

Comment On Fair Credit Reporting Act Affiliate Marketing Proposed Regulations

Under the Fair Credit Reporting Act (FCRA), communication of non-experience credit report type information by a person to an affiliate is prohibited (unless the opt-out notice is given to the consumer and the consumer does not elect to opt-out) because the communication of such non-experience information would make the person a credit reporting agency. See Section 603 (d)(2) of FCRA. Section 624 of FCRA governs the use of information received by a person from an affiliate. The explanation to the proposed regulations correctly points out this distinction.

The proposed regulations provide guidance relating only to what a person can do with information supplied to it by an affiliate. But regulations also need to be issued in order to provide clarification on the extent to which a person may use information which the person has properly obtained, not from an affiliate but in the ordinary course of its own business, to solicit credit, make offers of credit, and/or perform similar activities on behalf of an affiliate. The explanation of the proposed regulations alludes to this issue in an example referred to as "constructive sharing" of eligibility information to conduct marketing. The proposed regulations should clarify whether "constructive sharing" is considered to be communication of information between affiliates and if so, under what circumstances.

The proposed regulations also should clarify how the proposed definition of "person" affects the other provisions of section 624 of FCRA. The proposed definition of "person" states that actions taken by an agent on behalf of a person will be treated as actions of that person. How does this definition affect the application of section 624(a)(4) of FCRA?

Creditors need guidance from the Federal Reserve Board on these issues because they are not answered in the statute. Please clarify the following questions and issues:

Questions

1. Under Section 624, can a person (Creditor A) use information that would constitute credit report information (i.e., non-experience information), properly obtained but not obtained from an affiliate, to make a solicitation or offer of credit, on behalf of Creditor B (Creditor A's affiliate), to a consumer with whom Creditor A has a pre-existing business relationship, without giving the opt-out notice?

For example, assume Creditor A has legally obtained a credit report on a consumer in connection with a credit application made to Creditor A. Creditor A, acting as an agent on behalf of Creditor B, (i) uses information in that same credit report to "score" the consumer for a credit product offered by Creditor B and (ii) solicits or makes an offer of credit to the consumer for Creditor B's credit product. No information is actually communicated to Creditor B by Creditor A. Creditor A does not give the opt-out notice to the consumer. Creditor B has no pre-existing business relationship with consumer. Creditor B has not received an opt-out election from the consumer.

Suggested answer: Yes. Section 624 of FCRA only applies to the use by a person of eligibility information received from an affiliate. The information described above was not received from an affiliate.

2. Same facts as Question #1 above. Do the actions by Creditor A make it a "consumer reporting agency" or otherwise violate FCRA?

Suggested answer: No. No information was communicated to Creditor B, the affiliate. Creditor A merely performed a service as agent for Creditor B.

3. Same facts as Question #1 above. Because of the proposed definition of "person," is the "scoring" of the consumer and the offer of credit by Creditor A considered to have been performed and made by Creditor B? If so, does the scoring and the offer (by Creditor B) violate FCRA?

Suggested answer: Even if the scoring and offer are considered to have been performed and made by Creditor B, no eligibility information was communicated to Creditor B from an affiliate, so section 624 does not apply. Creditor B made a firm offer of credit which it is permitted to do under section 604(c)(1)(B) of FCRA. Creditor B received only the name of consumer from Creditor A, and no other information which would constitute "eligibility information."

4. Does the term "solicitation" as defined in the proposed regulations include a firm offer of credit?

Suggested answer: Yes. The definition is broad enough to include an offer of credit, but that issue should be clarified.