

Taking an “Adverse Action”



- Overview
- Triggering Events
- Required Disclosures
- Compliance Best Practices

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March 5, 2019

Foundation

- Congress's determination to require transparency to avoid discrimination and so that consumers and businesses applying for credit (or individuals affected by decisions in employment applications, rentals, insurance, or government licenses or benefits) receive notice of the reasons a creditor took adverse action
- Two laws: (1) Equal Credit Opportunity Act ("ECOA") and (2) Fair Credit Reporting Act ("FCRA")



“Adverse Action” Foundation

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



Part I: ECOA and Reg. B

- Serves consumers and businesses by providing transparency to the credit underwriting process; prohibits discrimination by creditors against applicants
- Protects against potential credit discrimination by requiring creditors to explain the reasons adverse action was taken



“Adverse Action” Under ECOA

- 12 C.F.R. § 1002.2(c)(1):
 - Refusal to grant credit in substantially the amount or terms requested (unless a counteroffer is made and accepted)
 - Termination of an existing account or an unfavorable change in the terms of existing credit
 - Refusal to increase credit available



Not an “Adverse Action” Under ECOA

- 12 C.F.R. § 1002.2(c)(2):
 - Change in terms agreed to by applicant
 - Action taken relating to inactivity or default
 - Point of sale/loan refusal to authorize transaction
 - Refusal to extend credit where prohibited by law
 - Refusal to extend credit because credit type not offered



ECOA 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**



ECOA: When is Notice Required?

- 30 days after receiving a completed application concerning the creditor's approval, counteroffer, or adverse action
- 30 days after taking adverse action on an incomplete application, unless notice is provided regarding incompleteness (see later slides)
- 30 days after taking adverse action on an existing account
- 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered



Polling Question

- Prequalification Request:
 - The creditor evaluates specific information about a consumer interested in a mortgage (who has provided information on her income and her intended down payment), and then tells the consumer its loan to value policy and other general lending policies, but does not tell the consumer if she qualifies for a loan.
 - Should you treat this as an inquiry or an application?



ECOA: Inquiry or Application

- If a creditor has both a policy and a practice of not accepting oral applications, then a telephone or other oral inquiry would not constitute an “application”
- 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
- Whether an inquiry becomes an application can **depend on how the creditor responds to the applicant**, not on what the applicant says or asks



ECOA: Application Complete?

- “Application” means “an oral or written request for an extension of credit that is made **in accordance with procedures used by a creditor** for the type of credit requested.”
- “Completed Application” means “an application in connection with 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 The creditor shall exercise reasonable diligence in obtaining such information.”



Different Types of ECOA Action

- Approval
- Denial
- Counteroffer
- Incomplete Application



ECOA: 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)



ECOA: Taking Adverse Action

- A creditor must notify the applicant of adverse action within 30 days after receiving a complete credit application
- Notification shall be in writing and “contain a statement of the action taken; the name and address of the creditor; a [required statement]; the name and address of the Federal agency that administers compliance with respect to the creditor; and either:” (1) a statement of the specific reasons for the action taken; or (2) a disclosure of the right to a statement of reasons within 30 days if required within 60



Contents of Reg. B Consumer Notice

- To an **applicant (consumer or business) and any person liable or will become liable;**
- 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** (next slide);
- the **name and address of the Federal agency that administers compliance** with respect to the creditor; and
- Either: (1) a statement of **specific reasons** for the action taken; or (2) 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 this part].



ECOA: 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
- 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



ECOA: Incomplete Applications

- Notify of “adverse action” per above, **or, again with 30 days of receipt, notify the applicant of the incompleteness**
- Notice shall specify information needed, designate a reasonable time for a reply, and inform the applicant that failure to provide the requested info will result in no further consideration being given
- If no response, the creditor has no further obligation; if the applicant does respond with required information, then the creditor shall respond under complete application rules
- Creditor can orally request more info before an application is deemed “complete” at its option; remains incomplete, then treat per above



ECOA: Applications Submitted By Third Parties

- No notice required if an 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 (i.e., if no creditor offers credit, then each needs to comply with normal procedures)
 - A notice given by a third party shall disclose the identity of each creditor on whose behalf the notice is given.
- When a notice is to be provided through a third party, a creditor is not liable for an act or omission of the third party that constitutes a violation of the regulation if the creditor 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.



ECOA: Business Applicants

- Business has **\$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 specified
 - 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 or an extension of trade credit, credit incident to a factoring agreement, or similar business credit:**
 - Notify the applicant within a reasonable time (oral or written) of adverse action;
 - Provide a written statement of the reasons for adverse action and the ECOA notice if requested in writing by the applicant within 60 days of the creditor's notification



Excellent Resources

- 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/>



ECOA: Best Practices

- Ensuring appropriate procedures to determine if an application or inquiry is received and whether an application is complete or incomplete
- Adhering to internal procedures to ensure that the variable deadline requirements discussed above are met
- Avoiding content violations by ensuring notices contain all necessary information as previously discussed
- Providing sufficiently specific reasons for adverse actions taken (see official commentary for paragraph 9(b)(2))



Polling Question

A non-member applies for a mortgage with a complete application. 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 based on not being a member. Is an adverse action notice required? Yes or no?



ECOA: Failure to Comply with Reg. B

- Administrative enforcement
- Civil penalties:
 - Actual and punitive damages in individual or class actions
 - Liability for punitive damages can apply only to nongovernmental entities and is limited to \$10,000 in individual actions and the lesser of \$500,000 or 1 percent of the creditor's net worth in class actions
 - Costs and attorneys' fees



ECOA: Record Retention

- For “25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section) after the date that a creditor notifies an applicant of action taken on an application or of incompleteness, the creditor shall retain in original form or a copy thereof” the application and all related information and the response



Part 2: Fair Credit Reporting Act

- FCRA's requirements for adverse action notices apply only to **consumer transactions** and are designed to alert consumers that negative information was the basis for the adverse action
- Reg. B applies to loans (from creditors), but FCRA applies to actions taken by any "person;" thus, could apply to actions taken in conjunction with deposit accounts



“Adverse Action” Under FCRA

Defined more broadly than ECOA and includes (15 U.S.C. § 1681a(k)):

- As **defined under 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.



FCRA: Notice Requirements

Under 15 U.S.C. § 1681m, a person must provide notice if:

- Adverse action was taken based in whole or in part on information in a consumer report;
- Consumer credit (personal, family, or household purposes) 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.



FCRA: Adverse Action Based on Consumer Report

1. Provide oral, written, or electronic notice of the adverse action to the consumer;
2. Provide a written or electronic disclosure to the consumer of (a) a numerical credit score used in taking any adverse action; and (b) the 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; 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;
3. Provide orally, in writing, or electronically (a) the name, address, and telephone number of the CRA (including a toll-free telephone number) that furnished the report to the person; and (b) a statement that the CRA 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**
4. Provide to the consumer an oral, written, or electronic notice of the consumer's right (a) to obtain a free copy of a consumer report on the consumer from the CRA, which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and (b) to dispute the accuracy with CRA of any information in a consumer report furnished by the agency.



FCRA: Adverse Action Based on Third Party Info

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.



FCRA: Adverse Action Based on Affiliate

- Notice of the action taken and that adverse action was taken based on information from an affiliate (common ownership or affiliated corporate control); 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.



FCRA: Adverse Action Misc.

- FCRA has no specific timing requirements for providing adverse action notices
- Safe harbor (15 U.S. Code § 1681m(c)) → “No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he **maintained reasonable procedures to assure compliance** with the provisions of this section.”



Polling Question

Given that FCRA's definition of "adverse action" encompasses the ECOA's, is a notice under FCRA always going to be required when notice is required under the ECOA?



FCRA: Pre-Adverse Action on Employment

- 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 when you intend to take adverse action:
 - 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 Application By Mail, Telephone, Computer, or Other Means

Under § 1681b(b)(3)(B), there are specific requirements for applications for positions over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and where as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means



FCRA: Failure to Comply

- Safe harbor under § 1681m(h)(7) → “A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.”
- No civil actions under § 1681m(h)(8), providing exclusively for administrative enforcement (some initial judicial confusion, notably in E.D. Va., regarding whether a private action still existed; but large majority of case law, including E.D. Va., holds that the proviso applies to the entire section and no private right of action exists)



ECOA and FCRA

- What happens when notice is required under both ECOA and FCRA?
- 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 (see 12 C.F.R. Appendix C to Part 202)
- Though FCRA has no timeframes, when issuing a combined notice, the ECOA's deadlines will govern
- When in doubt, disclosure; safe is always better than sorry



Takeaways

- Implement appropriate policies and procedures to ensure that that appropriate determinations are made and followed through on regarding required notice and deadlines for providing such notice
- Financial institutions should ensure that updates for automated disclosure systems are received, tested, and correctly implemented, along with appropriate training for personnel monitoring and participating in compliance process (consider secondary review of notices)
- Aim for doing more than required under the ECOA and FCRA, including delivering a combined adverse action notice to all consumer applicants



Taking an “Adverse Action”

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March 5, 2019

