ECOA and FCRA Adverse Action Notice Overview

While both statutes work to protect consumers, the notice requirements serve different purposes. Regulation B provides transparency to consumers and businesses regarding the underwriting process and mitigates credit discrimination by requiring creditors to explain the reasons behind an adverse action. The FCRA protects consumers by alerting them that negative information was the basis for an adverse action.

What Constitutes an Adverse Action?

The two statutes have overlapping but distinguishable definitions of "adverse action." Under Regulation B, an adverse action includes:

- A refusal to grant credit in substantially the amount or on substantially the terms requested in an application (unless applicant accepts counteroffer);
- A termination of an account, or an unfavorable change in the terms that does not affect all or substantially all of a class of the creditor's accounts; or
- A refusal to increase the amount of credit available to an applicant who has made an application for an increase.

The FCRA's definition incorporates Regulation B's credit focused definition, but also includes non-credit consumer-initiated transactions, such as when an insurance company denies or cancels coverage, or an employer denies employment or makes any other employment decision that adversely effects a current or prospective employee. Most notably, the FCRA definition only applies to consumers, not business transactions.

Adverse Action Notice Triggers

Generally, a Regulation B adverse action is triggered when adverse action is taken on a credit application or an existing credit account. This includes completed or incomplete credit applications. If the application is incomplete, a creditor can either: (a) deny the incomplete application within 30 days of receiving it and provide an adverse action notice specifying that an incomplete application is the reason for denial, or (b) provide a notice of incompleteness within 30 days of receipt. This notice must (1) specify the remaining information needed, (2) designate a reasonable time frame to provide the missing information, and (3) inform the applicant that application will not be further considered if the requested information is not provided.

Additionally, notice is required when a creditor makes a counteroffer on a credit application which the applicant declines. A counteroffer is made where a creditor is willing to extend credit, but on different terms than the applicant requested. This can look like a creditor requiring a higher down payment on a mortgage loan, or a shorter repayment term for an automobile loan. A counteroffer must be sent within 30 days of receiving a completed application. If the applicant does not expressly accept or use the credit offered within 90 days, an adverse action notice must be sent.

In contrast, the FCRA requires notice in the following scenarios:

- 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 increases based on information obtained from third parties other than consumer reporting agencies. This information must bear 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.

An adverse action notice may be required under one or both laws. For example, if a creditor denied a consumer's checking account application based on information furnished by a consumer reporting agency, that would trigger the FCRA notice requirement because it was based on information from a consumer reporting agency, but not Regulation B because there was no application for credit. In contrast, denying a loan application would trigger both notice requirements if the decision was based, in whole or in part, on information in a consumer report.

Regulation B also provides examples of when an adverse action is not required. Specifically, a creditor need not provide notice if:

- 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 (An approved application will be treated as withdrawn).

Who Must Receive Notice of an Adverse Action?

Regulation B broadly defines "applicant" to include individuals applying for credit, and businesses of all sizes. Guarantors are not considered applicants under this definition. The FCRA only applies to individual consumers, however both statutes include co-applicants.

If multiple applicants apply, under Regulation B, creditors only need to provide notice to the primary applicant, if their identity is readily apparent. However, under the FCRA, the type of information relied on determines who is required to receive notice. If the action is taken based on a consumer report, then all consumers against whom an adverse action is taken must receive notice. If the action is taken based on credit scores, then, for privacy reasons, each individual should receive a separate notice.

Adverse Action Timing

Regulation B has specific requirements for when creditors must notify applicants of an adverse action. Creditors must provide notice:

- 30 days after receiving a complete, or incomplete, credit application;
- 30 days after taking adverse 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.

The FCRA does not have specific timing requirements. When both statutes are implicated, institutions may provide combined adverse action notices, in which case, Regulation B's timing requirements apply. This timing requirement also applies to businesses with a gross annual revenue of $1 million or less. However, for businesses with a gross annual revenue which exceeds $1 million, a creditor must simply provide notice within a reasonable time.

Notice Content Requirements

Under Regulation B, consumer notices must always be in writing. Electronic notices are sufficient if a consumer has complied with the E-Sign Act. The notice must include:

- the creditor's name and address;
- an ECOA antidiscrimination notice as provided, or substantially similar to that in 1002.9(b)(1);
- the name and address of the creditor's primary regulator;
- a statement of the action taken by the creditor; and
- Either
    - a statement of the specific reasons for the action taken; or
    - a disclosure of the applicant's right to a statement of specific reasons and the name, address, and telephone number of the person or office from which this information can be obtained.

For businesses with a gross revenue of less than $1 million, creditors can either follow the requirements for consumer applicants or provide the business applicant with a written disclosure, at application, that (a) describes the right to receive written reasons for the denial within 30 days, if requested within 60 days of the creditor's notice, (b) provides the name, address, and telephone number of the person or office from which the reasons can be obtained, and (c) includes the ECOA notice. This notice can be either oral or written. Moreover, for businesses with a gross annual revenue exceeding $1 million, creditors can follow either of the preceding notice methods or provide oral or written notice of the action taken within a reasonable time afterward. If the

applicant makes a written request for denial, the creditor most similarly provide a written statement of the reasons for the adverse action and the ECOA notice.

Under the FCRA, there are three different kinds of adverse action notices. A Section 615(a) notice is required where an adverse action was taken based on information in a consumer report. A Section 615(b)(1) notice is required if consumer credit is denied, or a charge for credit is increased, based on information obtained from third parties other than consumer reporting agencies. Lastly, a Section 615(b)(2) notice is required if an adverse action is taken based on information obtained from an affiliate, other than information in a consumer report or information concerning the affiliates own transactions or experiences with the consumer.

Section 615(b)(1) notices must include the consumer's right to request the information that was relied on in taking the adverse action within 60 days of the adverse action notice. Section 615(b)(2) notices must include notice that adverse action was 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. The information must be provided within 30 days after receiving the request.

Section 615(a) notices are most common and must include:

- A disclosure that the adverse action was taken based on information obtained from a consumer reporting agency.
- A statement that the CRA did not make the credit decision and is unable to provide to the consumer the specific reasons why the adverse action was taken.
- The consumer's right to:
    - Obtain a free copy of his or her consumer report from the CRA providing the information, if requested w/in 60 days.
    - To dispute the accuracy or completeness of any information in a consumer report furnished by the CRA.
- The name, address, and telephone number of CRA that furnished the report.
- Credit score disclosures, if the credit score was a factor in taking adverse action.

While credit score disclosures cannot be combined with any other FCRA disclosures, they can be combined with the adverse action notice disclosures required by ECOA. Furthermore, credit score disclosures cannot be provided on a separate form, they must be included on the adverse action form.

When does an Inquiry, Pre-qualification, or Pre-approval Become an Application?

Whether an inquiry or prequalification request becomes an application depends on how the creditor responds to the consumer, not on what the consumer says or asks. Under Regulation B comment 2(f)-3, an inquiry or prequalification becomes an application: "if in giving information to the consumer, the creditor also evaluates information about the consumer, decides to decline the

request, and communicates this to the consumer, the creditor has treated the inquiry or prequalification request as an application." Moreover, certain preapproval programs can be applications. For example, if an applicant asks for a preapproval of a loan and the creditor has a program where after a comprehensive analysis of creditworthiness it issues a written commitment that is valid for a designated period of time to extend a loan up to a specified amount, it would be deemed a preapproval.