to evaluate employee efficiency or customers' satisfaction with the level of service provided by the creditor is not privileged even if evidence of discrimination is uncovered incidentally. If a self-test is designed for multiple purposes, only the portion designed to determine compliance with the ECOA is eligible for the privilege.

The principal attribute of self-testing is that it constitutes a voluntary undertaking by the creditor to produce new data or factual information that otherwise would not be available and could not be derived from loan or application files or other records related to credit transactions. Self-testing includes, but is not limited to, the practice of using fictitious applicants for credit (testers), either with or without the use of matched pairs. A creditor may elect to test a defined segment of its business, for example, loan applications processed by a specific branch or loan officer, or applications made for a particular type of credit or loan program. A creditor also may use other methods of generating information that is not available in loan and application files, such as surveying mortgage loan applicants. To the extent permitted by law, creditors might also develop new methods that go beyond traditional pre-application testing, such as hiring testers to submit fictitious loan applications for processing.

The privilege does not protect a creditor's analysis performed as part of processing or underwriting a credit application. A creditor's evaluation or analysis of its loan files, Home Mortgage Disclosure Act data, or similar types of records (such as broker or loan officer compensation records) does not produce new information about a creditor's compliance and is not a self-test for purposes of this section. Similarly, a statistical analysis of data derived from existing loan files is not privileged.

Types of Information Privileged. The privilege under this section applies to the report or results of the self-test; data or factual information created by the self-test; and any analysis, opinions, and conclusions pertaining to the self-test report or results. The privilege covers workpapers or draft documents as well as final documents.

Types of Information Not Privileged. The privilege under this section does not apply to either of the following:

- Information about whether a creditor conducted a self-test, the methodology used or the scope of the self-test, the time period covered by the self-test, or the dates it was conducted
- Loan and application files or other business records related to credit transactions, and information derived from such files and records, even if it has been aggregated, summarized, or reorganized to facilitate analysis

The information listed in the first bullet above is not privileged and may be used to determine whether the prerequisites for the privilege have been satisfied. Accordingly, a creditor might be asked to identify the self-testing method – for example, whether pre-application testers were used or data were compiled by surveying loan applicants. Information about the scope of the self-test (such as the types of credit transactions examined, or the geographic area covered by the test) also is not privileged.

Property appraisal reports, minutes of loan committee meetings, or other documents reflecting the basis for a decision to approve or deny an application; loan policies or procedures; underwriting standards; and broker compensation records are examples of the types of records that are not privileged. If a creditor arranges for testers to submit loan applications for processing, the records are not related to actual credit transactions for purposes of this paragraph and may be privileged self-testing records.

Appropriate Corrective Action [§ 1002.15(c)]

General Requirement. For the privilege in this section to apply, appropriate corrective action is required when the self-test shows that it is more likely than not that a violation occurred, even though no violation has been formally adjudicated.

The rule addresses only the corrective actions required for a creditor to take advantage of the privilege in this section. A creditor may be required to take other actions or provide additional relief if a formal finding of discrimination is made.

Appropriate corrective action is required even though no violation has been formally adjudicated or admitted by the creditor. In determining whether it is more likely than not that a violation occurred, a creditor must treat testers as if they are actual applicants for credit. A creditor may not refuse to take appropriate corrective action under this section because the self-test used fictitious loan applicants. The fact that a tester's agreement with the creditor waives the tester's legal right to assert a violation does not eliminate the requirement for the creditor to take corrective action, although no remedial relief for the tester is required under 1002.15(c)(3).

Determining the Scope of Appropriate Corrective Action. A creditor must take corrective action that is reasonably likely to remedy the cause and effect of a likely violation by taking both of the following steps:

- Identifying the policies or practices that are the likely cause of the violation
- Assessing the extent and scope of any violation

Whether a creditor has taken or is taking corrective action that is appropriate will be determined on a case-by-case basis. Generally, the scope of the corrective action that is needed to preserve the privilege is governed by the scope of the self-test. For example, a creditor that self-tests mortgage loans and discovers evidence of discrimination may focus its corrective actions on mortgage loans, and is not required to expand its testing to other types of loans.

In identifying the policies or practices that are a likely cause of the violation, a creditor might identify inadequate or improper lending policies, failure to implement established policies, employee conduct, or other causes. The extent and scope of a likely violation may be assessed by determining which areas of operations are likely to be affected by those policies and practices, for example, by determining the types of loans and stages of the application process involved and the branches or offices where the violations may have occurred.

Depending on the method and scope of the self-test and the results of the test, appropriate corrective action may include one or more of the following:

- If the self-test identifies individuals whose applications were inappropriately processed, offering to extend credit if the application was improperly denied and compensating such persons for out-of-pocket costs and other compensatory damages
- Correcting institutional policies or procedures that may have contributed to the likely violation, and adopting new policies as appropriate
- Identifying and then training and/or disciplining the employees involved
- Developing outreach programs, marketing strategies, or loan products to serve more effectively segments of the lender's markets that may have been affected by the likely discrimination
- Improving audit and oversight systems to avoid a recurrence of the likely violations

Types of Relief. Appropriate corrective action may include both prospective and remedial relief, except that to establish a privilege under this section:

- A creditor is not required to provide remedial relief to a tester used in a self-test.
- A creditor is required only to provide remedial relief to an applicant identified by the self-test as one whose rights were more likely than not violated.
- A creditor is not required to provide remedial relief to a particular applicant if the statute of limitations applicable to the violation expired before the creditor obtained the results of the self- test or the applicant is otherwise ineligible for such relief.

The use of pre-application testers to identify policies and practices that illegally discriminate does not require creditors to review existing loan files for the purpose of identifying and compensating applicants who might have been adversely affected.

If a self-test identifies a specific applicant who was discriminated against on a prohibited basis, to qualify for the privilege in this section the creditor must provide appropriate remedial relief to that applicant; the creditor is not be required to identify other applicants who might also have been adversely affected.

A creditor is not required to provide remedial relief to an applicant that would not be available by law. An applicant might also be ineligible for certain types of relief due to changed circumstances. For example, a creditor is not required to offer credit to a denied applicant if the applicant no longer qualifies for the credit due to a change in financial circumstances, although some other type of relief might be appropriate.

No Admission of Violation. Taking corrective action is not an admission that a violation occurred.

Scope of Privilege [§ 1002.15(d)]

The report or results of a privileged self-test may not be obtained or used by either of the following:

- A government agency in any examination or investigation relating to compliance with the act or this regulation
- A government agency or an applicant (including a prospective applicant who alleges a violation of § 1002.4(b), prohibition against illegal discouragement, in any proceeding or civil action in which a violation of the act or this regulation is alleged

The privilege applies with respect to any examination, investigation, or proceeding by Federal, state, or local government agencies relating to compliance with the ECOA or this regulation. Accordingly, in a case brought under the ECOA, the privilege established under this section preempts any inconsistent laws or court rules to the extent they might require disclosure of privileged self-testing data.

The privilege does not apply in other cases (such as in litigation filed solely under a state's fair lending statute). In such cases, if a court orders a creditor to disclose self-test results, the disclosure is not a voluntary disclosure or waiver of the privilege for purposes of paragraph 15(d)(2); a creditor may protect the information by seeking a protective order to limit availability and use of the self-testing data and prevent dissemination beyond what is necessary in that case.

Paragraph 15(d)(1) precludes a party who has obtained privileged information from using it in a case brought under the ECOA, provided the creditor has not lost the privilege through voluntarily disclosure under paragraph 15(d)(2).

Loss of Privilege. The report or results of a self-test are not privileged under paragraph (d)(1) of this section if the creditor or a person with lawful access to the report or results) takes any of the following actions:

- Voluntarily discloses any part of the report or results, or any other information privileged under this section, to an applicant or government agency or to the public
- Discloses any part of the report or results, or any other information privileged under this section, as a defense to charges that the creditor has violated the act or regulation
- Fails or is unable to produce written or recorded information about the self-test that is required to be retained under § 1002.12(b)(6) when the information is needed to determine whether the privilege applies. This paragraph does not limit any other penalty or remedy that may be available for a violation of § 1002.12.

A creditor's corrective action, by itself, is not considered a voluntary disclosure of the self-test report or results. For example, a creditor does not disclose the results of a self-test merely by offering to extend credit to a denied applicant or by inviting the applicant to reapply for credit. Voluntary disclosure could occur under this paragraph, however, if the creditor disclosed the self-test results in connection with a new offer of credit.

Disclosure of self-testing results to an independent contractor acting as an auditor or consultant for the creditor on compliance matters does not result in loss of the privilege.

The privilege is lost if the creditor discloses privileged information, such as the results of the self-test. The privilege is not lost if the creditor merely reveals or refers to the existence of the self-test.

A creditor's claim of privilege may be challenged in a court or administrative law proceeding with appropriate jurisdiction. In resolving the issue, the presiding officer may require the creditor to produce privileged information about the self-test.

Limited Use of Privileged Information. Notwithstanding paragraph (d)(1) of this section (general rule on scope of privilege), the self-test report or results and any other information privileged under this section may be obtained and used by an applicant or government agency solely to determine a penalty or remedy after a violation of the act or this regulation has been adjudicated or admitted. Disclosures for this limited purpose may be used only for the particular proceeding in which the adjudication or admission was made. Information disclosed under this paragraph (d)(3) remains privileged under paragraph (d)(1) of this section.

A creditor may be required to produce privileged documents for the purpose of determining a penalty or remedy after a violation of the ECOA or Regulation B has been formally adjudicated or admitted. A creditor's compliance with such a requirement does not evidence the creditor's intent to forfeit the privilege.

Section 14: Enforcement, Penalties, and Liabilities [12 C.F.R. § 1002.16]

Enforcement, Penalties, and Liabilities [§ 1002.16]

Administrative Enforcement [§ 1002.16(a)]

Administrative enforcement of the ECOA and this regulation is assigned to the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Board of Directors of the Federal Deposit Insurance Corporation, National Credit Union Administration, Surface Transportation Board, Civil Aeronautics Board, Secretary of Agriculture, Farm Credit Administration, Securities and Exchange Commission, Small Business Administration, Secretary of Transportation, and Bureau of Consumer Financial Protection.

If not specifically assigned to other authorities, compliance with the requirements imposed under the act and this regulation is enforced by the Federal Trade Commission.

Penalties and Liabilities [§ 1002.16 (b)]

Civil Liability. Any creditor that fails to comply with a requirement imposed by the ECOA or this regulation is subject to civil liability for actual and punitive damages in individual or class actions. Liability for punitive damages is restricted to nongovernmental entities and is limited to $10,000 in individual actions and the lesser of $500,000 or 1.0 percent of the creditor's net worth in class actions.

Equitable and declaratory relief may be provided, and the act also authorizes the awarding of costs and reasonable attorney's fees to an aggrieved applicant in a successful action.

A civil action may be brought in an appropriate U.S. district court without regard to the amount in controversy within five years after the date of the occurrence of the violation. Civil actions may also be undertaken within one year after the commencement of an administrative enforcement proceeding or of a civil action brought by the Attorney General of the United States within five years after the alleged violation.

Administrative Remedies. If an agency responsible for administrative enforcement is unable to obtain compliance with the act or this part, it may refer the matter to the Attorney General of the United States. In addition, if a Federal financial institution's regulatory agency has reason to believe that one or more creditors have engaged in a pattern or practice of discouraging or denying applications in violation of the ECOA or Regulation B, the agency must refer the matter to the U.S. Attorney General, who may bring a civil action for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

If a financial institution's regulatory agency has reason to believe (as a result of a consumer complaint, conducting a consumer compliance examination, or otherwise) that a violation of the ECOA or this regulation has occurred which is also a violation of the Fair Housing Act, and the matter is not referred to the U.S. Attorney General, the agency will notify the Secretary of Housing and Urban Development and will notify the applicant that the Secretary of Housing and Urban Development has been notified and that remedies for the violation may be available under the Fair Housing Act.

Inadvertent Errors. A creditor's failure to comply with the technical requirements of the regulation will not be considered a violation if it results from an inadvertent error. Inadvertent errors include, but are not limited to, clerical mistake, calculation error, computer malfunction, and printing error. An error of legal judgment is not an inadvertent error under the regulation. For inadvertent errors that occur under §§ 1002.12 (record retention) and 1002.13 (monitoring information), this section requires that they be corrected prospectively.

On discovering an inadvertent error, the creditor is required to correct it as soon as possible. If a creditor inadvertently obtains the monitoring information regarding the ethnicity, race, and sex of the applicant in a dwelling-related transaction when not required, the creditor may act on and retain the application without violating the regulation.

Appendix A

Appendix A to 12 C.F.R. 1002: Federal Enforcement Agencies

The following list indicates the Federal agencies that enforce Regulation B for particular classes of creditors. Any questions concerning a particular creditor should be directed to its enforcement agency. Terms that are not defined in the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in the International Banking Act of 1978 (12 U.S.C. 3101).

Banks, savings associations, and credit unions with total assets of over $10 billion and their affiliates

Bureau of Consumer Financial Protection, 1700 G Street NW., Washington DC 20006

Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the Bureau:

FTC Regional Office for region in which the creditor operates or Federal Trade Commission, Equal Credit Opportunity, Washington, DC 20580

National banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks

Office of the Comptroller of the Currency, Customer Assistance Group, 1301 McKinney Street, Suite 3450, Houston, TX 77010–9050

State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act

Federal Reserve Consumer Help Center, P.O. Box 1200, Minneapolis, MN 55480.

Nonmember Insured Banks, Insured State Branches of Foreign Banks, and Insured State Savings Associations:

FDIC Consumer Response Center, 1100 Walnut Street, Box #11, Kansas City, MO 64106.

CFPB Bulletin 2013-02

Date: March 21, 2013

Subject: Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act

This bulletin provides guidance about compliance with the fair lending requirements of the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B, for indirect auto lenders that permit dealers to increase consumer interest rates and that compensate dealers with a share of the increased interest revenues. This guidance applies to all indirect auto lenders within the jurisdiction of the Consumer Financial Protection Bureau (CFPB), including both depository institutions and nonbank institutions.

Background

While consumers may seek financing for automobile purchases directly from a financial institution, many seek financing from the auto dealer. The auto dealer may provide that financing directly or it may facilitate indirect financing by a third party such as a depository institution, a nonbank affiliate of a depository institution, an independent nonbank, or a "captive" nonbank (an auto lender whose primary business is to finance the purchase of a specific manufacturer's automobiles).

In indirect auto financing, the dealer usually collects basic information regarding the applicant and uses an automated system to forward that information to several prospective indirect auto lenders. After evaluating the applicant, indirect auto lenders may choose not to become involved in the transaction or they may choose to provide the dealer with a risk-based "buy rate" that establishes a minimum interest rate at which the lender is willing to purchase the retail installment sales contract executed by the consumer for the purchase of the automobile. In some circumstances, the indirect auto lender may exercise discretion in adjusting the buy rate, making underwriting exceptions, or modifying other terms and conditions of the financing as a result of additional negotiation between the indirect auto lender and the dealer.

The indirect auto lender may also have a policy that allows the dealer to mark up the interest rate above the indirect auto lender's buy rate. In the event that the dealer charges the consumer an interest rate that is higher than the lender's buy rate, the lender may pay the dealer what is typically referred to as "reserve" (or "participation"), compensation based upon the difference in interest revenues between the buy rate and the actual note rate charged to the consumer in the retail installment contract executed with the dealer. Dealer reserve is one method lenders use to compensate dealers for the value they add by originating loans and finding financing sources. The exact computation of compensation based on dealer markup varies across lenders and may vary between programs at the same lender. After the deal is consummated with the consumer, the retail installment contract may then be sold to the lender, which has already indicated its willingness to extend credit to the applicant.

The supervisory experience of the CFPB confirms that some indirect auto lenders have policies that allow auto dealers to mark up lender-established buy rates and that compensate

dealers for those markups in the form of reserve (collectively, "markup and compensation policies"). Because of the incentives these policies create, and the discretion they permit, there is a significant risk that they will result in pricing disparities on the basis of race, national origin, and potentially other prohibited bases.

Indirect Auto Lenders as Creditors Under the ECOA

The ECOA makes it illegal for a "creditor" to discriminate in any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age, receipt of income from any public assistance program, or the exercise, in good faith, of a right under the Consumer Credit Protection Act.

The ECOA defines a "creditor" to include not only "any person who regularly extends, renews, or continues credit," but also "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."2 Regulation B further provides that "creditor" means "a person, who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit" and expressly includes an "assignee, transferee, or subrogee who so participates."

The Commentary to Regulation B makes clear that an assignee is considered a "creditor" when the assignee participates in the credit decision. The Commentary provides that a "creditor" "includes all persons participating in the credit decision" and that "[t]his may include an assignee or a potential purchaser of the obligation who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated."

Even as assignees of the installment contract, indirect auto lenders are creditors under the ECOA and Regulation B if, in the ordinary course of business, they regularly participate in a credit decision. The CFPB recognizes that there is a continuum of indirect lender participation in credit decisions, ranging from no participation to being the sole decision maker with respect to a particular transaction, and that a lender's practices and conduct may place it at various points along this continuum. The CFPB also recognizes that credit transactions in indirect auto lending take many forms. However, information gathered by the CFPB suggests that the standard practices of indirect auto lenders likely constitute participation in a credit decision under the ECOA and Regulation B.

For example, an indirect auto lender is likely a creditor under the ECOA when it evaluates an applicant's information, establishes a buy rate, and then communicates that buy rate to the dealer, indicating that it will purchase the obligation at the designated buy rate if the transaction is consummated. In addition, when a lender provides rate sheets to a dealer establishing buy rates and allows the dealer to mark up those buy rates, the lender may be a creditor under the ECOA when it later purchases a contract from such a dealer. These two examples are illustrative of common industry practices; indirect auto lenders may also be creditors under other circumstances.

The Liability of Indirect Auto Lenders for Discrimination Resulting from Markup and Compensation Policies

An additional consideration for auto lenders covered as creditors under the ECOA is whether and under what circumstances they are liable for pricing disparities on a prohibited basis. When such disparities exist within an indirect auto lender's portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact.

An indirect auto lender's markup and compensation policies may alone be sufficient to trigger liability under the ECOA if the lender regularly participates in a credit decision and its policies result in discrimination. The disparities triggering liability could arise either within a particular dealer's transactions or across different dealers within the lender's portfolio. Thus, an indirect auto lender that permits dealer markup and compensates dealers on that basis may be liable for these policies and practices if they result in disparities on a prohibited basis.

Some indirect auto lenders may be operating under the incorrect assumption that they are not liable under the ECOA for pricing disparities caused by markup and compensation policies because Regulation B provides that "[a] person is not a creditor regarding any violation of the [ECOA] or [Regulation B] committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction." This provision limits a creditor's liability for another creditor's ECOA violations under certain circumstances. But it does not limit a creditor's liability for its own violations — including, for example, disparities on a prohibited basis that result from the creditor's own markup and compensation policies. Additionally, an indirect auto lender further may have known or had reasonable notice of a dealer's discriminatory conduct, depending on the facts and circumstances.

Limiting Fair Lending Risk in Indirect Auto Lending

Institutions subject to CFPB jurisdiction, including indirect auto lenders, should take steps to ensure that they are operating in compliance with the ECOA and Regulation B as applied to dealer markup and compensation policies. These steps may include, but are not limited to:

- imposing controls on dealer markup and compensation policies, or otherwise revising dealer markup and compensation policies, and also monitoring and addressing the effects of those policies in the manner described below, so as to address unexplained pricing disparities on prohibited bases; or
- eliminating dealer discretion to mark up buy rates and fairly compensating dealers using another mechanism, such as a flat fee per transaction that does not result in discrimination.

Another important tool for limiting fair lending risk in indirect auto lending is developing a robust fair lending compliance management program. The CFPB recognizes that the appropriate program will vary among financial institutions. In our most recent Supervisory Highlights, we set out the following features of a strong fair lending compliance program, which are applicable in the indirect auto lending context:

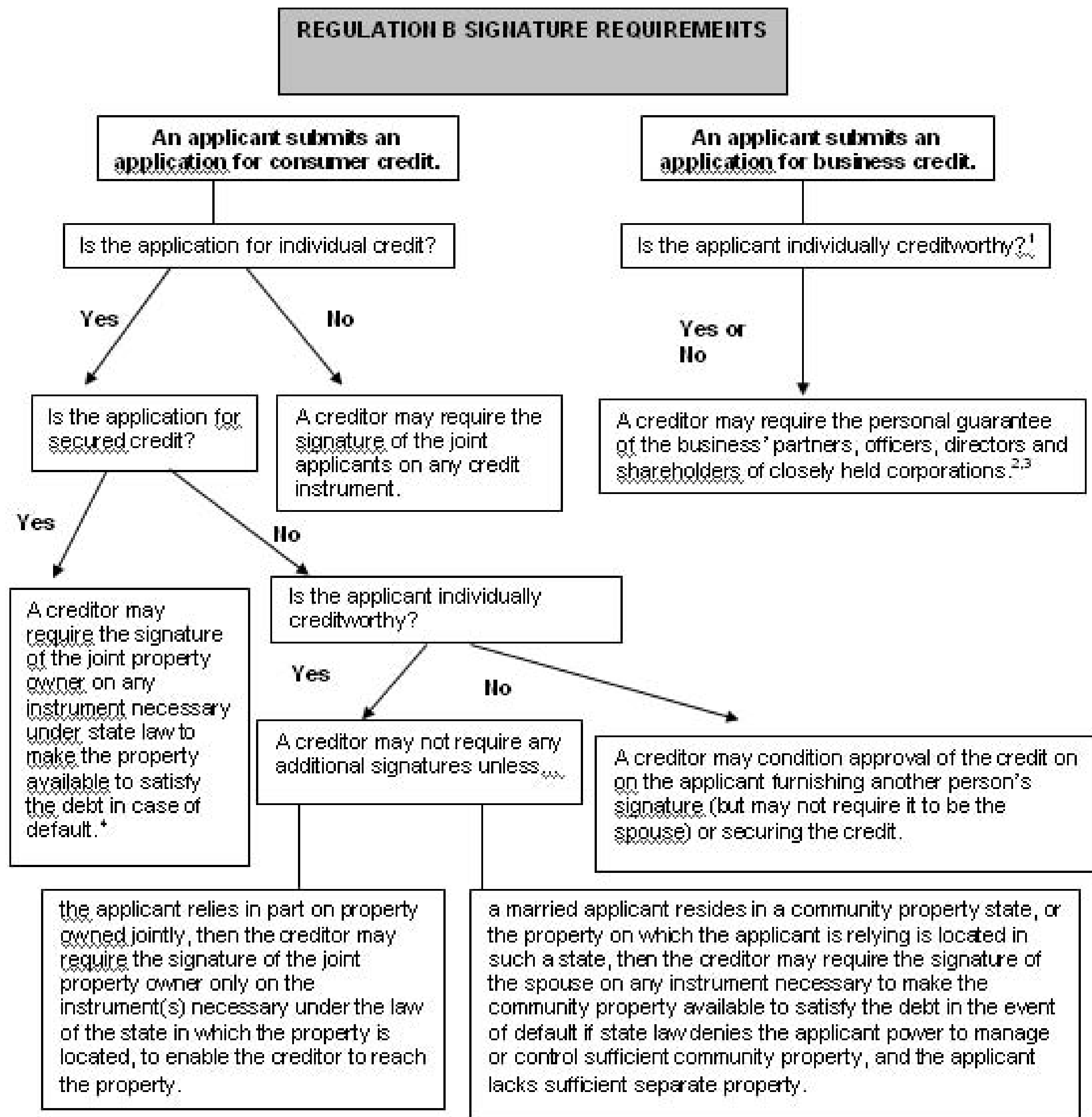
- an up-to-date fair lending policy statement;
- regular fair lending training for all employees involved with any aspect of the institution's credit transactions, as well as all officers and Board members;
- ongoing monitoring for compliance with fair lending policies and procedures;
- ongoing monitoring for compliance with other policies and procedures that are intended to reduce fair lending risk (such as controls on dealer discretion);
- review of lending policies for potential fair lending violations, including potential disparate impact;

- depending on the size and complexity of the financial institution, regular analysis of loan data in all product areas for potential disparities on a prohibited basis in pricing, underwriting, or other aspects of the credit transaction;
- regular assessment of the marketing of loan products; and
- meaningful oversight of fair lending compliance by management and, where appropriate, the financial institution's board of directors.

For some lenders, additional compliance-management components may be necessary to address significant fair lending risks. For example, indirect auto lenders that retain dealer markup and compensation policies may wish to address the fair lending risks of such policies by implementing systems for monitoring and corrective action by:

- sending communications to all participating dealers explaining the ECOA, stating the lender's expectations with respect to ECOA compliance, and articulating the dealer's obligation to mark up interest rates in a non-discriminatory manner in instances where such markups are permitted;
- conducting regular analyses of both dealer-specific and portfolio-wide loan pricing data for potential disparities on a prohibited basis resulting from dealer markup and compensation policies;
- commencing prompt corrective action against dealers, including restricting or eliminating their use of dealer markup and compensation policies or excluding dealers from future transactions, when analysis identifies unexplained disparities on a prohibited basis; and
- promptly remunerating affected consumers when unexplained disparities on a prohibited basis are identified either within an individual dealer's transactions or across the indirect lender's portfolio.

The CFPB will continue to closely review the operations of both depository and non-depository indirect auto lenders, utilizing all appropriate regulatory tools to assess whether supervisory, enforcement, or other actions may be necessary to ensure that the market for auto lending provides fair, equitable, and nondiscriminatory access to credit for consumers."


REGULATION B SIGNATURE REQUIREMENTS
An applicant submits an application for consumer credit.
An applicant submits an application for business credit.
Is the application for individual credit?
Is the applicant individually creditworthy?[1]
Yes
No
Yes or No
Is the application for secured credit?
A creditor may require the signature of the joint applicants on any credit instrument.
A creditor may require the personal guarantee of the business' partners, officers, directors and shareholders of closely held corporations.[2,3]
Yes
No
A creditor may require the signature of the joint property owner on any instrument necessary under state law to make the property available to satisfy the debt in case of default.[4]
Is the applicant individually creditworthy?
Yes
No
A creditor may not require any additional signatures unless...
A creditor may condition approval of the credit on on the applicant furnishing another person's signature (but may not require it to be the spouse) or securing the credit.
the applicant relies in part on property owned jointly, then the creditor may require the signature of the joint property owner only on the instrument(s) necessary under the law of the state in which the property is located, to enable the creditor to reach the property.
a married applicant resides in a community property state, or the property on which the applicant is relying is located in such a state, then the creditor may require the signature of the spouse on any instrument necessary to make the community property available to satisfy the debt in the event of default if state law denies the applicant power to manage or control sufficient community property, and the applicant lacks sufficient separate property.