

# Adverse Action Notices:



**Why?**  
**When?**  
**How?**

Terry C. Frank  
September 19, 2018



**KAUFMAN &  
CANOLES**  
attorneys at law

# Why?

- Congress's determination that consumers and businesses applying for credit, or individuals affected by decisions in applications for employment, rentals, insurance or government licenses or benefits should receive notice of the reasons a creditor took adverse action on the application or on an existing credit account.



# Says who?

- ECOA – Equal Credit Opportunity Act
  - 15 U.S.C. § 1691
  - Implemented by Reg B: 12 C.F.R. § 1002
- FCRA – Fair Credit Reporting Act
  - 15 U.S.C § 1681
  - No implementing regs



# ECOA and Reg B

- Designed to help consumers and businesses by providing transparency to the credit underwriting process.
- Protects against potential credit discrimination by requiring creditors (or prospective employers) to explain the reasons adverse action was taken.



# ECOA Notification Requirements

- Creditor must inform applicant of any action taken on a credit application, whether favorable or adverse.
- Timing and content of the notifications are dependent upon the **type of action taken** and the **status of the application.**



# Application Received? Complete or Incomplete?

- Determine whether or not an application has been received upon which action can be taken.
  - Inquiry or Application
  - The creditors' actual procedures and not stated policies will distinguish credit inquiries and credit applications.
- Determine whether the application is “complete” or “incomplete.”
  - Completed credit application supplies creditor with all information that is **regularly** obtained and considered in evaluating applications for the amount and type of credit requested.



## Inquiry or Application:

- If a creditor has both a policy and a practice of not accepting oral applications or of not making credit decisions based on oral applications, then a telephone or other oral inquiry would not constitute an “application” under Regulation B.
- If a creditor has either a policy or a practice of making credit decisions without requiring completion of a written application, then an “application” will be deemed to have been received if the inquirer provided sufficient information concerning his ability to repay the loan to the degree that the creditor is able to evaluate the information and indicate to the applicant whether the credit would be extended.
- Whether an inquiry becomes an application **depends on how the creditor responds to the applicant**, not on what the applicant says or asks.



## Polling Question:

- Prequalification Request:
  - The creditor evaluates specific information about the consumer and tells the consumer the loan amount, rate, and other terms of credit the consumer could qualify for under various loan programs, explaining the process the consumer must follow to submit a mortgage application and the information the creditor will analyze in reaching a credit decision. Should you treat this as an inquiry or an application? Yes or no?





# Complete or Incomplete?

- Creditor can request more info before an application is deemed “complete”:
  - Credit reports;
  - Employment and deposit verifications;
  - Additional information requested from the applicant; and
  - Approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure or provide security for the credit or collateral.
- If an application is incomplete with respect to matters that the applicant can complete, a creditor is required to make a **reasonable effort to promptly notify** the applicant of the incompleteness and to allow the applicant a reasonable opportunity to complete the application.



# Different Types of ECOA Action:

- Approval;
- Denial;
- Counteroffer; or
- Incomplete Application.



# Approval:

- Notice of approval must be made within 30 days after receiving a completed application.
- Notice of approval may be expressly stated or implied (for example, the creditor may give the applicant the credit card, money, property, or services for which the applicant applied).



# Denial:

- A creditor must notify the applicant of **adverse action** within 30 days after receiving a complete credit application.



# Counteroffer:

- The creditor must notify an applicant of adverse action within 90 days after making a counteroffer unless the applicant expressly accepts or uses the credit during that time.
- A notification of rejection of credit applied for coupled with counteroffer of credit may be given either in writing or orally.
- If the creditor gives a written combined counteroffer and adverse action notice, it is not required to give the applicant a second adverse action notice if the applicant does not accept the counteroffer.
- A sample of a combined notice is contained in Form C-4 of Appendix C to Regulation B.



# Incomplete Application:

When a creditor receives an incomplete application, it may choose (within 30 days) to either:

- Notify the applicant of action taken; or
- Notify the applicant of the incompleteness of the application.



# Notice of Incompleteness:

- In writing;
- Must specify the information the creditor needs if it is to consider the application;
- Provide a reasonable period of time for the applicant to furnish the missing information; and
- Advise application will not be reviewed if information not received.



# What is Adverse Action?

- 12 C.F.R. § 1002.2(c)(1)
- Defined by Reg B as:
  - Denial of application for new credit;
  - Termination or unfavorable change in terms of existing credit;
  - Refusal to increase credit.





# Polling question:

A non-member applies for a mortgage. While she would otherwise satisfy all lending requirements (credit history, income, etc.), she resides outside of the credit union's field of membership. The credit union denies her application. Is an adverse action notice required?

Yes or no?



# Not an adverse action:

- 12 C.F.R. § 1002.2(c)(2)
- 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 refusal or failure to authorize an account transaction at point of sale or loan except when the refusal is a termination or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts or when the refusal is a denial of an application for an increase in the amount of credit available under the account;
- A refusal to extend credit because applicable law prohibits the creditor from extending the credit requested; or
- A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested.



# When is Notice Required?

- Taking adverse action on a completed credit application;
- Taking adverse action on an incomplete credit application;
- Taking adverse action on an existing credit account; or
- Making a counteroffer to an application for credit and the applicant does not accept the counteroffer.



# Notice Not Required:

- The transaction does not involve credit;
- A credit applicant accepts a counteroffer;
- A credit applicant expressly withdraws an application; or
- The creditor approves a credit application and both parties expect that the applicant will inquire about its status, but the applicant does not inquire within 30 days after application (the approved application is treated as withdrawn).



## Third parties – Indirect lending

- 12 C.F.R. § 1002.9(g)
- No notice required if application is made on behalf of an applicant to more than one creditor and the applicant **expressly accepts or uses credit offered** by one of the creditors.
- Notice required if no credit is offered or if the applicant does not expressly accept or use the credit offered
  - **Each creditor** taking adverse action must comply with this section, directly or through a third party.
  - A notice given by a third party shall disclose the identity of each creditor on whose behalf the notice is given.
- *Third party notice—enforcement agency.* If a single adverse action notice is being provided to an applicant on behalf of several creditors and they are under the jurisdiction of different Federal enforcement agencies, the notice need not name each agency; disclosure of any one of them will suffice.
- No liability for an act or omission of the third party accurately and in a timely manner provided the third party with the information necessary for the notification and maintains reasonable procedures adapted to prevent such violations.



# Timing of Reg B notice:

- Within 30 days after receiving a complete credit application;
- 30 days after receiving an incomplete credit application;
- 30 days after taking action on an existing credit account; or
- 90 days after making a counteroffer to an application for credit if the applicant does not accept the counteroffer.
- 12 C.F.R. § 1002.9.



## Polling question:

- Is a statement that the adverse action is based on the creditor's internal standards or policies or that the applicant, joint applicant, or similar party failed to achieve a qualifying score on the creditor's credit scoring system sufficient?



# Who and What:

## Contents of Reg B consumer notice:

- To an **applicant (consumer or business) and any person liable or will become liable;**
  - Does not include guarantors
  - Notice only given to the primary applicant if readily apparent from the application.
- In writing;
- Contain a statement of the action taken;
- Name and address of the creditor;
- a statement of the provisions of section 701(a) of the Act;
- the name and address of the Federal agency that administers compliance with respect to the creditor; and either:
  - 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. The disclosure shall 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 shall also disclose the applicant's right to have them confirmed in writing within 30 days of receiving the applicant's written request for confirmation.





# ECOA § 701(a) language:

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 or agencies listed in Appendix A of Regulation B]. (See also 12 C.F.R. § 1002.9(b)).



# Excellent resources:

- [https://www.ncua.gov/Legal/GuidesEtc/GuidesManuals/OCP\\_FairLendingGuide.pdf](https://www.ncua.gov/Legal/GuidesEtc/GuidesManuals/OCP_FairLendingGuide.pdf)
- Sample adverse action notices (Appx C of Reg B)
  - <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/C/>



# Business applicants:

- \$1,000,000 or less in gross revenues for preceding fiscal year, creditor must comply with other aspects listed for consumer notices except:
  - The statement of the action taken may be given orally or in writing, when adverse action is taken;
  - Disclosure of an applicant's right to a statement of reasons may be given at the time of application, instead of when adverse action is taken, provided the disclosure contains the information required and the ECOA notice specifies
  - For an application made entirely by telephone, a creditor satisfies the requirements by an oral statement of the action taken and of the applicant's right to a statement of reasons for adverse action.
- For business applicants with more than \$1,000,000 in revenue:
  - Notify applicant within a reasonable time (oral or written) of adverse action;
  - Provide a written statement of the reasons for adverse action if requested in writing by applicant within 60 days of adverse decision.



# Common Reg B notice violations:

- *Notice violations:* notification or timing errors.
- *Credit Score violations:*
  - Failing to recognize when the requirement applies.
- *Content Violations:*
  - Typically relate to handling incomplete applications;
  - Failure to identify an application as incomplete; or
  - Failure to provide alternatives.



# Failure to comply with Reg B

- Admin enforcement;
- Civil penalties
  - Range from \$100 to \$1,000 in an individual lawsuit and up to the lesser of \$500,000 or 1% of the credit union's net worth in a class action lawsuit; and
  - Attorneys fees



# Record retention:

- 25 months



# FCRA

Defined more broadly than ECOA and includes:

- Adverse action as defined in section 701(d)(6) of ECOA;
- A denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;
- A denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee
- A denial or cancellation of, an increase in any charge for, or any adverse or unfavorable change in the terms of a government license or benefit; or
- An action on an application or transaction initiated by a consumer, or in connection with account review that is adverse to the consumer's interests.



# When is FCRA Adverse Action Notice Required?

For a covered transaction, a person must provide notice if:

- Adverse action was taken based in whole or in part on information in a consumer report;
- Consumer credit is denied or a charge for credit increased based on information obtained from third parties other than consumer reporting agencies bearing upon the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living; or
- Adverse action was taken based on information furnished by a corporate affiliate of the person taking the action.





# Who gets FCRA notice?

- Any consumer defined as an individual, including co-applicants.



# Adverse action based on CRA report:

- 15 U.S.C. § 1681m(a)
- Provide oral, written, or electronic notice —
  - Numerical credit score;
  - Range of possible credit scores under the model used;
  - All of the key factors that adversely affected the credit score of the consumer in the model used, the total number of which shall not exceed 4 (unless a key factor was excessive inquiries);
  - the date on which the credit score was created; and
  - the name of the person or entity that provided the credit score or credit file upon which the credit score was created.
- Provide orally, in writing, or electronically—
  - the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and
  - a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
- Provide to the consumer an oral, written, or electronic notice of the consumer's right—
  - to obtain a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (3), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and
  - to dispute the accuracy with CRA of any information in a consumer report furnished by the agency.



## Adverse action based on third party that is **not** a CRA:

Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly **because of information obtained from a person other than a consumer reporting agency** bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the **user** of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.



## Decision based on info from affiliate:

- Notice that adverse action was taken based on information from an affiliate; and
- The consumer's right to obtain the information by sending a written request within 60 days after receipt of the adverse action notice; and
- Information must be provided within 30 days after receiving the request.



# If based on credit score:

- The numerical credit score used to make the decision;
- The range of 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.



# Polling question:

Can ECOA and FCRA apply to same transaction or application?

– Yes or No?



# FCRA and ECOA

- To reduce the compliance burden, a creditor can use a single, combined notice to comply with the adverse action requirements of both laws, and model forms have been published in connection with Regulation B.



# FCRA – Employment:

- 15 U.S.C. § 1681b;
- Tell the applicant you might their consumer report for decisions related to their employment.
  - This notice must be in writing and in a stand-alone format. The notice **cannot** be in an employment application.
- Get written permission from the applicant or employee.
- Certify compliance to the company from which you are getting the applicant or employee's information. You must certify that you:
  - notified the applicant or employee and got their permission to get a consumer report;
  - complied with all of the FCRA requirements; and
  - will not discriminate against the applicant or employee or otherwise misuse the information, as provided by any applicable federal or state equal opportunity laws or regulations.





# FCRA: Pre-adverse action

- Before you reject a job application, reassign or terminate an employee, deny a promotion, or take any other adverse employment action based on information in a consumer report, you must give the applicant or employee:
  - a notice that includes a copy of the consumer report you relied on to make your decision; and
  - a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act", which the company that gave you the report should have given to you.
  - Giving the person the notice in advance gives the person the opportunity to review the report and tell you if it is correct.



# FCRA Employment Adverse Action Notices:

- Send the applicant the adverse action letter
- Letter must include:
  - Name, address and phone number of the CRA,
  - Statement that explains the CRA had no role in the decision to not hire the applicant, and is not able to explain why the decision was made;
  - Statement letting the applicant know they have the right to dispute any information contained in their consumer report, and that they can request additional free copies of the consumer report from the CRA within 60 days.
  - Include another copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.”
  - Under the FCRA, employers are required to notify the applicant **twice, both before and after adverse action**. This gives the applicant the maximum opportunity to correct any incomplete or inaccurate information in the consumer report that can hurt their chances at employment.



# Failure to comply with FCRA:

- Administrative enforcement available
- Statute of limitations for civil cases is two years
- 15 U.S.C. § 1681o – Civil liability for negligent noncompliance:
  - Actual damages and
  - Successful action = costs and attorneys' fees
- 15 U.S.C. § 1681n – Civil liability for willful noncompliance:
  - Actual damages;
  - Punitive damages; and
  - Successful action = costs and attorneys' fees



# Adverse Action Notices: ECOA and FCRA

Terry C. Frank  
Kaufman & Canoles, P.C.  
[tcf Frank@kaufcan.com](mailto:tcf Frank@kaufcan.com)  
804.771.5745

September 19, 2018



KAUFMAN &  
CANOLES  
attorneys at law