

Creditor List Screening Practices: Certain Implications Under the Fair Credit Reporting Act and the Equal Credit Opportunity Act

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The direct mail or telephone solicitation of targeted individuals to accept offers of preapproved credit or to apply for credit is an increasingly prevalent practice today, particularly for retailers and credit card issuers.¹ The manner in which a creditor selects the individuals to receive its offers of or applications for credit is critical in identifying potential customers likely to be approved for extensions of credit under the creditor's credit criteria. Creditors commonly employ the practice of list screening, otherwise known as prescreening,² to determine their target audience. List screening typically begins with a creditor renting a list or lists of names from various sources (e.g., magazine subscription lists). Potential customers who represent a suspected credit risk are then deleted from these lists by consumer reporting agencies, which apply various criteria specified by the creditor against information in the consumer reporting agency's files.³ Alternatively, lists of prospective customers are developed from names on file at the consumer reporting agency and are again screened using the creditor's criteria to delete those persons suspected of being less creditworthy.⁴ List screening is regulated under federal law, primarily by the Fair Credit Reporting Act.⁵ Further, although not currently directly applicable to list screening,

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1. Smith, *Revision of the Board's Equal Credit Regulation: An Overview*, 71 Fed. Res. Bull. 913, 922 (1985). See also Fed. Res. Bd. Staff Mem. 4, 5 (Sept. 29, 1978).

2. *Id.* Screening methods other than list screening, such as extending credit only to depositors of a bank, local residents, or applicants who meet minimum income requirements, may be employed to target potential customers. Hsia, *Credit Scoring and the Equal Credit Opportunity Act*, 30 Hastings L.J. 371, 438 (1978). Many points raised in this article would also apply to these more informal methods of screening.

3. See Smith, *supra* note 1, at 922.

4. See Fed. Res. Bd. Staff Mem. 2 (Aug. 24, 1984).

5. 15 U.S.C. §§ 1681-1681t (1982 & Supp. V 1987).

the principles of the Equal Credit Opportunity Act⁶ should be considered by creditors with respect to their list screening practices.

FAIR CREDIT REPORTING ACT

SUMMARY OF THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act ("FCRA")⁷ regulates the providing of "consumer reports"⁸ by "consumer reporting agencies."⁹ A consumer reporting agency may furnish a consumer report only for the permissible purposes specified in the FCRA.¹⁰ Under the FCRA, a consumer reporting agency also must comply with requirements regarding, inter alia, the accuracy of information reported on consumers,¹¹ the deletion of obsolete information from consumer reports,¹² the disclosure to consumers of information in their files,¹³ and procedures in cases of disputed accuracy of information in consumers' files.¹⁴ A creditor may not willfully obtain a consumer report from a consumer reporting agency under false pretenses.¹⁵ Whenever a creditor denies consumer credit based wholly or partly upon information obtained either in a consumer report furnished by a consumer reporting agency or from any other person, it must disclose certain information about its sources to the consumer.¹⁶

6. *Id.* §§ 1691-1691f (1982 & Supp. V 1987).

7. *Id.* §§ 1681-1681t.

8. A "consumer report" is

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit The term does not include . . . any report containing information solely as to transactions or experiences between the consumer and the person making the report

Id. § 1681a(d) (1982).

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

Id. § 1681a(f).

10. Permissible purposes for furnishing a consumer report include a court order; a consumer's written instructions; or the creditor's intention to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to the consumer. *Id.* §§ 1681b(1), 1681b(2), 1681b(3)(A).

11. *Id.* § 1681e(b).

12. *Id.* § 1681c.

13. *Id.* § 1681g.

14. *Id.* § 1681i.

15. *Id.* § 1681q.

16. *Id.* § 1681m.

Both consumer reporting agencies and creditors that willfully¹⁷ or negligently¹⁸ fail to comply with the FCRA, face civil liability. Creditors that willfully obtain consumer reports from a consumer reporting agency under false pretenses are subject to criminal liability as well.¹⁹ Moreover, the Federal Trade Commission ("FTC") and other federal agencies may enforce compliance with the FCRA through judicial or administrative proceedings.²⁰

The FCRA preempts state fair credit reporting laws only to the extent that such laws are inconsistent with the FCRA.²¹ Consequently, states may impose more stringent requirements upon consumer reporting agencies and users of consumer reports. However, the effect of such state laws on list screening practices is beyond the scope of this article.

APPLICATION OF THE FCRA TO LIST SCREENING

Presenting a creditor with a list of names that has been screened by a consumer reporting agency constitutes the furnishing of a consumer report.²² In 1973, the FTC construed the FCRA to permit the practice of list screening by a consumer reporting agency subject to certain restrictions ("Prescreening Interpretation").²³ The FTC initially found that a creditor does not deny credit to anyone whose name was deleted from the initial list and is therefore not

17. *Id.* § 1681n.

18. *Id.* § 1681o.

19. *Id.* § 1681q.

20. *Id.* § 1681s (1982 & Supp. V 1987).

21. *Id.* § 1681t (1982).

22. See definition of "consumer report," *supra* note 8.

23. 38 Fed. Reg. 4947 (1973) (codified at 16 C.F.R. § 600.5 (1987)). The Prescreening Interpretation provides:

(a) The practice of prescreening is common in the consumer reporting industry. One typical situation arises when a consumer reporting agency performs a list editing service for customers that market their products by direct mail solicitations. The seller sometimes sends his list to a consumer reporting agency, where the list is edited by deletion of those names that have an adverse credit record in the files.

(b) In this instance, the editing process is only used for the purpose of determining to whom the initial mailing is sent. Those individuals edited from the original list may apply for credit at a later date, in which case a new credit determination is made without reference to the mailing list either edited or unedited. In other situations, the consumer reporting agency is asked to create its own list of credit worthy individuals, based upon the soliciting business's criteria.

(c) The contention is put forth that the company does not deny credit to anyone whose name was deleted from the initial list and therefore it is not required to give notice to the consumer pursuant to section 615(a). It is also asserted that the prescreening service constitutes a permissible purpose to receive consumer reports under section 604(3)(A). That is, each individual whose name remains on the list then receives a solicitation involving an offer of extension of credit from the company. Finally, the list is used solely for the purpose stated above and is not used at any future date as a basis for denying credit.

(d) The user of a consumer report must be considering a business transaction involving each consumer upon whom a consumer report is furnished. Unlike credit guides, users of prescreened lists have a present intention to have a business transaction with every person on the prescreened list. Moreover, the furnishing of prescreened lists of consumers will only be

required to provide notice to any such consumer under FCRA section 615(a).²⁴ It also determined that a prescreening service constitutes a permissible purpose to receive consumer reports under FCRA section 604(3)(A)²⁵ if (i) each person whose name remains on the list is solicited for an extension of credit by the user of the list, (ii) the list is used solely for such solicitation purposes, and (iii) the list is not used in the future as a basis for denying credit.²⁶ Finally, the FTC cautioned that the creditor may not delegate to the consumer reporting agency its credit granting decisions such that an applicant for consumer credit would be denied the right to section 615 disclosures or any other rights under the FCRA.²⁷

ISSUES UNDER THE FCRA

The critical date for purposes of the application of the Prescreening Interpretation is the date when the prescreened list is furnished to the creditor. Once the list is delivered to the creditor, that creditor must extend a credit offer to each person whose name remains on the list.²⁸ It is thus useful to examine separately the issues which arise under the FCRA before and after the list is furnished to the creditor.

Before List Is Furnished to Creditor

Under the FCRA, every consumer reporting agency must maintain procedures to ensure that a prescreened list is furnished for a permissible purpose. Any creditor receiving a list must certify to the consumer reporting agency the purpose for which the consumer report is sought.²⁹ In the case of a prescreened

permissible when the user can certify that every person listed will be the subject of an offer to enter into the particular business relationship involved.

(e) The Commission recognizes that the legislative history of the FCRA reveals a concern for the consumer's privacy and the accuracy of information stored at credit bureaus, and demonstrates a sensitivity as to the balance between the free flow of credit information for legitimate business purposes and the right of the consumer to keep his affairs private. However, the practice of prescreening results in no significant harm to consumers and the practice is not inconsistent with the basic purposes of the Act. Further, the ability of the consumer reporting agency to perform these prescreening services for a credit grantor shall not be deemed to permit delegation to a consumer reporting agency by a business of its credit granting, employment, insurance, or other business decisions whereby the consumer applying for such would be denied the right to the section 615 disclosures or any other rights under the Act.

24. 16 C.F.R. § 600.5(c) (1987). See 15 U.S.C. § 1681m(a) (1982).

25. See 15 U.S.C. § 1681b(3)(A) (1982).

26. 16 C.F.R. § 600.5(c) (1987). See FTC Staff Op. Letter No. 342 (May 1, 1985) (notes that only a list of names, not a collection of written consumer reports on individuals, is furnished to a creditor and asserts that the Prescreening Interpretation authorizes this activity because there is a "minimum intrusion on consumers' privacy"), reprinted in R. Clontz, Jr., *Fair Credit Reporting Manual E-276* (Cum. Supp. 1987). See also 16 C.F.R. § 600.5(e) (1987).

27. *Id.* § 600.5(e).

28. *Id.* § 600.5(c).

29. 15 U.S.C. § 1681e(a) (1982).

list, the creditor must certify that an offer to extend credit will be made to each person on the final list.³⁰

In a 1985 FTC staff opinion,³¹ the Division of Credit Practices endorsed a creditor's use of a service bureau to perform additional screening following the screening performed by the consumer reporting agency but before the list was furnished to the creditor. The letter noted that the service bureau permitted to use the consumer reporting agency's files also would be operating as a consumer reporting agency on behalf of its particular subscriber. It concluded that the consumer reporting agency which allowed its files to be used by the service bureau would not be in violation of the permissible purpose requirement because the bureau's subscriber would have a permissible purpose to use the file.

It is also clear that disclosures need not be provided to consumers whose names are deleted from the initial list. A creditor need not provide section 615(a) disclosures to consumers whose names are screened and deleted from the initial list before the final list is furnished to the creditor.³² Moreover, a consumer reporting agency which screens a list is not required either to record an inquiry against such consumers or to disclose to those consumers that their names appeared on the initial list.³³

After List Is Furnished To Creditor

Whether further screening is permitted after the final list is furnished depends upon the nature and timing of the "postscreening." Once the creditor receives the final list, no further screening is allowed before the credit offer is extended to the consumer.³⁴ Thus, the creditor may not update a "stale" list before mailing the prescreened solicitation. Further screening apparently is also impermissible if the consumer rejects the offer, at least if the rejection is in response to a telephone solicitation.³⁵ In this situation, there would not appear to be a permissible purpose for the creditor's further use of the consumer's name.

30. 16 C.F.R. § 600.5(d) (1987). See 15 U.S.C. §§ 1681b(3)(A), 1681e(a) (1982 & Supp. V 1987). This certification commonly is incorporated into the agreement between the consumer reporting agency and the creditor.

31. FTC Staff Op. Letter No. 342, *supra* note 26. The FTC has ruled that "(a)dvise rendered by the [FTC] staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding." 16 C.F.R. § 1.3(c) (1987). See *Hulshizer v. Global Credit Servs.*, 728 F.2d 1037, 1038 (8th Cir. 1984) (even if creditor relied upon an informal FTC advisory opinion, it would not be shielded from liability under the federal Fair Debt Collection Practices Act arising from a good faith error).

32. 16 C.F.R. § 600.5(c) (1987). See 15 U.S.C. § 1681m(a) (1982).

33. See FTC Staff Op. Letter No. 218 (C. Lee Peeler, author, Sept. 14, 1976) ("Peeler Letter I") (by implication), *reprinted in* R. Clontz, Jr., *supra* note 26, at E-24; FTC Staff Op. Letter No. 211 (not dated) (by implication), *reprinted in* R. Clontz, Jr., *supra*, at E-13. See also 15 U.S.C. § 1681g(a)(3)(B) (1982).

34. 16 C.F.R. §§ 600.5(c), 600.5(d) (1987). See FTC Staff Op. Letter No. 327 (Mar. 28, 1984), *reprinted in* R. Clontz, Jr., *supra* note 26, at E-241.

35. See FTC Staff Op. Letter No. 130 (May 7, 1974) (notes with approval that, under creditor's plan, "(a)n individual who responds negatively to any solicitation receives no further solicitation and

However, nothing prohibits a creditor from resoliciting persons on the final list who do not respond to the credit offer. The Prescreening Interpretation provides that the final list may not be used at a future date as a basis for denying credit.³⁶ This restriction should be considered inapplicable to a resolicitation because the denial of credit to a prescreened consumer subsequent to the resolicitation will be based upon information obtained by the creditor in the consumer's application or during the response verification process.³⁷ Information contained in the final list will only be used for solicitation purposes and will have no impact upon the determination to deny credit.

The FTC staff has provided the most extensive guidance concerning permissible additional screening in instances where the consumer accepts the credit offer. In 1978, C. Lee Peeler, an attorney in the Division of Credit Practices, issued an opinion ("Peeler Letter II") that a

creditor's decision to obtain a hard copy of the consumer's credit report after an application is submitted by a prescreened consumer and to use the information on the report to further evaluate the application would not necessarily disqualify an otherwise legitimate prescreening. The same would be true for evaluation of the information contained on the application form. . . . One acceptable further evaluation would be verifying that the customer's credit status has not changed since the date of prescreening.³⁸

Thus, the creditor apparently may verify the information contained on the application and confirm that the applicant is the person who was solicited.³⁹ Peeler Letter II concluded, however, that a full reevaluation of the applicant's creditworthiness would seemingly be impermissible because it would "render the [creditor's] intention to enter into a business transaction with each consumer on the prescreened list illusory."⁴⁰ Consequently, a creditor should refrain from applying new criteria in its evaluation of applications submitted by prescreened consumers. Nevertheless, if the creditor discovers during the verification process that a prescreened consumer has experienced a decline in credit status since the date of the prescreening and the decline would have caused the consumer's name to have been deleted from the initial list had it predated the prescreening, Peeler Letter II implies that the creditor may deny credit to such a consumer.

no further use is made of his name or his consumer report."), *reprinted in* R. Clontz, Jr., *Fair Credit Reporting Manual* E-213 (rev. ed. 1977).

36. 16 C.F.R. § 600.5(c) (1987).

37. *See infra* text accompanying notes 38-41.

38. FTC Staff Op. Letter No. 248 (C. Lee Peeler, author, Apr. 21, 1978) ("Peeler Letter II"), *reprinted in* R. Clontz, Jr., *supra* note 26, at E-77.

39. *Id.* The creditor may, for example, contact the applicant's employer or an address verification service.

40. *Id.* (citing 16 C.F.R. § 600.5(d) (1987)). Peeler Letter II cautions creditors not to imply in their solicitations that consumers' accounts are preauthorized if that is not true. The letter notes that violation of this requirement would subject a creditor to the sanctions imposed under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982 & Supp. V 1987).

Peeler Letter II does not analyze the situation in which, during the verification process, a creditor obtains derogatory information concerning a prescreened consumer which predates the prescreening. Such information would first become relevant to the credit determination during the postscreening either because the consumer reporting agency conducting the prescreening did not apply the credit criteria to the information or because the information was not recorded in its files. In either case, the consumer's credit status has not changed since the date of the prescreening; the prescreening simply did not reveal the unfavorable data. Assuming that, if considered, such information would have caused the consumer's name to have been deleted from the initial list, the creditor should be entitled to deny credit to the consumer. The creditor has neither applied new credit criteria to the consumer's application nor engaged in a complete reevaluation of the applicant's creditworthiness. Instead, it has merely applied the original criteria to information that should have been considered during the prescreening. Thus, there is no significant harm to the consumer, and the FCRA's goal of promoting the "free flow of credit information for legitimate business purposes"⁴¹ is vindicated.

In connection with postscreening activities, creditors should note that the staffs of the FTC⁴² and the Federal Reserve Board ("FRB")⁴³ have issued opinions that any creditor subject to their jurisdiction that submits credit and trade references from credit applications to a credit bureau in order to have such information verified and to have consumer reports concerning such applicants issued does not become a "consumer reporting agency" under the FCRA. Conversely, the staff of the Office of the Comptroller of the Currency ("OCC") continues to interpret the FCRA to provide that a national bank that submits credit and trade references from an application to a credit bureau for such purposes is a "consumer reporting agency."⁴⁴ The OCC staff interpretation is subject to attack, however, because it focuses on whether the applications constitute "consumer reports" rather than on the threshold inquiry as to whether the creditor is a "consumer reporting agency."⁴⁵

41. 16 C.F.R. § 600.5(e) (1987).

42. FTC Staff Op. Letter No. 373 (May 2, 1986), *reprinted in* R. Clontz, Jr., *supra* note 26, at E-330.

43. Letter from Griffith L. Garwood, Director of the Division of Consumer and Community Affairs (Sept. 3, 1986). The Garwood letter limits the earlier FRB Staff Op. Letter (Jerauld C. Kluckman, author, Dec. 1, 1971), *reprinted in* R. Clontz, Jr., *supra* note 35, D-6, to the situation in which a state Federal Reserve member bank "transmits information from credit applications to a credit bureau simply to supplement or improve the credit bureau's files without requesting that the information be verified and a consumer report issued." In this situation, the Garwood letter confirms that the bank would be a "consumer reporting agency."

44. Letter from Charles F. Byrd, Assistant Director of the Legal Advisory Services Division (Apr. 9, 1985), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 85,505.

45. Both FTC Staff Op. Letter No. 373, *supra* note 42, and the Garwood letter, *supra* note 43, focus on whether a creditor is a "consumer reporting agency." *See supra* note 9. Both letters conclude that the creditor does not assemble information for a fee or on a cooperative nonprofit basis, but instead pays the credit bureau to verify the information contained in the applications. Moreover, they note that the creditor's purpose in providing the applications is not to furnish

