NATIONAL CONSUMER REPORTING ASSOCIATION, INC.

Fair Credit Reporting Act
Fair and Accurate Credit Transactions Act
Gramm-Leach-Bliley Act
Red Flag Rules
National Credit Repository End User Regulations

Mortgage Lender & Broker Certification Study Guide and Test

701 E. Irving Park Rd., Suite 306
Roselle, IL 60172

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INTRODUCTION

This Study Guide is intended as a brief explanation of two laws affecting mortgage lenders and brokers, the Fair Credit Reporting Act (FCRA) as amended by the Fair and Accurate Credit Transactions Act of 2003 (FACTA) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Gramm-Leach-Bliley Act (GLB). The Guide is for use with the NCRA End User Test, provided with this Study Guide. The Study Guide and End User Test are provided as a courtesy from NCRA for distribution by its mortgage reporting members to their lender and broker customers. **The Study Guide is not intended as legal advice and users of it should consult their legal counsel for advice regarding legal compliance.**

At the outset it is necessary to explain the law governing mortgage reporting agencies and understand the difference between traditional consumer reporting and the type of activity in which mortgage reporting companies are engaged.

The three main consumer reporting repositories and their affiliates collect, maintain and report consumer financial information from credit grantors, public record sources and others relating to specific consumers and report such information to other credit grantors in order that such creditors may make informed judgments about whether to grant credit to such individuals. Consumer reporting agencies also report such information to potential insurers, employers, landlords and others when consumers apply for insurance, employment, leases, etc.

Under the federal FCRA (Title VI of the Consumer Credit Protection Act) and various state laws dealing with consumer reporting, there are a number of procedures and activities required of consumer reporting agencies and users of their information. In general, consumer reporting agencies are required to utilize reasonable procedures to assure maximum possible accuracy of the information which they collect, maintain and report and only report such information when a user certifies that it has a "permissible purpose" for utilizing such information, i.e., when a consumer has applied for credit, employment, insurance or when a user has a legitimate business transaction initiated by the consumer.

When a user of a consumer report denies the consumer a benefit (such as a denial of credit) based in whole or in part on information contained in a consumer report, the user is required to notify the consumer of the name, address and telephone number of the consumer reporting agency which issued the report and to notify the consumer of his right to obtain a free copy of the report within 60 days and his right to dispute the accuracy or completeness of any information in the report. Such a denial is called "adverse action" under the FCRA.

Upon the presentation of reasonable identification, a consumer reporting agency is required to disclose the contents of information maintained in its files (including recipients of the report within the previous 12 months) to consumers. If a consumer has been denied credit, employment, insurance or other benefits within 60 days of the request for disclosure, the consumer reporting agency is required to disclose such information free of charge. Otherwise, a charge, set by the federal government, may be made for the disclosure.

The Fair and Accurate Credit Transactions Act of 2003, or FACTA, was passed by Congress in December 2003 to help consumers monitor their credit ratings and prevent identity theft. This law requires the three major credit reporting agencies or credit bureaus (Experian, Equifax, and Trans Union) to provide every person one free credit report per year.

In the event a consumer disputes information which had been reported by the consumer reporting agency, the agency is required to reinvestigate the information (usually by contacting the source of the information), re-verify it if it is correct, delete or change it if it is incorrect, and send corrected copies to users specified by the consumer so that the user may reconsider it previous denial. Generally, a consumer reporting agency is required to notify the original furnisher of the information within 5 days of receipt of a dispute, notify the consumer of the results of the reinvestigation within 5 days of completion of it and complete the reinvestigation within 30 days of receipt of a dispute.

Mortgage reporting companies, of course, do not maintain a data base of consumer information from which they report such information to credit grantors. Their function in the consumer reporting process is to *merge and update* information collected, maintained and reported by the consumer reporting repositories and those merged and updated reports are then made to credit grantors. Because of the definition of "consumer reporting agency" in the FCRA, mortgage reporting companies qualify as "consumer reporting agencies" and must comply with the requirements of the FCRA in dealing with consumer inquiries. Mortgage Reporting companies are defined as "resellers" under Section 603 (u) of the Act, agencies that "(1) assemble and merge information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and (2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

Therefore, while mortgage reporting companies technically must comply with the disclosure, reinvestigation, dispute resolution, and correction procedures required of consumer reporting agencies in general, in practical terms they cannot *change* information in a repository's data base nor can they send corrected copies to affected credit grantors. Mortgage reporting and other specialized reporting companies must work with the repositories and their affiliates to perform those functions and comply with the FCRA's requirements. These efforts include performing the required disclosures and reinvestigations, and *with respect to the report issued to the mortgage lender or other user,* correct that report where necessary.

The test you will be taking consists of 30 Multiple choice and True or False questions. You have 45 minutes to complete the exam and will need to get 75% correct to pass. You may refer to the study guide during the test.

Each part asks questions about the various sections within the FCRA, GLB Red Flag Rules and other regulations. Certain sections of the laws are emphasized more than others based on their operational importance.

You will be able to take the test as many times in order to pass. It is recommended that you certify yourself every year as laws will change and amend from time to time.

Once you have passed the exam, you will receive a certification from the National Consumer Reporting Association.

- The key topics will be:
- Permissible Purposes of Reports
- Information Requirements
- Disclosures to Consumers
- Disputes
- Need to Know Information
- GLB Requirements
- Requirements of the National Credit Repositories

The study guide that follows will help you to achieve your goal of certification. The *"Section... "* reference throughout the study guide refers to the specific location of that item in the Fair Credit Reporting Act which can be found on the website of the Federal Trade Commission
at: http://www.ftc.gov/os/statutes/fcradoc.pdf

READ ON AND GOOD LUCK!!

SECTION I

CONSUMER REPORTING AGENCY RESPONSIBILITIES UNDER THE FCRA

A. Consumer Reporting Agencies Must Limit Access to Users with Permissible Purposes, *Section 604*

Consumer reporting agencies are required to limit access to consumer reports to the following purposes:

- As permitted by order of a court or a federal grand jury subpoena. *Section 604(a)(1)*

- For any purpose if the consumer gives permission in writing. *Section 604(a)(2)*

- For the extension of credit as a result of an application from a consumer, or the review or collection of a consumer's credit account. *Section 604(a)(3)(A)*

- For employment purposes, including hiring and promotion decisions, where the consumer has given written permission. *Sections 604(a)(3)(B) and 604(b)*

- For the underwriting of insurance as a result of an application from a consumer. *Section 604(a)(3)(C)*

- When there is a legitimate business need, in connection with a business transaction that is initiated by the consumer. *Section 604(a)(3)(F)(i)*

- To review a consumer's account to determine whether the consumer continues to meet the terms of the credit account. *Section 604(a)(3)(F)(ii)*

- To determine a consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status. *Section 604(a)(3)(D)*

- For use by a potential investor or servicer, or current insurer, in a valuation of, or an assessment of, the credit or repayment risks associated with an existing credit obligation. *Section 604(a)(3)(E)*

- For use by state and local officials in connection with the determination of child support payments, or modifications and enforcement thereof. *Sections 604(a)(4) and 604(a)(5)*

- For use by the FDIC or NCUA as part of preparation for its appointment or exercise of its power of a receiver, conservator or liquidating agent for an insured depository institution. *Section 604 (a)(6)*

In addition, creditors and insurers may obtain certain consumer report information for the purpose of making unsolicited offers of credit or insurance. These limited purposes are generally enforced by contract between the consumer reporting agency and the user and thus if a user violates the law, it also violates the contract and should give rise to a termination of service by the consumer reporting agency. Other requirements include on-site inspections, verifiable phone listings, licensing and permanent signage

Under Section 607(d), consumer reporting agencies are required to provide a notice to their users as to their responsibilities under the FCRA.

B. Special Requirements for Employment Reports, *Sections 604(b), 613*

Section 604(b) imposes special and complex requirements for both consumer reporting agencies issuing reports for employment purposes and for their users. Mortgage reporting users must *not* utilize a mortgage report for employment purposes.

C. Special Requirements for Reports in Connection with Credit or Insurance Transactions Not Initiated by the Consumer, *Section 604(c)*

Sections 604(c) and (e) set forth elaborate procedures to be followed by consumer reporting agencies which provide "prescreened lists" of consumer reports to credit grantors which have established criteria before the offer is made and, in turn, make "firm offers of credit or insurance" to consumers. Prescreened lists may only include the name and address of the consumer, an identifier that is not unique to the consumer for use in verifying his identity, and other information pertaining to the consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor.

D. Requirements Relating to Information Contained in Consumer Reports, *Section 605*

Section 605 contains a laundry list of items which have obsolescence periods of seven or ten years. (Note that some state laws limit consumer reporting agencies to shorter periods of time.) The only exceptions to these obsolescence periods are set forth in 605(b), which allows reporting of *all* adverse information if the report involves a credit transaction is for a principal amount of more than $150,000 or if it involves the underwriting of insurance of more than $150,000 or if it involves employment of the consumer at an annual salary of more than $75,000. Section 605 also requires that consumer reporting agencies reporting bankruptcy information to report the chapter in bankruptcy in which the case was filed and, if the case is withdrawn, indicate that it was withdrawn upon receiving

documentation certifying such withdrawal.

Section 605(e) requires consumer reporting agencies which receive information from information furnishers that an account was voluntarily closed or is disputed (as is required of them under sections 623(a)(3) and (4)) by a consumer to notate such information in subsequent consumer reports.

Section 605(g) requires repository reporting agencies to notify the user in the event that the address given by the consumer substantially differs from the address in the file. This section of the Act requires that the federal enforcement agencies write regulations to provide guidance with respect to address discrepancies. This is part of the "Red Flag Rule" discussed at page 16, below.

Section 605A contains a number of requirements relating to fraud alerts, active duty alerts and identity theft prevention. In general, these provisions allow a consumer to place information in a repository reporting agency's files in the event that the consumer has reasonable suspicion that a third party is attempting to utilize the consumer's identity, or in the event the consumer is on active military duty. A user may not establish a new credit plan or extension of credit in the event alerts are on the file unless the user utilizes reasonable procedures to form a reasonable belief that the user knows the identity of the person and contacts the consumer if a telephone number was provided by the consumer. In certain circumstances a consumer may require a consumer reporting agency to block the reporting of information in his file in the event of reported identity theft.

E. Compliance Procedures, *Section 607*

Section 607 Requires:

- Consumer reporting agencies to "maintain reasonable procedures designed to avoid violations of Section 605" (relating the reporting of obsolete information) and to limit the furnishing of reports for permissible purposes under Section 604. These procedures include identifying prospective users, having them certify the purposes for which the information is sought and that the information will be used for no other purpose.

- Consumer reporting agencies to "maintain reasonable procedures to assure maximum possible accuracy of the information".

- Consumer reporting agencies to not prohibit a user of their consumer reports from disclosing the contents of the report to the consumer if adverse action has been taken by the user based in whole or in part on the report. This is designed to further promote disclosure.

- Consumer reporting agencies to provide a notice to information furnishers and to users of their responsibilities under the FCRA

- Consumer reporting agencies to obtain disclosures from resellers (including other consumer reporting agencies) regarding the identity of the end-user of the information and each permissible purpose for which the report is furnished to the end-user. Resellers (including consumer reporting agency resellers) must establish reasonable procedures to ensure that the report is resold only for a permissible purpose, including by requiring that each person who resells the report identify the end user, certify each purpose for the report and that it will be used for no other purpose, and make reasonable efforts to verify the identifications and certifications before reselling the report. This provision relates to "reissues" or "secondary uses" and will be discussed below.

  The resale provisions of section 607(e) are designed to require that some controls be placed on agencies which sell reports for further use or resale. Resellers are contractually required by each repository to identify the end user, the permissible purpose for which they will obtain consumer reports, and to perform specific background and credentialing activities on each customer such as third party site inspections of the customer's business location, and business and personal background investigations. Resellers are also required to report to the repositories the identity of each "secondary user" with which the customer shares the consumer report. The action of sharing a consumer report in certain financial transactions, such as mortgage, is covered by the doctrine of "joint use" under FCRA. Secondary Use is a recent interpretation of this joint use provision by the repositories, whereby each repository levy's a charge for every "secondary use" or "reissue" of the report.

F. Disclosures to Consumers, *Sections 609 and 610*

Upon request and proper identification, the FCRA requires consumer reporting agencies to disclose "all information in the consumer's file at the time of the request" except credit scores or other risk scores relating to the consumer.

In addition, the agency is required to disclose the name (and trade name) of all persons obtaining the consumer's report during the previous two years for employment purposes and previous one year for all other purposes. If the consumer so requests, the agency must also disclose the address and telephone number of such inquirers. This must be accompanied by a written summary of the consumer's rights under the Act when the disclosure is made in writing.

G. Procedures in Case of Disputed Accuracy, *Section 611*

The dispute, reinvestigation and resolution process by consumer reporting agencies include:

- The reinvestigation process must be completed within 30 days from the time the agency receives the notice of the dispute from the consumer, *unless* during that time the agency receives additional information relevant to the

- investigation from the consumer, in which case the reinvestigation period may be extended for an additional 15 days. *Section 611(a)(1)*

- The agency must notify the furnisher of information of the dispute within 5 business days of receiving it and include all relevant information regarding the dispute. If it later receives additional relevant information, it must forward that to the information furnisher as well. *Section 611(a)(2)*

- The agency may terminate a reinvestigation if it reasonably determines that the dispute is frivolous or irrelevant. If it does so, it must notify the consumer within 5 days of making such a determination and inform the consumer of the reasons for the determination and identify additional information it needs to investigate further, and if it receives such information it is required to review and consider it. *Section 611(a)(3) and (4)*

- If information is found to be inaccurate or incomplete or cannot be verified, the agency must "promptly" delete it. If information is deleted from a consumer's file because it was found to be unverifiable or inaccurate, it may not be reinserted into the file unless (1) the information furnisher certifies to its accuracy and (2) notifies the consumer that the item has been reinserted, the business name and address of the information furnisher, and a notice that the consumer has the right to add a statement to the consumer's file disputing the completeness or accuracy of the information. The agency must maintain reasonable procedures designed to prevent the reappearance of deleted information in a consumer's file. *Section 611(a)(5)*

- Agencies operating on a nationwide basis must implement an automated system through which information furnishers may report the results of reinvestigations to it and other such nationwide agencies.

- An agency must notify the consumer within 5 business days of completing the reinvestigation, which (1) states that the reinvestigation is complete, (2) encloses a copy of the consumer report as a result of the reinvestigation, (3) offers a description of the reinvestigation procedure if requested by the consumer (which such description must then be sent to the consumer within 15 days of receiving such a request), (4) provides a statement of the consumer's right to add a statement to the file, and (5) informs the consumer that he has the right to request, following the deletion of any information or addition of any notation of dispute, that notifications of such deletions or notations be sent to any person who has received a consumer report from the agency within the previous two years for employment purposes or six months for any other purpose. *Section 611(a)(6)*

H. Charges for Disclosures, *Section 612*

Disclosures may be charged in certain circumstances:

- The disclosures under section 609 must be made without charge if within *60 days* of a consumer's request for disclosure the consumer has been sent a

- notice of adverse action under section 615. This applies to any consumer reporting agency that maintains a file on the consumer. One free annual disclosure of credit reports is available at www.annualcreditreport.com.

- These disclosures must also be made free of charge once in every 12 month period if the consumer certifies that he is unemployed and intends to apply for employment within the next 60 days, or is the recipient of public welfare assistance, or has reason to believe that the information in the agency's file is inaccurate due to fraud.

- Otherwise, the disclosures may be performed at a charge to the consumer, which (1) may not exceed a maximum amount (subject to annual changes authorized by the federal agency with jurisdiction over the FCRA), and (2) must be disclosed to the consumer prior to making the disclosures.

- The agency may also charge for making notifications to previous recipients of the report following a reinvestigation, but such charges (1) must not exceed the price the agency would charge each designated recipient for a consumer report and (2) must be disclosed to the consumer prior to furnishing the information.

I. Public Record Information for Employment Purposes, *Section 613*

Section 613 requires consumer reporting agencies issuing reports for employment purposes to either (1) notify the consumer at the time the report is issued that public record information is being reported (if in fact it is being reported) or (2) maintain strict procedures to insure that when public record information which is likely to have an adverse effect on the consumer's ability to obtain employment, it is complete and up to date (i.e., the current public record status is reported). It is for this reason that consumer reporting agencies maintain special access codes to be utilized by users when using reports for employment purposes. If a user were to obtain a report without informing the agency that it is for an employment purpose, the user would be in violation of Section 604(f) and it might put the agency in violation of Section 613.

J. Civil Liability, *Sections 616, 617*

Sections 616 and 617 establish civil liability for willful and negligent noncompliance with the Act.

In the case of willful noncompliance, the court may allow actual damages of not less than $100 nor more than $1,000 *and* punitive damages, plus costs and attorney fees. In the case of a willful obtaining of a consumer report under false pretenses or knowingly without a permissible purpose, the court may assess actual damages or $1,000, *whichever is greater,* plus punitive damages, costs and attorney fees.

In the case of negligent noncompliance, the court may allow any actual damages, plus costs and attorney fees.

In both cases, either party may receive its attorney fees in the event the other party files an unsuccessful pleading, motion or other paper in bad faith or for purposes of harassment.

K. Criminal Liability, *Sections 619, 620*

Any person who knowingly or willfully obtains a consumer report from a consumer reporting agency under false pretenses, or any officer or employee who knowingly or willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined or imprisoned not more than 2 years, or both.

L. Administrative Enforcement, *Section 621*

Since the adoption of the FCRA, the Federal Trade Commission ("FTC") has enforced the Act at the Federal level by bringing enforcement actions against CRAs, entities that furnish information to CRAs, and users of consumer reports such as creditors and employers. The recently created Consumer Financial Protection Bureau ("CFPB") and the FTC now have joint FCRA enforcement authority over a host of industries. It is expected that the CFPB will broadly interpret and actively enforce the FCRA. In so doing, the CFPB may give heavy weight to the FTC's interpretations of the FCRA, and to the most recent FTC Staff Report.

Federal enforcement is largely divided between the Federal Trade Commission ("FTC") and the CFPB, with the FTC retaining authority over security and identity theft issues, and the CFPB over although a laundry list of federal agencies which regulate banks, credit unions, air carriers, etc. are still currently authorized to enforce the Act with respect to their regulated institutions, but federal agency's regulating banks, savings associations and credit unions may *not* conduct examinations regarding compliance with the Act except in response to a complaint. The Federal Reserve Board may issue interpretations of the Act with respect to certain financial institutions.

The FTC was given all of its procedural, investigative and enforcement powers that it has with respect to the Federal Trade Commission Act in enforcing the FCRA and may commence a civil action to recover a civil penalty of up to $2,500 per violation. Information furnishers, however, may not be given civil penalties for violating section 623(a)(1) (reporting information with actual knowledge of errors or after notice or confirmation of errors) unless they have been previously enjoined from doing so and have violated the terms of such an injunction.

As to state enforcement, states are authorized to bring an action to enjoin any violation of the Act, bring an action on behalf of its residents to seek damages, seek penalties of not more than $1,000 for each willful or negligent violation, plus costs and reasonable attorney fees. If a state determines to bring any such action it must notify the FTC before doing so and the FTC has the right to intervene in the action and remove it to federal court. If a federal action is pending, no state may bring a state action during the pendency of the federal proceeding.

M. Relation to State Laws, *Section 624*

This provision is rather complicated and was drafted in the legislative trade-off between those members of Congress who wanted to completely preempt state credit reporting laws and those who were against any preemption whatsoever.

In general, all state laws respecting

- (1) prescreening,
- (2) time requirements in section 611 on reinvestigations (except those state laws in effect on September 30, 1996),
- (3) duties of persons under section 615 taking adverse action,
- (4) obsolescence periods under section 605 for information in consumer reports (except those state laws in effect on September 30, 1996),
- (5) responsibilities of information furnishers under section 623 (except the laws of Massachusetts and California),
- (6) information exchange between persons affiliated by common ownership or control (except Vermont), and
- (7) the form and content of disclosures under section 609(c) are preempted.

SECTION II

USER RESPONSIBILITIES UNDER THE FCRA

A. Limiting Accessing of Consumer Reports for Permissible Purposes, *Section 604*

To protect the privacy of the confidential kinds of information contained within consumer reports, Congress limited the purposes for which such reports may be issued. Those purposes are listed in Section 604 of the FCRA and are shown in section IA, page 4 of this Guide

Users of consumer reports include credit grantors of all kinds, landlords, employers, insurance underwriters, collection agencies and any other person or entity engaged in a legitimate business transaction between that person and the subject of the consumer report.

Most consumer reporting agencies incorporate the permissible purposes language into their contracts with users. Users are required to be notified by consumer reporting agencies of their responsibilities under the FCRA *{Section 607(d)).*

Because the FCRA imposes potentially severe penalties upon persons who obtain reports without having permissible purposes, users should adopt strict procedures within their operations regarding *which* employees have the authority and ability to access consumer reports and should advise those employees in the strongest possible manner about limiting the obtaining of the reports.

In most cases, users will have access to their consumer reporting agency via computer terminal, which will require a password and, user identification. Users should provide separate user IDs to individual employees, advise them of the confidentiality of the ID and thoroughly *audit* their consumer reporting invoices each month to insure that reports accessed match the names of persons with whom the user has a permissible purpose. User employees who violate policy and the FCRA should be dealt with accordingly.

These actions will help serve to insulate and protect the user as an employer in the event an employee violates the law. Strict security measures are also required under the GLB Privacy Rule and Safeguards Rule (see discussion under section IV).

B. Disclosure of credit scores by certain Mortgage Lenders, *Section 609(g)*

Section 609(g) requires a user that *makes or arranges* loans, and which uses a credit score in making a residential real property loan, must disclose to the consumer information about the credit score, how it was determined and the key factors adversely determining it, and provide a "Notice to the Home Loan Applicant" as set forth in the statute.

Note: A Notice of Credit Denial may not be combined with the credit score disclosure required under the Fair and Accurate Credit Transactions Act ("FACTA"), which is set forth in Section 609(g) of the Fair Credit Reporting Act.

C. Notifying Consumers of Adverse Action, *Section 615*

The term "adverse action" is defined very broadly by Section 603 of the FCRA and includes all business, credit, and employment actions affecting consumers that can be considered to have a negative impact— such as unfavorably changing credit or contract terms or conditions, denying or canceling credit or insurance, and denying employment or promotion.

1. Adverse Actions Based on Consumer Reports

If a user takes any type of adverse action based on information contained in a consumer report, the user is required by Section 615 of the FCRA to notify the consumer of that action. The notification may be done in writing, orally, or by electronic means. It must include the following:

- The name, address, and telephone number (including any toll-free telephone number) of the CRA that provided the report.
- statement that the CRA did not make the adverse decision and cannot explain why the decision was made.
- A statement setting forth the consumer's right to obtain a free copy of the consumer report from the CRA if the consumer requests the report within 60 days.
- A statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

Additionally, Section 1100F of the Dodd-Frank Act amended section 615 of the FCRA to add new credit score disclosure obligations in connection with adverse action. Specifically, when a user takes any adverse action based in whole or in part on information contained in a consumer report, the user must provide to the consumer:

- The numerical credit score used in taking the adverse action
- The range of possible credit scores under the model used
- The factors that adversely affected the credit score of the consumer, which should be

ranked in the order of their importance and should not exceed four factors—unless the number of credit inquiries is a factor and is not already reflected in the top four, in which case, five factors should be disclosed (i.e., the top four, plus inquiries)

- The date on which the credit score was created

- The name of the person or entity that provided the credit score or credit file upon which the credit score was based.

A Notice of Credit Denial may not be combined with the credit score disclosure required under the Fair and Accurate Credit Transactions Act ("FACTA"), which is set forth in Section 609(g) of the Fair Credit Reporting Act.

2. Adverse Actions in Employment Decisions

If a user for employment purposes intends to take adverse action, it must provide a "pre-adverse" action letter a reasonable time before taking adverse action that such action is intended. The Notice shall include a copy of the report and a copy of the consumer's rights under the FCRA §604(b)(3). The user still must send the adverse action notice if adverse action is taken.

3. Adverse Actions Based on Information Obtained From Third Parties Who Are Not Consumer Reporting Agencies

If a person takes an adverse action in connection with a credit transaction for personal, family, or household purposes that is based either wholly or partly upon information from a person other than a CRA, and the information is the type of consumer information covered by the FCRA, section 615(b)(1) of the FCRA requires that the user clearly and accurately disclose to the consumer his or her right to obtain disclosure of the nature of the information that was relied upon by making a written request within 60 days of notification. The user must provide the disclosure within a reasonable period of time following the consumer's written request.

4. Adverse Actions Based on Information Obtained From Affiliates

If a person takes an adverse action involving credit, insurance, or employment based on information of the type covered by the FCRA, and this information was obtained from an entity affiliated with the user of the information by common ownership or control, section 615(b)(2) requires the user to notify the consumer of the adverse action. The notification must inform the consumer that he or she may obtain a disclosure of the nature of the information relied upon by making a written request within 60 days of receiving the adverse action notice. If the consumer makes such a request, the user must disclose the nature of the information not later than 30 days after receiving the request. Information that is obtained directly from an affiliated entity relating solely to its transactions or experiences with the consumer, and information obtained in a consumer report from an affiliate are not covered by the FCRA and adverse action notices under these circumstances are not necessary.

Note that there are other federal and state laws relating to adverse actions taken by creditors and others. For example, the Equal Credit Opportunity Act and corresponding Regulation B require that applicants for credit receive a notice of adverse action informing the consumer of the *reason(s)* for the action taken.

D. Risk Based Pricing Notice, *Section 615(h)*

Section 311 of the FACT Act added a new section 615(h) to the FCRA to address risk-based pricing. Risk-based pricing refers to the practice of setting or adjusting the price and other terms of credit offered or extended to a particular consumer to reflect the risk of nonpayment by that consumer.

Information from a consumer report is often used in evaluating the risk posed by the consumer. Creditors that engage in risk-based pricing generally offer more favorable terms to consumers with good credit histories and less favorable terms to consumers with poor credit histories.

Under section 615(h) of the FCRA, a risk-based pricing notice must be provided to consumers in certain circumstances. Generally a person must provide a risk-based pricing notice to a consumer when the person uses a consumer report in connection with an application, grant, extension or other provision of credit and, based in whole or in part on the consumer report, grants, extends or provides credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person.

Risk-based pricing notice requirements of section 615(h) apply only in connection with credit that is primarily for personal, household or family purposes, but not in connection with business credit.

Additional information can be obtained
at http://www.ftc.gov/os/fedreg/2011/03/110301riskbasedpricing.pdf

Content and Timing of Notice

Risk-based pricing notice must include a statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories. Notices must be provided to the consumer after the terms of credit have been set, but before the consumer becomes contractually obligated on the credit transaction. Lenders may communicate the Risk-Based Pricing Notice in one of three ways; oral, written or electronic communication. To assist in determining which consumers are required to receive Risk-based pricing notices, several methods may be use; Direct Comparison Method, Credit Score Proxy Method, Tiered Pricing Method.

Exceptions

Creditors may choose to comply with the Risk Based Pricing Rule by providing a Credit Score Disclosure Exception Notice to *all* applicants, including applicants with no score, in lieu of a Risk Based Pricing Notice.

For credit secured by one to four units of residential real property, a creditor may provide consumers with a notice containing the credit score disclosure required by section 609(g) of the FCRA along with certain additional information that provides context for the credit score disclosure. Unlike the Risk Based Pricing Notice, this compliance method does not require the creditor to decipher which consumers should receive the Risk Based Pricing Notice. Creditors may use the Score Disclosure Exception Notice (Model form H-3) to comply. The notice must be provided before consummation of the transaction in the case of closed-end credit, or before the first transaction is made under an open-end plan. This disclosure may also include the Notice to Home Loan Applicant.

In the case of credit that is not secured by one to four units of residential real property, creditors may provide a Credit Score Exception Notice similar to the exception notice for residential real estate as long as it is provided to *all* applicants. Creditors may use Model Form H-4 to comply.

Other exceptions to the Risk-Based Pricing Notice Requirement include

- A consumer applies for specific material terms and is granted those terms, unless those terms were specified by the person using a consumer report after the consumer applied for or requested credit and after the person obtained the consumer report.

- A creditor uses consumer reports to prepare a prescreened credit solicitation under the "firm offer of credit" provision of §604(c)(2) of the FCRA. (If a consumer receiving a solicitation applies for credit, and a risk-based pricing notice may then be triggered.)

A creditor provides an adverse action notice to the consumer under §615(a) of the FCRA.

Exception notices include Credit Score Exception Notice ("CSEN"), Mortgage CSEN, Non-Mortgage CSEN and No Score Available Notice. Creditors are not required to provide risk-based pricing notices if they are providing the Credit Score Exception Notice to *all* consumers who request credit.

E. The Dodd Frank Act (DFA) of 2011, Section HOOF ("Use of Consumer Reports") amends FCRA Sections 615(a) and 615(h).

Notices required under FCRA Section 615(a) and under FACTA Risk Based Pricing Rule must include a numerical credit score used in:

1. taking any adverse action (based whole or in part of any information in a consumer report) or
2. making a Risk-Based decision.

Under the new section a "Credit Score" may include proprietary scores, fraud detection scores or consumer authentication scores. "Credit Score" excludes any mortgage score or rating of an automated underwriting system that considers one or more factors in addition

to credit information, including the loan to value ratio, the amount of down payment or the financial assets of a consumer; or any other elements of the underwriting process.

If a "credit score" is "used" in: taking adverse action or in making a Risk Based Pricing decision then a Dodd Frank Act notice must be provided. The notice must include:

- the range of possible credit scores under the model used;
- key factors that adversely affected the consumers credit score (generally, not to exceed 4 factors, unless one factor was the number of inquiries);
- date on which the score was created, and
- name of the entity that provided the credit score or credit file on which the score was created.

If a Credit Score Disclosure Exception Notice is provided as a FACTA requirement, requirement is satisfied for Dodd Frank Act notice and content.

A separate notice to each consumer must be provided if the notice contains a credit score. If the consumers have the same address, and the notice does not include a credit score, requirement may be satisfied by providing a single notice addressed to both consumers.

Credit Score Disclosure provided on or with Exception Notices (already required by FACTA) must also include the following:

- A Consumer Report is a record of the consumer's credit history
- A Credit Score is a number that takes into account information in a consumer report
- A Credit Score can affect whether the consumer can obtain credit and what the cost of that credit will be
- A distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score, in the form of a bar graph meeting certain specifications, or a clear statement informing the consumer how his or her credit score compares to the scores of other consumes
- A consumer is encouraged to verify the accuracy of the imormation contained in the consumer report
- Contact information for the centralized source from which consumers may obtain their free annual consumer report.
- Websites of the Federal Reserve Board and Federal Trade Commission for more information

F. Special Obligations for Employment Purposes, *Sections 604(b), 613*

A person obtaining a consumer report for employment purposes (to hire, promote,

discharge, or otherwise change the status of an employee or potential employee), must certify to the consumer reporting agency that it has disclosed to the consumer in writing before the report has been procured, in a document that consists solely of such disclosure, that a report may be obtained for employment purposes (see form which follows) and that the consumer has authorized, in writing, the procurement of the report. The certification must also include a commitment that the person obtaining the report will provide to the consumer, before taking any adverse action, a copy of the report and a description in writing of the rights of the consumer. Note that this is the same notice which must be given by consumer reporting agencies to consumers when providing a written disclosure of the contents of the report under Section 610 and its content is prescribed by the Federal Trade Commission. The certification must also state that information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation.

G. Special Obligations for Medical Information, *Section 604(g)*

A consumer reporting agency is prohibited from reporting medical information for employment, credit or insurance purposes unless the consumer consents to the furnishing of the report. All such information must be disclosed to the consumer. The vast majority of consumer reporting agencies do not maintain or report medical information.

H. Obligations of Users of Prescreened Lists, *Sections, 604(c) and (e), 615(d)*

The FCRA permits creditors and insurers to obtain limited consumer report information for use in connection with unsolicited offers of credit or insurance under certain circumstances. Sections 603(1), 604(c), 604(e), and 615(d). This practice is known as "prescreening" and typically involves obtaining a list of consumers from a CRA who meet certain pre-established criteria and credit may not be extended if the criteria are not met.

Prescreened lists are marketed exclusively by consumer reporting agencies which *maintain* and regularly update information in their files and thus are the province of the three repositories, Experian, Equifax and TransUnion. Because the three repositories operate nationally (and are so defined in Section 603(p) as those who assemble, or evaluate, and maintain information on consumers on a nationwide basis), the FCRA requires them to maintain a toll-free number by which consumers may "opt-out" of being placed on such solicitations. The repositories also sell "trigger lists" of consumers who have applied for mortgage loans.

I. Obligations of Resellers, *Section 607(e)*

Section 607(e) of the FCRA requires any person who obtains a consumer report for resale, which includes most mortgage reporting and employment reporting agencies, to take the following steps:

- Disclose the identity of the end-user to the source CRA.
- Identify to the source CRA each permissible purpose for which the report will be furnished to the end-user.
- Establish and follow reasonable procedures to ensure that reports are resold only for permissible purposes, including procedures to obtain: (1) the identity of all end-users; (2) certifications from all users of each purpose for which reports will be used; and (3) certifications that reports will not be used for any purpose other than the purpose(s) specified to the reseller. Resellers must make reasonable efforts to verify this information.
- If the reseller receives a consumer dispute of information contained in a report it resold, the reseller shall within five (5) business days of receiving a dispute:

    A. Check to see if it caused the inaccuracy. If so, the reseller has twenty (20) days to correct the report, upon finding no problem with its handling of the report.
    B. Notify the originating CRA of the dispute. Upon completion of the re-investigation, it shall notify the reseller of the results and the reseller shall promptly advise the consumer.

The requirements for "secondary use" and "reissues" are discussed in section IE of this Guide.

J. Red Flag Guidelines, *Section 615(e)*

Section 615(g) requires the federal enforcement agencies to promulgate a "red flag" rule establishing guidelines for "financial institutions" and creditors, credit card issuers and credit report users (which also report information) to detect, prevent and mitigate against identity theft. The Red Flag Rule has been written, at (16 CFR 681), and provides detailed procedures for lenders subject to the Rule to implement by November 8, 2008. The Rule requires the implementation of a number of procedures to prevent identity theft. These may include, for example, unusual account activity, fraud alerts on a consumer report, or attempted use of suspicious account application documents. The program must also describe appropriate responses that would prevent and mitigate the crime and detail a plan to update the program. The program must be managed by the Board of Directors or senior employees of the financial institution or creditor, include appropriate staff training, and provide for oversight of any service providers. More information on the Red Flag Rule will be discussed in Chapter V.

K. Penalties, *Sections 616, 617 and 619*

The FCRA contains five types of penalties for non-compliance, civil liability of willful violations, civil liability for negligence, criminal penalties for obtaining information under false pretenses, criminal penalties for unauthorized disclosure by officers or employees of consumer reporting agencies, and administrative civil penalties imposed by the Federal Trade Commission and by state enforcement officials.

1. Willful failure to comply with any provision of the Act by any person is subject to civil damages equal to the actual damages sustained of not less than $100 or more than $1,000 and punitive damages as allowed by the court plus court costs and attorney fees. In the case of civil liability of a person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer, or $1,000, whichever is greater, and punitive damages as allowed by the court plus court costs and attorney fees.

2. Negligent failure to comply with any provision of the Act is subject to actual damages sustained by the consumer, plus court costs and attorney fees.

3. For the knowing and willful obtaining of information on a consumer reporting agency under false pretenses, a person may be subject to a fine under Title 18, U.S. Code and imprisoned for not more than two years.

4. For the knowing and willful providing of information by concerning an individual from the agency's files to a person not authorized to receive that information an officer or employee of a consumer reporting agency may be fined under Title 18, U.S. Code and imprisoned for not more than two years.

5. The Federal Trade Commission and other appropriate federal agencies may seek civil damages against a person involved in a knowing violation "which constitutes a pattern or practice of violations" of $2,500 per violation. However, damages may not be sought for violations of Section 623 (a) (1), relating to the reporting of inaccurate information with actual knowledge of the inaccuracy by a furnisher of information, unless such person had been previously enjoined from committing the violation. Chief law enforcement officers of each state may bring actions to enjoin any violation of the Act and seek civil penalties plus court costs and attorney fees.

SECTION III

INFORMATION FURNISHER RESPONSIBILITIES UNDER THE FCRA

A. Duty to Provide Accurate Information, *Section 623*

The FCRA prohibits information furnishers from providing information to a consumer reporting agency that they know (or has reasonable cause to believe) is inaccurate.

Surprisingly, however, if a furnisher clearly and conspicuously discloses an address to consumers at which any future disputes may be directed, the furnisher is **not** subject to this general prohibition. *Sections 623(a)(1)(A) and (a)(1)(C)*

In other words, information furnishers have a choice: they may either be subject to the prohibition against furnishing information knowing that the information is inaccurate **or,** alternatively, may provide to consumers (presumably in applications for credit or in billing statements) an address to which consumers may notify them of errors in information which such furnisher has provided to a consumer reporting agency. If a furnisher receives such a notice, and the information is in fact inaccurate, he is prohibited from subsequently reporting the information.

B. Duty to Correct and Update Information, *Section 623*

If at any time a furnisher determines that information provided to a CRA is not complete or accurate, the furnisher must provide complete and accurate information to that agency. In addition, the furnisher must notify all CRAs that received the information of any corrections, and must thereafter report only the complete and accurate information. *Section 623(a)(2)*

C. Duties After Notice of Dispute from Consumer, *Section 623*

If a consumer notifies a furnisher, at the address specified by the furnisher for such notices, that specific information is inaccurate, and the information is in fact inaccurate, the furnisher must thereafter report the correct information to CRAs. *Section 623(a)(1)(B)*

If a consumer notifies a furnisher that the consumer disputes the completeness or accuracy of any information reported by the furnisher, the furnisher may not subsequently report that information to a CRA without providing notice of the dispute. *Section 623(a)(3)*

D. Duties After Notice of Dispute from Consumer Reporting Agency, *Section 623(b)*

If a CRA notifies a furnisher that a consumer disputes information provided by the furnisher, the furnisher has a duty to follow certain procedures. The furnisher must:

- Conduct an investigation and review all relevant information provided by the CRA. *Sections* 623(b)(1)(A) and (b)(1)(B)
- Report the results to the CRA, and, if the investigation establishes that the information was, in fact, incomplete or inaccurate, report the results to all CRAs that received the information and that compile and maintain files on a nationwide basis. *Sections 623(b)(1)(C) and (b)(1)(D)*
- Do the above within the time period set in the FCRA for the CRA itself to review and correct any inaccuracies, which is 30 days (unless the consumer provides relevant additional information during the 30 days, in which case the time period is 45 days). *Section 623(b)(2)*

E. Duty to Report Account Histories, *Section 623*

When a consumer voluntarily closes an account, the furnisher must report this fact when it provides information to CRAs for the time period in which the account was closed. *Section 623(a)(4)*

If a furnisher reports information concerning a delinquent account placed for collection, charged to profit or loss, or subject to any similar action, the furnisher must, within 90 days, provide the CRA with the month and the year that the delinquency commenced so that the agency will know how long to keep the information in the consumer's file. *Section 623(a)(5)*

The seven-year reporting period for accounts placed for collection or charged to profit and loss shall begin no later than 180 days from the date of the commencement of the delinquency which preceded the collection activity or charge to profit and loss. *Section 605(c)*

SECTION IV

REPONSIBILITIES UNDER GLB ACT

The Financial Modernization Act of 1999, also known as the "Gramm-Leach-Bliley Act" or GLB Act, includes provisions to protect consumers' personal financial information held by financial institutions. The principal parts to the privacy requirements include the Financial Privacy Rule and the Safeguards Rule ,each of which were written by the FTC.

The GLB Act gives authority to eight federal agencies and the states to administer and enforce the Financial Privacy Rule and the Safeguards Rule. These two regulations apply to "financial institutions," which include not only banks, securities firms, and insurance companies, but also companies providing many other types of financial products and services to consumers. Among these services are lending, brokering or servicing any type of consumer loan, transferring or safeguarding money, preparing individual tax returns, providing financial advice or credit counseling, providing residential real estate settlement services, collecting consumer debts and an array of other activities. Such non-traditional "financial institutions" are regulated by the FTC.

The Financial Privacy Rule governs the collection and disclosure of customers' personal financial information by financial institutions. It also applies to companies, whether or not they are financial institutions, who receive such information. The Privacy Rule requires initial and annual privacy notices to *customers* of financial institutions. It does not apply until a customer relationship is established between the financial institution and the consumer and the initial privacy notice is not required to be sent to the consumer-customer until non-public personal information is communicated to a third party. While lenders and brokers are subject to the Privacy Rule, consumer reporting agencies are specifically exempted from the notice provisions and the other provisions which are applicable fall within the same type of strictures as are required by the FCRA.

The Safeguards Rule requires all financial institutions to design, implement and maintain safeguards to protect customer information. The Safeguards Rule applies not only to financial institutions that collect information from their own customers, but also to financial institutions "such as credit reporting agencies" that receive customer information from other financial institutions. The rule requires that they develop, implement, and maintain a comprehensive information security program that is written in one or more readily accessible parts and contains administrative, technical, and physical safeguards that are appropriate to your size and complexity, the nature and scope of your activities, and the sensitivity of any customer information. The objectives of are to insure the security and confidentiality of customer information, protect against any anticipated threats or hazards to the security or integrity of such information; and protect against unauthorized access to or use of such information.

SECTION V

RED FLAG RULE

The "Red Flag Rule" (16 CFR 681) is designed to prevent identity theft.

The Rule was promulgated by the federal financial agencies and the Federal Trade Commission pursuant to amendments to the Fair Credit Reporting Act (FCRA) made by the Fair and Accurate Credit Transactions Act ("FACTA"). The rules implementing *Section* 114 require each "financial institution" or creditor to develop and implement a written Identity Theft Prevention Program (Program) to detect, prevent, and mitigate identity theft in connection with the opening of certain accounts or certain existing accounts. The rules implementing *Section* 114 also require credit and debit card issuers to assess the validity of notifications of changes of address under certain circumstances. Additionally, rules under section 315 provide guidance regarding reasonable policies and procedures that a user of consumer reports must employ when a consumer reporting agency sends the user a notice of address discrepancy.

There are three key parts to the Rule: *Section* 681.1, which addresses the duties of users of consumer reports regarding address discrepancies, *Section* 681.2, which addresses the duties of "financial institutions" regarding the detection, prevention and mitigation of identity theft, and *Section* 681.3, which addresses the duties of credit card issuers regarding changes of address. There is also an Appendix A, which contains guidelines on the detection, prevention and mitigation of identity theft.

Section 681.1 applies to "users" of consumer reports, but only if such a user "regularly and in the ordinary course of business *furnishes* information *to* the consumer reporting agency from which the notice of address discrepancy relating to the consumer was obtained." Thus the rule applies to some mortgage lenders, but not others.

Section 681.3 applies only to credit card issuers, and is not in issue.

Section 681.2 applies to "financial institutions" and creditors. This part of the rule has been delayed until May 1, 2009 by the FTC, but a lender regulated by one of the other federal financial agencies must begin to comply as of November I, 2008. "Financial institutions" are defined as having the same meaning as that in the FCRA, 15 USC 1681a(t), which defines them as "a state or national bank, as state or federal savings and loan association, a mutual savings bank, a state or federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer." The final rule broadly defines "creditor" as *"anyone who arranges for the extension, renewal or continuation of credit or any assignee of an original creditor who participates in the decision to extend, renew or continue credit"* In turn, "credit" is defined as the right to defer payment of a debt whether in just one or multiple payments and regardless of whether any charge is imposed for the deferment. However the term will not include typical invoicing for services provided or products sold unless actual credit terms are included.

If a lender determines that it is either a "financial institution" or a "creditor" it must establish reasonable polices and procedures to:

- identify patterns, practice or specific activity that would indicate the possible existence of identity theft;
- incorporate the identified Red Flags into the Program;
- detect Red Flags that have been incorporated into the Program, when they occur;
- provide for an appropriate response when Red Flags are detected to prevent and mitigate possible identity theft; and
- update and monitor the Program on regular intervals to ensure the relevancy of its existing Red Flags and incorporate new ones due to changes in risk to customers or risks to the safety and soundness of the "financial institution" or to the "creditor" from identity theft.

The Program should identify and include Red Flags from the following categories, as applicable:

- alerts, notifications, or other warnings received from consumer reporting agencies or service providers;
- the presentation of suspicious documents;
- the presentation of suspicious personal identifying information;
- the unusual use of, or other suspicious activity related to, a covered account; and
- notices from customers, victims of identity theft, law enforcement authorities, or other person regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

The Rule is far more complicated than can be summarized here and lenders should consult counsel regarding policies and procedures to be adopted.

SECTION VI

OTHER REQUIREMENTS

There are other requirements that must be followed in addition to the laws already discussed in this program. These requirements, primarily enforced by the National Credit Repositories have roots in privacy law, or come from the repositories' interpretation of the law. While a criminal or civil liability may be created for violation of these rules, a mortgage originator deemed to be in violation of these rules may find its ability to obtain credit reports from any credit reporting agency limited or even prohibited. The regulations in this section should be considered just as important as any of the previous sections in the program.

When contracting the services of a credit reporting agency, all end users will be required to sign a contract with their Credit Reporting Agency and certify the permissible purpose for which the credit reports will be used. Additionally, end users will be required to provide additional items about the end user to document the end user's legitimacy to the National Credit Repositories during regularly scheduled compliance audits. Items the CRA's may require from brokers and lenders include an onsite inspection to be completed by a third party, a copy of the mortgage license and or business license, copies of marketing materials and advertisements, a copy of a business telephone listing, a copy of the lease on office space, permanent signage for the business, and other items as deemed necessary to document the company's business purpose.

Under the FCRA, a mortgage originator is considered an end user of credit reports. In addition to the end user, others with a legitimate permissible purpose may receive a copy of the credit report when playing a role in the funding of the consumer's loan in a single transaction. An example of this is a wholesale lender reviewing the file for funding consideration. These companies are classified as joint users under the FCRA. New guidelines published by the national credit repositories require that these joint users also be called "secondary users" or the recipients of a "reissue" or "secondary use" credit report and be assessed a new credit reporting fee by the National Credit Repositories. Secondary use is defined as "the use of a consumer credit report, by multiple lenders, for the same credit transaction.

A mortgage originator or lender will be in possession of private non public consumer information in the consumer credit reports. These reports and all information supporting the documentation of the consumer authorization to access the report must be retained in a safe and secure place and maintained for a period of at least 5 years from the date of the report. Additionally the user must notify the Credit Reporting Agency from whom the report was obtained of any breach of security of consumer reporting data if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person within 24 hours of that security breech.

While working with consumers to obtain mortgage loans a lender or broker may be solicited be companies that specialize in credit repair or restoration making claims that they can remove negative data from the consumer's credit report. (These companies do not have the ability to issue a credit report to close the loan and should not be confused with the credit reporting agency

that issues credit reports and provides credit analysis products or credit rescoring services.) The Federal Trade Commission has determined that the vast majority of these companies are fraudulent and the National Credit Repositories have deemed that any mortgage originator or lender caught working in association with or providing referrals to credit repair firms or credit clinics can be banned from obtaining credit reports for any purpose. The National Credit Repositories publish a "Do Not Sell" list of companies and individuals that are banned from obtaining access to credit data from any CRA to help facilitate this prohibition.