BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

DIVISION OF CONSUMER AND COMMUNITY AFFAIRS

Date: February 12, 2003

To: Board of Governors

From: Governor Gramlich, Chairman
Committee on Consumer and Community Affairs

Subject: Amendments to Regulation B (Equal Credit Opportunity)

The attached item has been reviewed by members of the Committee on Consumer and Community Affairs and is now ready for Board consideration.

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Date: February 12, 2003

To: Board of Governors

From: Division of Consumer and Community Affairs
(D. Smith, A. Hurt, and staff [1])
Legal Division
(V. Mattingly and S. Alvarez)

Subject: Amendments to Regulation B (Equal Credit Opportunity)

ACTION REQUESTED: Approval to publish a final rule amending Regulation B, following a comprehensive review of the regulation. The staff's recommendations include:

- Retaining the general prohibition against inquiring about, or noting, applicants' personal characteristics (such as national origin and race) for nonmortgage credit, but establishing an exception that would permit data collection by a creditor conducting a privileged self-test that meets the requirements of Regulation B; and

- Requiring creditors to retain records for certain prescreened credit solicitations, to address concerns about how national origin, race, age, or other prohibited bases of discrimination may be used in such solicitations.

SUMMARY:

The Equal Credit Opportunity Act (ECOA) makes it unlawful for a creditor to discriminate against an applicant in any aspect of a credit transaction on the basis of the applicant's race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract), the receipt of public assistance benefits, and the good faith exercise of a right under the Consumer Credit Protection Act. The ECOA is

[1] J. Gell, N. Taylor, D. Stein, J. Wood, K. Ryan, M. Le

implemented by the Board's Regulation B. Regulation B contains specific rules concerning the taking and evaluation of credit applications, how credit history information is reported on accounts used by spouses, procedures and notices for credit denials and other adverse action, and limitations on requiring signatures of persons other than the applicant on credit documents. While all types of creditors (including banks, retailers, finance companies, and mortgage companies) are subject to the general rule against credit discrimination, the regulation excepts certain types of credit (such as securities credit) from some of its specific requirements. The regulation also contains model forms for optional use by creditors.

The present action by the Board represents the culmination of a multiyear review of Regulation B, pursuant to statutory requirements to review regulations periodically. Two major policy issues are presented for Board consideration. The first relates to whether creditors ought to be allowed to record applicants' personal characteristics such as race, sex, and national origin in nonmortgage credit transactions. Creditors are currently prohibited from doing so by provisions in Regulation B that date back to 1976.[2]

The issue of whether data notation ought to be permitted or prohibited for nonmortgage credit has been both controversial and highly sensitive over the years, with strong views on both sides of the issue. There are many who believe that unlawful

[2] For mortgage transactions that involve the financing of the purchase of an applicant's principal dwelling (or the refinancing of a purchase money loan), the regulation requires creditors to collect data on an applicant's age, sex, marital status, and race or national origin. Regulation C (Home Mortgage Disclosure) covers a wider range of transactions, applying also to other home purchase loans (for example, a vacation home) as well as to home improvement loans, whether or not secured by a dwelling. Regulation C requires notation of an applicant's sex and race or national origin.

discrimination is better addressed by maintaining a process that is, to the extent possible, "blind" with respect to the applicant's race, national origin, and other prohibited bases of discrimination. Others take an opposite view; they believe that recording applicant characteristics will better facilitate the monitoring of creditors' compliance with the ECOA.

For the Board, the issue is whether lifting the prohibition or leaving it in place will better carry out the purposes of the ECOA's antidiscrimination provisions. It is an issue the Board has considered several times over the past seven years, as discussed in the background section below. In the most recent action, the Board proposed in August 1999 to remove the prohibition, leaving it to individual creditors to decide whether or not they wanted to collect the information on a voluntary basis.

Although the proposed rule change would permit but not require creditors to engage in data notation, many in the industry expressed concern that mandatory data collection would soon follow, imposing compliance and other burdens on the industry. Taking the opposite view were many consumer and community advocacy groups and others who believed that recording applicant characteristics would facilitate the monitoring of compliance with ECOA; and many among them made clear that they would in fact prefer mandatory collection.

The staff's recommendation calls for retaining the general prohibition against inquiring about, or noting, applicants' personal characteristics (such as race and national origin) for nonmortgage credit. The staff believes that, by restricting creditors' access to information about applicants' personal characteristics, the existing prohibition better contributes to reducing or avoiding credit discrimination. At the same time, the staff

recommends that the Board create an exception to the prohibition that would permit data notation in a self-test that meets the requirements in the regulation that implement a statutory provision adopted by the Congress in 1996. The narrow exception would provide an opportunity for creditors to better monitor their compliance with fair lending law and take appropriate corrective action.

The second policy issue relates to whether creditors should be required to retain records related to prescreened credit solicitations used to target potential customers. The question arises in part because the ECOA prohibits discrimination by a creditor against an applicant—meaning someone who has at a minimum sought credit. In the case of prescreened solicitations, it is creditors who take the initiative in identifying potential customers, with no action initially by potential customers. Typically the creditors will specify criteria to a consumer reporting agency, which uses information from its files to compile a list of persons who meet the criteria specified by the creditor.[3]

Over the years, supervisory agencies, consumer advocacy groups, and others have raised concerns that Regulation B generally does not apply to marketing through prescreened solicitations. That concern has to do with the possibility that prescreened solicitations could provide creditors with a means to circumvent or evade the ECOA: if a creditor used a prohibited basis to exclude prospective applicants, currently the practice would not necessarily violate Regulation B. Anecdotal evidence suggests that creditors

[3] Some commenters questioned the Board's legal authority to require record retention for prescreened solicitations given that the ECOA and the regulation's protections generally apply only to persons who have requested credit. The staff has reviewed the Board's authority to impose the proposed requirement, and believes the ECOA gives the Board the necessary authority by authorizing the Board to issue regulations that in the Board's judgment "are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." A more detailed discussion is provided on p. 21.

have used prohibited bases, such as age, and factors that could serve as proxies for prohibited bases, such as zip codes, to exclude certain potential customers.

The Board's 1999 proposed amendments to Regulation B would require creditors to retain records for prescreened solicitations defined as "firm offers of credit" under the Fair Credit Reporting Act. Creditors would retain information about the criteria used to select potential customers, the text of any solicitation, complaints that might be received, and the portion of the marketing plan related to the solicitation. The records retained would enable the Federal Reserve and other enforcement agencies to assess the need to cover certain solicitations.

The staff recommends that the Board adopt the proposed rule requiring creditors to retain records for certain prescreened solicitations, to determine whether and how national origin, race, age or other prohibited bases of discrimination are being used in such solicitations, with one modification to minimize compliance burden. The draft final rule omits the requirement to retain the portion of the marketing plan that related to the solicitation. The staff believes that, with this modification, the requirement to retain records would provide enforcement agencies with useful information, without imposing undue compliance burden, so that the Board might determine at some future date whether additional steps are warranted for coverage of prescreened solicitations by Regulation B.

A draft Federal Register notice, incorporating the recommended final rule, is attached. The notice discusses other miscellaneous revisions to the regulation; the more significant changes are mentioned in this memorandum, at page 27.

BACKGROUND

The Board began a review of Regulation B in March 1998 by publishing an Advance Notice of Proposed Rulemaking ("Advance Notice"). In addition to soliciting general comment on revisions to the regulation, the Board solicited comment on: (1) whether, for nonmortgage credit, the Board should consider removing the prohibition barring creditors from inquiring about or noting an applicant's race, national origin, and other personal characteristics; (2) how, and to what extent, creditors use race or age or any other bases of discrimination prohibited under the ECOA in offering credit through prescreened solicitations; and (3) whether the current exceptions from specific requirements of the regulation should be retained for business credit. The Board also solicited comment on whether it should seek to provide guidance on creditors' potential liability for the discriminatory acts of third parties participating in the same transaction.

In addition, the Board posed a series of questions about procedures that creditors use to provide credit information to consumers and to prequalify consumers for credit. The purpose of the questions was to assess whether the Board should provide a bright-line test for determining when an inquiry about credit turns into an application for credit.

The Board received approximately 330 comment letters. Generally, commenters addressed only the specific issues identified in the Advance Notice. The issue concerning data notation on nonmortgage loans drew the most comments, with commenters expressing strong views both for and against lifting the prohibition against data notation.

Based upon its own analysis of the issues and a review of comments received on the Advance Notice, the Board issued a proposed rule in August 1999 to revise Regulation B and the official staff commentary. The more significant proposed changes

to the regulation were related to: (1) removing the general prohibition barring data notation on an applicant's race, religion, national origin, and other personal characteristics; (2) requiring creditors to retain certain records for prescreened solicitations; and (3) expanding from 12 to 25 months the record retention period for most business credit applications. The Board received approximately 750 comment letters on the proposed rule. Again, the issue concerning data notation on nonmortgage loans drew the most comments.

ISSUES FOR BOARD CONSIDERATION

There are two major policy issues for Board consideration. The first concerns the general prohibition against the notation of applicants' personal characteristics in connection with nonmortgage credit, and whether to retain the prohibition and create an exception permitting a creditor to collect information about applicant characteristics to conduct a "self-test" in compliance with Regulation B. The second issue concerns prescreened credit solicitations, and whether to require creditors to keep records related to such solicitations.

I. Notation of Applicants' Personal Characteristics for Nonmortgage Credit

The question is whether lifting the prohibition to allow creditors generally to inquire about, or note, information about applicants' personal characteristics, such as race or national origin, is a better approach to deterring credit discrimination than retaining the prohibition and creating a limited exception for conducting a privileged self-test to determine compliance with the Act and regulation.

A. Background

Because the ECOA makes it unlawful for creditors to consider any of the prohibited bases of discrimination in a credit transaction, since 1976 Regulation B generally has prohibited creditors from inquiring about, or noting, applicants' personal characteristics in any aspect of a credit transaction. The prohibition was intended to discourage discrimination, based on the premise that if creditors cannot inquire about or note applicants' personal characteristics, such as national origin or race, they are less likely to unlawfully consider the information in connection with a credit transaction.

For home mortgage lending, there were specific concerns at the time the regulation was adopted about unlawful discrimination. Thus, Regulation B requires creditors to record the applicant's national origin or race, marital status, sex, and age for applications to finance the purchase of a home or to refinance a home-purchase loan. (This requirement was added in 1976 when the regulation was amended to implement expanded coverage of the ECOA to include national origin, race, and other prohibited bases of discrimination.[4]) The data collection enables enforcement agencies to better monitor home mortgage lenders' compliance with the ECOA. In 1989, the Congress amended the Home Mortgage Disclosure Act (HMDA), implemented by the Board's Regulation C, to impose a similar data collection requirement that applies to mortgage loans more broadly, encompassing home improvement loans in addition to purchase-money and refinanced home loans.

[4] As enacted by the Congress in 1974, the ECOA barred discrimination only on the basis of sex and marital status.

B. The 1999 Proposal to Amend Regulation B

In its August 1999 rulemaking, the Board proposed to amend the regulation by removing the general prohibition against inquiring about or noting information about an applicant's national origin, religion, color, sex, or race to allow voluntary collection of such data for nonmortgage credit products.[5] Consideration of applicant characteristics such as race in evaluating creditworthiness, except as permitted by law, would continue to be prohibited.[6] The Board recognized that removing the prohibition could allow loan officers access to information on applicants' personal characteristics that might not otherwise be available, and that such access could provide the opportunity for unlawful discrimination. Also, the usefulness of the data for fair lending enforcement would depend on whether creditors implemented standards for uniform collection of the data—such as by product, for all applicants, or for all borrowers. Nevertheless, the Board believed that removing the prohibition for all nonmortgage credit might allow issues of credit discrimination to be better addressed. Because data notation would be on a

[5] The Board had previously considered the issue of personal data notation in 1995, when the federal financial regulatory agencies were revising regulations that implement the Community Reinvestment Act. The Board proposed to remove the prohibition in Regulation B to respond to concerns about whether creditors were meeting the needs of their communities, particularly for small business and small farm lending. The majority of commenters opposed removal of the prohibition. After extensive deliberation, the Board withdrew the proposal in December 1996, and stated that, given the political sensitivity of the issues, the matter was better left to the Congress.

In 1998, the Board again solicited comment in its Advance Notice on removal of the prohibition. The Board raised the issue in response to concerns that continued to be expressed by the Department of Justice and some of the federal financial regulatory agencies. These agencies pointed to anecdotal evidence of discrimination in connection with small business and other types of credit. The commenters who supported and those who opposed lifting the ban were fairly evenly divided. Most of those who favored lifting the prohibition, however, were primarily focused on removing it for small business lending.

[6] The Act and regulation provide exceptions for "special purpose programs" designed to make credit available to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants for a similar type and amount of credit.

voluntary basis, creditors could target those product lines where they might have particular concern about potential discrimination.

The proposed rule lifting the prohibition provided that applicants could not be required to provide information about their race, national origin, religion, color, or sex. Creditors that chose to engage in data notation would have been required to disclose—at the time they requested the information—that providing the data was optional, and that the creditor would not take the information (or the applicant's decision not to provide it) into account in any aspect of the credit transaction. A proposed model notice was included.

C. Summary of Comments on the Proposal

More than 600 commenters addressed the issue of data notation raised by the 1999 proposal. Many commenters—including most of the federal financial regulatory agencies, the Department of Justice, the Department of Housing and Urban Development, small businesses and their trade associations, consumer advocates, community organizations, individual consumers, and a few banks—favored removing the prohibition. Enforcement agencies and others believed that creditors' ability to collect and analyze information about the ethnicity and race of applicants and an agency's ability to review that information in the course of compliance examinations could provide a better fair lending tool than prohibiting the notation of such information. A significant number of these commenters favored removing the prohibition for all nonmortgage credit products, but most of those who favored lifting the ban focused their comments on small business lending.

Most of the commenters favoring removal of the prohibition believed that mandatory collection is the most effective way to monitor and enforce fair lending compliance for small business and other nonmortgage loans. Consumer advocate and community group commenters generally endorsed voluntary data collection, but often as a first step toward mandatory collection and disclosure. These commenters also believed that standards for data collection were needed, and urged the Board to develop HMDA-like standards for data collection on nonmortgage loans. These commenters said that allowing data notation would enable creditors and government agencies to monitor for possible discriminatory practices, and might enable creditors to better target underserved markets. Some commenters believed that, in the case of home mortgage lending, the mandatory collection and public disclosure of data have increased access to those products for low-income and minority consumers.

Most industry commenters preferred that the Board retain the general prohibition in Regulation B against data notation. A number of them indicated that they would not collect data even if they were permitted to do so by the removal of the prohibition. They also expressed reservations about lifting the prohibition, mentioning concerns about the likely pressure to collect data and the potential risk of litigation based on unreliable data. Commenters also expressed concern that creditors that obtained data about ethnicity, race, and other personal characteristics would be placed at a competitive disadvantage relative to other lenders because some consumers might find notation of their personal characteristics offensive. Some commenters expressed concern that a requirement for mandatory collection of data would soon follow the lifting of the prohibition, which would impose substantial burdens and costs on institutions. Many commenters criticized

the lack of definitional and other standards to ensure the collection of accurate and reliable data. They expressed concern, for example, that the lack of uniform guidance regarding how to determine the minority-owned or women-owned status of small businesses would render collected data meaningless. Some commenters believed the current rule has been effective in discouraging discrimination by denying loan officers access to information that would enable them to discriminate on a prohibited basis. Individual consumers and some industry representatives asserted that data notation intrudes upon consumers' privacy.

Some commenters indicated that if the prohibition were removed, they would likely not collect information about applicants' personal characteristics unless collection was subject to the ECOA's self-test privilege; and they urged the Board to extend the self-test privilege to information about applicants' personal characteristics. In the August 1999 proposal, the Board had noted that creditors choosing to collect applicant characteristics would likely do so on the application form or in the application process and therefore the privilege would not apply to this data collection. Industry commenters challenged the Board's view of the applicability of the self-test privilege.

Some congressional commenters submitted a legal analysis which included the argument that the prohibition against inquiring about applicants' personal characteristics is required by the ECOA and must be enforced by the Board, and which stated that creditors would continue to be barred from collecting information about personal characteristics even if the Board amended Regulation B to remove the regulatory prohibition. They argued in their legal analysis that the ECOA's enumeration of exceptions to the general prohibition against discrimination on the basis of race, color,

sex, national origin, religion, age and certain other characteristics implied a prohibition on any other collection by creditors of data regarding these personal characteristics of applicants. The Board's staff disagrees with this analysis; the fact that the ECOA provides that certain types of inquiries regarding personal characteristics are permitted does not mean that other inquiries are prohibited.[7]

D. Staff Recommendation

Based on comments received and further analysis, the staff recommends that the Board retain the general prohibition on inquiring about, or noting, information about nonmortgage credit applicants' personal characteristics, such as race and national origin, and recommends further that the Board create an exception for collection of this information by a creditor for the purpose of conducting a privileged self-test. The staff believes that retaining the general prohibition and adopting the self-testing exception achieves the purposes of both the central prohibition against discrimination contained in the ECOA and the self-testing provision in the ECOA.[8]

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[7] The ECOA provisions that expressly permit certain types of inquiries about personal characteristics exist to allow creditors to inquire about characteristics of an applicant and to use the information in the credit decision—such as asking about marital status to determine property rights. Without explicitly permitting these inquiries, a creditor could not use information about applicants' personal characteristics in making its credit decision without violating the ECOA's central prohibition. A Legal Division memorandum addressing the legal issues in detail is available to Board members upon request in the Secretary's Office.

[8] Because this recommendation on the self-test privilege differs from the position proposed in 1999, the staff has considered whether the revised rule should be reproposed as a matter of law. Under the 1999 proposal, the prohibition would have been lifted without limitation and the self-test privilege would not have applied to the collection of information about applicant characteristics. Under the draft final rule, the prohibition would remain in place with an exception that allows creditors to collect this information as part of a privileged self-test. The staff believes that, in the context of a proposal to lift the prohibition completely, the Board would be authorized without further public comment to adopt a rule that would lift the prohibition partially (by creating a limited exception) to permit the collection of data for a self-test, particularly where commenters urged the Board to clarify that the self-test privilege would be available if the prohibition were lifted. Staff therefore believes that the final rule is reasonably viewed as a logical outgrowth of the 1999 proposed rule.

The staff believes that the existing prohibition, by restricting creditors' access to information about applicants' personal characteristics, contributes to reducing or avoiding credit discrimination**.** Lifting the prohibition and permitting creditors to inquire, note, and use information about applicant characteristic without limitation, as was proposed, would create some risk that information would be used for discriminatory purposes. For example, lifting the prohibition without constraints could have resulted in selective inquiries or notation. Moreover, without definitional and other standards, the reliability of voluntarily collected data is questionable.

At the same time, creditors desiring to monitor and assure compliance with the ECOA by collecting information about applicants' personal characteristics should not be prevented from doing so. Creating an exception for collecting such information as part of a self-test would further the purposes of the ECOA by providing creditors with an additional tool for measuring and improving their levels of compliance with the ECOA and Regulation B. Permitting data notation as part of a self-test would enable creditors to develop compliance programs that utilize applicant characteristic data in a controlled and targeted manner.[9]

[9] The Congress adopted the self-test privilege in 1996 as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Pub. L. 104-208, 110 Stat. 3009). The purpose for creating a self-test privilege was "to encourage institutions to undertake candid and complete self-tests for possible fair lending violations and to act decisively to correct any discovered problems." S. Rep. No. 104-185, at 15 (Dec. 14, 1995). Section 202.15 of Regulation B implements the self-test provision; it defines a self-test as a program, practice, or study designed and used specifically to determine compliance with the Act and regulation, that creates data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions. The privilege applies only if the creditor takes appropriate corrective action when it is more likely than not that a violation has occurred. The results of the self-test cannot be obtained by a government agency in an examination or investigation or by an agency or an applicant in any proceeding or lawsuit alleging a violation of the ECOA or Regulation B. Information about whether a creditor conducted a self-test, the methodology used or the scope of the test, and the time period covered by the test is not privileged.

The constraints imposed by the regulation's self-test provision would help ensure that the information is not used to discriminate on a prohibited basis and is only collected and used for the purpose of monitoring compliance with the ECOA and Regulation B and for taking appropriate corrective action. Any information about applicants' personal characteristics collected as part of a self-test would have to be kept separate from the loan or application files and from other business records related to credit transactions, in order for the privilege to apply. Although creditors may collect the information during the application process, the information may not be placed with non-privileged business records, such as the credit application or loan documents, and may not be considered in extending credit.[10]

Creditors would retain the flexibility to determine the time, place, scope, and methodology of any self-test. In preparing to conduct a self-test that involves the collection of applicants' personal characteristics, creditors would be expected to develop a written plan that describes, among other things, the specific purpose of the self-test, the methodology to be used, the geographic area covered, types of credit transactions involved, the identity of the entity that will conduct the test and analyze the data (such as the creditor's audit department), and the timing of the test, including the expected start date and end date or the expected duration of the test.

Information about applicants' personal characteristics that is collected as part of a self-test should be analyzed within a reasonable time frame and the creditor must take corrective action when it is more likely than not that a violation has occurred. The staff

[10] The staff notes that the existing regulation regarding the self-test privilege does not prohibit collection of data in the application process.

commentary to Regulation B provides examples of appropriate corrective action, including correcting institutional policies or procedures that may have contributed to the likely violation and adopting new policies as appropriate.

Currently creditors may use "mystery shoppers" or fictitious applicants ("testers") to determine compliance with the ECOA at the pre-application stage. With the recommended revision to the regulation, creditors would have the flexibility to utilize and develop a variety of self-testing techniques (internally or using independent third parties) to ensure ECOA compliance at various stages of a credit transaction using information collected about applicant characteristics combined with other information. For example, self-tests using information about the personal characteristics of actual applicants might better determine whether, at the application stage, persons seeking credit are being treated differently from other applicants on the basis of race, age, sex, religion, or national origin; or, for loan originations, whether disparities based on race or other prohibited bases of discrimination may exist in the terms and conditions of loan agreements entered into by similarly situated applicants. A self-test might also be conducted to test account review or collection procedures, or other aspects of the credit transaction where unlawful discrimination might occur.

Because this new exception for collecting personal characteristics would be available for the purpose of conducting a self-test to determine the creditor's compliance with the ECOA or Regulation B, a creditor could not use the data for other purposes, such as marketing, unless necessary to take corrective action, without losing the self-test

privilege.[11] The collection of data about applicant characteristics as part of a self-test could only be used and evaluated by persons conducting the self-test. The data could not be used or evaluated by any person involved in the credit transaction, except in the context of taking corrective action when a violation is found. The data may not be used in a credit decision.

Consistent with the Congress's intent to encourage self-tests by creditors to ensure compliance with the ECOA and Regulation B, the staff recommends that the Board establish an exception to the general prohibition against data notation by amending the regulation to permit creditors to inquire about, and note, information about nonmortgage credit applicants' personal characteristics when conducting a self-test that meets the requirements of Regulation B, § 202.15. In collecting information about applicant characteristics as part of a self-test, creditors will be required to disclose that providing the information is optional, that the information is being collected to monitor for compliance with the ECOA and will not be used in making a credit decision, and where applicable, that certain information will be noted based on visual observation or surname.

II. Record Retention for Prescreened Solicitations

With respect to prescreened solicitations, the issue is whether to require that creditors retain certain records related to prescreened solicitations. Under the proposal, these records included the criteria used to select potential customers, correspondence relating to complaints, marketing plans, and other information. The retention of

[11] A creditor conducting a self-test may also lose the self-test privilege under other circumstances. For example, it would be lost if the creditor discloses any part of the results of the self-test as a defense to charges that the creditor has violated the act or regulation. See Regulation B, § 202.15(d) and related provisions of the staff commentary.

information related to prescreened solicitations would allow effective review and analysis of creditors' possible use of prohibited bases (such as age and race) in connection with such solicitations.

A. Background

The ECOA prohibits discrimination by a creditor against an *applicant*—a person who has requested or received credit—on a prohibited basis regarding any aspect of a credit transaction. A credit transaction is defined by Regulation B as covering every aspect of an applicant's dealings with a creditor, beginning with requests for information. Thus, the coverage of the ECOA encompasses a person who has, at a minimum, sought credit. But because a person could be discouraged from seeking credit or credit information, the regulation expressly prohibits a creditor from engaging in any practice (including advertising) that would discourage a reasonable person, on a prohibited basis, from applying for credit.

In some circumstances, consumers do not have to initiate a request for credit, but rather respond to a solicitation from the creditor. Creditors use a number of techniques to identify potential customers. For instance, creditors will often specify criteria to consumer reporting agencies, which then draw on information from credit files to compile lists of persons who meet those criteria. This marketing technique—involving prescreened solicitations—is typically carried out through mailed solicitations as well as by telemarketing. In the marketing of some credit products through prescreened solicitations, creditors often offer discounted introductory rates, attractive terms, and enhancements (such as purchase discounts, in the case of credit cards) that may not be available through other application channels.

Prescreened credit solicitations, particularly for credit cards, are not new. With advances in technology that facilitate the building of databases, however, the use of prescreened solicitations has become more commonplace and more sophisticated. Prescreened solicitations can be used to target consumers most likely to use a particular credit product, or to target segments of the population that are most likely to respond to the offer of credit. Conversely, prescreened solicitations can be used to exclude some consumers from receiving offers of credit. They can potentially be used to target consumers in low-income, predominantly minority neighborhoods for less favorable credit products, or less favorable terms, on the supposition that these consumers are less creditworthy.

Over the years, there has been concern that Regulation B generally does not apply to marketing by prescreened solicitations. When the regulation was originally implemented in 1975, the definition of "credit transaction" included "solicitation of prospective applicants by advertising or other means." Thus, the prohibition against discrimination based on marital status and sex applied to solicitations. In December 1976—when the Board revised Regulation B to bar discrimination based on national origin, race, and other prohibited bases—the definition of credit transaction omitted any reference to solicitations. In the final rule, the regulation instead prohibited creditors from discouraging persons from applying for credit on a prohibited basis.

B. The 1999 Proposal to Require Record Retention for Prescreened Solicitations

Under the 1999 proposed amendments to Regulation B, creditors would be required to retain records for those prescreened solicitations defined as "firm offers of credit" under the Fair Credit Reporting Act (FCRA). Creditors would retain information

about the criteria used to select potential customers, the text of any solicitation, complaints that might be received about the solicitation, and the portion of the marketing plan related to the solicitation.

C. Summary of Comments on the Proposal

The Board received about 100 comment letters on this proposal. Commenters acknowledged that prospective applicants and advertisements are covered by the regulation's rule against discouraging applications on a prohibited basis. But some of them questioned the Board's legal authority to require record retention for prescreened solicitations given that the ECOA and the regulation's protections generally apply only to persons who have requested credit.

The staff believes that the Board has clear authority to require the retention of information regarding prescreened solicitation practices. In enacting the ECOA, the Congress found that there is a need to ensure that creditors exercise their responsibility to make credit available with fairness and impartiality and without discrimination on a prohibited basis. Thus, creditors must make credit available equally to all creditworthy customers regardless of race, national origin, sex, or other prohibited bases of credit discrimination. In this regard, Regulation B prohibits a creditor from making any statement, in advertising or otherwise, that would discourage on a prohibited basis a reasonable person from making or pursuing an application for credit.

The ECOA authorizes the Board to prescribe regulations to carry out the purposes of the Act including, in particular, regulations that "in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C.

§ 1691b(a)(1). This provides the Board authority to require creditors to retain records that the Board believes are necessary to assure that creditors are not circumventing or evading the requirements of the ECOA and Regulation B.

Prescreened solicitations are an increasingly important mechanism for making certain types of credit available to consumers, and can be an effective way of enhancing a creditor's compliance with the ECOA. On the other hand, prescreened solicitations could provide the means for creditors to circumvent or evade the ECOA and defeat its purposes by excluding prospective applicants on a prohibited basis. In order to help monitor solicitation practices to determine whether creditors are evading or circumventing the ECOA, the staff believes that creditors should be required to retain records related to prescreened solicitations so that enforcement agencies can review and analyze the possible use of prohibited bases in generating offers of credit.

Some commenters criticized the proposed requirements as burdensome. In particular, they expressed concern about the retention of correspondence relating to complaints and the retention of "components of marketing plans related to solicitations." They did not, however, quantify in cost or time the additional burdens associated with the requirements.

Commenters focused on how correspondence about complaints is kept and organized, rather than arguing that creditors do not retain such correspondence. They said that complaint correspondence may not be stored and tracked by solicitation in existing complaint tracking systems, and may not be retained in a central location within a financial institution. Also, commenters noted that marketing plans may vary

significantly from creditor to creditor; some plans may not have a specific "component" devoted to prescreened solicitations.

Consumer representatives and others supporting the record retention requirement believed that the benefit of the requirement substantially outweighs any compliance burden. They believed that creditors already retain most, if not all, of the documents required by the proposal for business or other reasons, such as to monitor the effectiveness of their marketing approach. Many of these commenters also believed that Regulation B should cover creditors' pre-application marketing practices more generally, beyond credit advertisements and beyond the record retention requirements that were proposed.

D. Staff Recommendation

Based on comments and its own further analysis, the staff recommends that the Board adopt the proposal requiring creditors to retain records related to the criteria used to select potential customers for prescreened solicitations, and correspondence related to consumer complaints. The staff believes that the record retention requirement would provide useful information without imposing excessive burden for determining at some future date whether additional steps might be warranted for coverage of prescreened solicitations by Regulation B. Creditors would not be required to maintain records in a central location or match complaints with specific solicitation programs.

The staff recommends making one modification in the proposed rule to reduce compliance burden. Upon further analysis, the staff believes that the proposed requirement to identify and retain the component of the marketing plan to which the solicitation relates could be overly burdensome. And since prescreened solicitations may

be one aspect of a creditor's overall marketing program, reviewing a single component may not provide the proper context. Therefore, the staff's recommendation omits the proposed record retention related to creditors' marketing plans.

Because of concerns about the potential impact of prescreened solicitations on some segments of the population, the staff believes that taking these steps would enable the Board to monitor solicitation practices, based on information that creditors currently maintain, in a systematic way. Generally, for business and other reasons, creditors retain much of the required information. For example, under the FCRA, persons that use information in consumer reports to select consumers who will receive offers of credit are required to maintain the criteria used to select the consumers for three years after the date the offer is made to the consumer. The Board's rule would require a 25-month retention period.

There will be some incremental burden associated with retaining information in a form that will enable creditors to demonstrate compliance. The staff believes, however, that the cost of retaining these records for purposes of examination under Regulation B would not likely be substantial; and commenters did not provide evidence to the contrary.

OTHER RECOMMENDATIONS

Record Retention for Certain Business Credit

The ECOA requires creditors to retain records or other data related to business loans as may be necessary to evidence compliance with the Act, generally for no less than one year. Regulation B requires creditors to retain credit applications and other records for 12 months, for credit extended to businesses with gross revenues of $1 million or less. For businesses with gross revenues in excess of $1 million, extensions of trade credit, and

credit incident to a factoring agreement or other similar types of business credit, a creditor must retain records for 60 days. If within that time period the applicant requests, in writing, the reasons for adverse action, or requests that records be retained, the creditor must retain the records for 12 months.

Some Reserve Banks and other enforcement agencies have expressed concern about the short duration of the record retention period for business credit. In the proposed amendments to Regulation B, the Board proposed to extend the record retention period to 25 months for credit applications involving businesses with gross revenues of $1 million or less. (The rule would have remained unchanged for credit applications involving larger businesses or trade and similar types of business credit.) The volume of business loans on a yearly basis for some institutions is low, and the agencies have reduced the frequency of compliance examinations. Thus, it is sometimes difficult for examiners to obtain an adequate sample in order to determine whether the creditor is complying with the requirements of Regulation B. Therefore, the Board believed that extending the record retention period would better enable the federal financial regulatory agencies to monitor and enforce compliance with the ECOA. Also, the Board believed that earlier concerns about storing business credit files might no longer be compelling given technological advances and the increased use of electronic storage.

Community groups and a civil rights organization supported the proposed extension of the record retention period, to better determine patterns of unlawful discrimination in connection with business credit. Some industry commenters also supported the proposed extension; they believed compliance would be easier with consistent rules for consumer and small business credit.

Most industry commenters opposed the proposal, stating that it would impose a significant burden by increasing the need for storage space and equipment and for additional employees and supervision. Some of these commenters noted that business documentation is typically more voluminous than documentation for consumer loans, and that a substantial amount of business loan documentation is kept in paper form. One commenter stated that the burden would be greater for smaller creditors than for larger creditors. Larger creditors likely benefit from the development of standardized business loan products and credit scoring models, while smaller creditors may rely more heavily on judgmental evaluation and paper documentation. Some commenters believed that the 12-month retention period preceding an examination is sufficient to establish patterns within a financial institution.

Based on the comments and upon further analysis, the staff recommends that the Board retain the current record retention period of 12 months. Although an expanded retention period could assist the enforcement agencies in monitoring and enforcing compliance with the act, the staff believes that the benefits of expanding the record retention requirement are outweighed by the compliance burdens. For example, the use of electronic record storage for many business credit records is not as prevalent as the staff originally believed.

Miscellaneous

The draft regulation contained in the attached Federal Register notice also incorporates the following revisions:

- Clarifies the definitions of "adverse action" and "creditor."
- Retains the exceptions from certain of the regulation's requirements for public utilities, securities, and government credit, with some modification to the exceptions for public utilities credit for consistency with the regulation's credit reporting requirements.
- Clarifies that if credit is denied (or other adverse action is taken) because a person other than the applicant, such as a guarantor, is not creditworthy, the stated reasons for the denial must specifically indicate the basis for the lack of creditworthiness of that other person.
- Clarifies that creditors may not evaluate married and unmarried applicants by different standards.
- Clarifies that creditors may not presume that the submission of a joint financial statement represents an application for joint credit.
- Adds to Regulation B the general standards contained in other consumer financial services regulations that disclosures must be clear and conspicuous and, with some exceptions, must be provided in a form applicants may retain.

The draft regulation does <u>not</u> incorporate the following proposed revision:

- Require notice of the right to a written statement of reasons for certain business credit.

Revisions to the official staff commentary include adding the definition for "pre-approved application" that the Board adopted under Regulation C (Home Mortgage Disclosure) in February 2002. The commentary also provides additional guidance on when an inquiry about credit becomes an application for credit. Certain proposed staff interpretations on when notices of credit denials and other adverse action must be provided to consumers are not being adopted at this time. Additional comment will be solicited on these issues.

FEDERAL RESERVE SYSTEM

12 CFR Part 202

[Regulation B; Docket No. R-1008]

EQUAL CREDIT OPPORTUNITY

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is publishing a final rule amending Regulation B, pursuant to the Board's policy of periodically reviewing and updating its regulations. Regulation B implements the Equal Credit Opportunity Act. Among other things, the final rule retains the general prohibition against inquiring about, or noting, applicant characteristics for nonmortgage credit transactions, and creates an exception when such data are collected for the purpose of conducting a self-test. The final rule also requires creditors to retain certain records related to prescreened solicitations for 25 months, to enable federal financial enforcement agencies to assess whether or how national origin, race, age, or other prohibited bases of discrimination under the ECOA are taken into account in prescreened solicitations. The official staff commentary has also been amended, although consideration of several previously proposed amendments has been deferred to allow preparation of a supplemental request for comment on those matters.

DATES: Effective April 1, 2003; however, to allow time for any necessary operational changes, the mandatory compliance date is April 1, 2004.

FOR FURTHER INFORMATION CONTACT: John C. Wood, Counsel; Kathleen C. Ryan or David A. Stein, Senior Attorneys; or Minh-Duc T. Le, Attorney; Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System,

at (202) 452-3667 or 452-2412; for users of Telecommunications Device for the Deaf ("TDD") only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691-1691f, makes it unlawful for a creditor to discriminate against an applicant in any aspect of a credit transaction on the basis of the applicant's national origin, marital status, religion, sex, color, race, age (provided the applicant has the capacity to contract), receipt of public assistance benefits, or the good faith exercise of a right under the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.).

The ECOA is implemented by the Board's Regulation B. In addition to the general prohibition against discrimination, the regulation contains specific rules concerning: the taking and evaluation of credit applications, how credit history information is reported on accounts used by spouses, procedures and notices for credit denials and other adverse action, and limitations on requiring signatures of persons other than the applicant on credit documents. The regulation also excepts certain types of credit (such as securities credit) from some requirements, and provides model forms for optional use by creditors.

When enacted in 1974, the ECOA prohibited discrimination on the basis of marital status and sex. In 1976, the Act was amended to designate other prohibited bases of discrimination, including race and national origin. Over the years, several significant amendments have been made. In 1989, the ECOA was amended by the Women's Business Ownership Act of 1988 (Pub. L. 100-533, 102 Stat. 2692) to require that

creditors give business applicants notice of the right to a written statement of reasons for a credit denial, and to impose a record retention requirement for certain business credit applications. In 1991, the ECOA was amended by the Federal Deposit Insurance Corporation Improvement Act (Pub. L. 102-242, 105 Stat. 2236) to provide applicants with the right to obtain a copy of any appraisal report used in connection with an application for credit to be secured by residential real property. The amendments also established referral responsibilities on the part of the federal financial supervisory agencies (for referrals to the Department of Justice and the Department of Housing and Urban Development) for certain violations of the ECOA. The Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Pub. L. 104-208, 110 Stat. 3009) amended the ECOA to create a privilege against disclosure for information developed by creditors as a result of "self-tests" they conduct.

II. Review of Regulation B

Pursuant to requirements of section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994, section 610(c) of the Regulatory Flexibility Act of 1994, and section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, the Board began a review of Regulation B in March 1998. (The Board's previous comprehensive review of Regulation B was completed in 1985.) An Advance Notice of Proposed Rulemaking (Advance Notice) was published to solicit general comment on revisions to the regulation, and also identified specific issues for comment (63 FR 12326, March 12, 1998). The Board received 330 comment letters on the Advance Notice. Most commenters addressed only the issues identified in the Advance Notice.

In August 1999, the Board issued a proposed rule (64 FR 44581, August 16, 1999). The major proposed revisions included the following: removing the general prohibition against creditors' noting or inquiring about applicant characteristics such as race, national origin, and sex for nonmortgage credit; requiring creditors to retain certain records for prescreened credit solicitations; and expanding from 12 to 25 months the record retention period for most business credit applications.

For public utilities, securities, and business credit, credit extended to governments, and incidental credit (for example, credit extended by a physician), Regulation B provides exceptions from certain of the notice, record retention, and other requirements. The Board proposed to retain the general categories of exceptions with some modifications. Other proposed revisions to the regulation (and to the official staff commentary) involved the definition of an "application" (including guidance on the distinction between an inquiry about credit and an application for credit); the definition of "creditor;" the term "adverse action;" the credit evaluation of married and unmarried applicants; and what constitutes evidence of a joint application for credit.

In addition to comments on the proposed revisions, the Board requested specific suggestions for other revisions that would facilitate compliance with, or improve, the regulation. Approximately 750 comments were received on the proposed rulemaking, and are discussed below under the relevant sections. Industry commenters opposed most of the major proposed revisions to the regulation, but provided suggestions for additional revisions to help facilitate compliance with the regulation, such as providing additional reasons, or clarifying existing reasons, for adverse action on the model forms. Most of the comments addressed the proposal to remove the prohibition on data notation,

expressing views both for and against. Amendments to several provisions of the staff commentary relating to adverse action notices that had previously been proposed are not being adopted at this time in order to allow the Board to solicit supplemental comment.

III. Summary of Revisions to the Regulation

Major revisions adopted by the Board include rules that adjust the limited exceptions for public utilities credit (§ 202.3(a)); create an exception to the general prohibition against inquiring about, or noting, applicant characteristics for nonmortgage credit transactions for the purpose of conducting a self-test (§ 202.5(b)(1)); and require record retention for certain prescreened credit solicitations (§ 202.12(b)(7)). Other amendments clarify the definitions of "adverse action" (§ 202.2(c)) and "creditor" (§ 202.2(l)); the rules for evaluating married and unmarried credit applicants (§ 202.6(b)(8)); and certain rules about obtaining signatures of nonapplicants (§ 202.7(d)(1)).

IV. Section-by-Section Analysis

The following discussion addresses the regulatory revisions section-by-section. Technical and non-substantive revisions generally are not separately discussed. Revisions to the official staff commentary are addressed in Parts V and VI.

Section 202.1—Authority, scope and purpose

There are no revisions to this section.

Section 202.2—Definitions

Sections 202.2(c)(1) and (2), and 202.2(l) have been revised. Proposed revisions to § 202.2(f) were not adopted.

2(c) Adverse action

2(c)(1)

Adverse action on a class of accounts—Section 202.2(c)(1)(ii) provides that adverse action includes a creditor's termination of or unfavorable change to the terms of an account, unless the action affects "all or a substantial portion of a class of the creditor's accounts." Under the proposal, "substantial portion" was changed to "substantially all" to clarify that a creditor's action must affect the overwhelming majority of accounts in a designated class to be excluded from the definition of adverse action. This revision emphasized that the exception applies only when the creditor's action is not based on the individual credit characteristics of the affected accountholders. For example, the exception would apply where a creditor terminates all secured credit accounts because it no longer offers that type of credit. The exception would not apply if the creditor terminated only those secured credit accounts that could not be moved into another card program after an evaluation of the individual credit characteristics of the accountholders.

Industry commenters expressed concern that the proposal would significantly narrow the application of the exception. Some of these commenters noted that adverse action notices would serve no useful purpose in the circumstances outside the narrower exception. On the other hand, community groups urged the Board to revise the exception so that it would apply only if all accounts in a class were adversely affected.

The revision has been adopted by the Board as proposed. The ECOA and Regulation B require creditors to give consumers reasons for an adverse credit decision. This notice requirement enables some recipients to identify and remedy errors in credit

reports and credit problems generally, and may also help in the detection of unlawful credit discrimination. The exception in § 202.2(c)(1)(ii) is intended to address the limited circumstance where an adverse action notice will not likely serve the intended informational or antidiscrimination goals. The Board expects to request comment in the future on guidance for defining a "class of accounts."

2(c)(2)

Section 202.2(c)(2)(iii) has been revised to conform to changes in § 202.2(c)(1)(ii).

2(f) Application

The Board proposed to revise § 202.2(f) to include in the definition of application a request for a preapproved loan under procedures in which a creditor issues creditworthy persons a written commitment to extend credit up to a designated amount that is valid for a designated period of time, even if subject to conditions. In the final rule, the proposed language on preapprovals is not included in the regulation's definition of application, but is instead contained in the official staff commentary, which clarifies that certain preapprovals are covered by the definition of application. (See comment 2(f)-5 and the supplementary information thereto). A technical change in the definition (replacing "established" with "used") has been made for clarity.

2(l) Creditor

Section 202.2(l) has been adopted substantially as proposed. The final rule changes the words "regularly participates in the decision of whether or not to extend credit" to "regularly participates in a credit decision, including setting the terms of the credit" to clarify the definition of "creditor."

Some commenters agreed with the proposed clarification, noting that it makes the rules parallel for insured depository institutions and private-sector loan intermediaries. A few commenters disagreed with the proposal, believing the scope of the definition was unclear. Other commenters asked that the Board clarify that a potential assignee that establishes terms of general applicability for credit extensions that it may acquire, but does not otherwise participate in setting the terms of individual loans, is not a creditor for purposes of the regulation. The final rule clarifies that the definition of creditor includes those who make the decision to deny or extend credit, as well as those who negotiate and set the terms of the credit with the consumer. But a potential assignee who establishes underwriting guidelines for its purchases but does not influence individual credit decisions is not a creditor. (See comment 2(l)-1).

Section 202.3—Limited Exceptions for Certain Classes of Transactions

The regulation provides certain exceptions for public utilities, securities, incidental, and government credit. Each of these types of credit remains subject to the general prohibition against discrimination on a prohibited basis. The exceptions generally address issues such as record retention, furnishing credit information, and inquiries about marital status and spousal information.

Revisions were proposed to the exceptions for public utilities, securities, and incidental credit. Based on comments and further analysis, the Board believes that providing certain exceptions is still appropriate, and that applying the rules of Regulation B in their entirety would not contribute substantially to effectuating the purposes of the Act, as discussed below.

3(a) Public utilities credit

3(a)(2) Exceptions

Public utilities credit refers to extensions of credit that involve public utility services if the charges for the service, delayed payment, and any discount for prompt payment are filed with or regulated by a governmental unit, such as a public utilities commission. Public utilities credit is currently subject to all of the regulatory requirements except those relating to furnishing credit information to consumer reporting agencies, collecting information about marital status, and retaining records. Under the proposed rule, only the exception for record retention would have been retained. The final rule has been modified. As discussed below, public utilities credit is now subject to all of the regulatory requirements except those relating to record retention and marital status information.

Commenters generally supported the proposal to remove the exception relating to the furnishing of credit information under § 202.10 (concerning accounts held or used by spouses). A number of commenters believed that removing the exception would help spouses build credit histories. A few commenters mistakenly thought the proposal required public utility companies that do not currently report payment history information to start reporting such information. The requirements of § 202.10 apply only to creditors that furnish credit information to consumer reporting agencies or to other creditors. Such creditors are required to furnish information that reflects the participation of both spouses if the applicant's spouse is permitted to use or is contractually liable on the account. Because some creditors now consider public utility payments as a source of repayment

history for underwriting purposes, eliminating the exception from § 202.10 seems necessary to facilitate the availability of this information to such other creditors.

Upon further analysis, the Board has retained the marital status exception. Although some public utilities do not currently collect marital status information, or are prohibited by state law from doing so, others may collect such information. Permitting utility firms to collect such information is consistent with eliminating the exception for furnishing credit information—those creditors that collect marital status information and report to credit bureaus will be able to reflect the participation of both spouses on the account.

The final rule retains the exception for record retention because public utility companies must keep records pursuant to regulations of other governmental bodies—often for longer periods of time than required by the ECOA. Extending this exception is appropriate because requiring record retention pursuant to Regulation B would not contribute substantially to effectuating the purposes of the Act.

3(b) Securities credit

3(b)(2) Exceptions

Securities credit is credit subject to section 7 of the Securities Exchange Act of 1934, regulations under that act, and rules of the self-regulatory organizations. Brokers and dealers are required to inquire about the financial activities of spouses to comply with the rules of the Securities Exchange Act and the National Association of Securities Dealers. For this reason, Regulation B excepts securities credit from several provisions including, among others, rules governing signature requirements, record retention, and asking about the sex of an applicant.

Because securities credit is subject to an extensive regulatory scheme, the Board proposed to retain the limited exceptions for such credit, with one exception—information about the sex of an applicant. The proposal to eliminate the exception was for consistency with the Board's proposal under § 202.5 to remove the general prohibition against the collection of applicant characteristics for nonmortgage credit. Since the Board has retained the general prohibition, there is a continued need for an exception regarding the sex of an applicant. Technical revisions have been made for clarity with no substantive change intended.

3(c) Incidental credit

3(c)(1) Definition

Currently, incidental credit is limited to consumer credit that is not: (1) made pursuant to the terms of a credit card account, (2) subject to a finance charge under Regulation Z (Truth in Lending), or (3) payable by agreement in more than four installments. This type of credit might be extended by a local merchant that does not normally extend credit, for example, to a long-standing customer; or by a doctor or lawyer, as an accommodation to a patient or a client.

The proposed rule would have expanded the definition of incidental credit to include incidental business credit. While some commenters supported the expansion, other commenters opposed it because of concerns about discrimination against minority-owned businesses. Upon further analysis, based on commenters' concerns about possible discrimination, the Board has retained the current definition of incidental credit.

3(c)(2) Exceptions

Incidental credit is excepted from a number of provisions in the regulation including those that govern requests for information about an applicant's marital status, an applicant's spouse or former spouse, and sources of an applicant's income. The proposed rule would have eliminated the exception for requesting information about the sex of an applicant, consistent with the Board's proposal under § 202.5 to remove the general prohibition against the collection of applicant characteristics for nonmortgage credit. Since the general prohibition has been retained, this exception also has been retained.

3(d) Government credit

The exceptions for government credit apply to extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities. The exceptions do not apply to credit extended by such entities; for example, a government agency that extends credit to a consumer who applies for individual credit may not require the signature of another person (including the spouse) on a credit instrument if the applicant is individually creditworthy. The Board believes that extending the exceptions for government credit remains appropriate, as applying the rules would not contribute substantially to effectuating the purposes of the Act.

Section 202.4—General Rules

Section 202.4 has been revised, as proposed, to incorporate general rules that apply under the regulation, some of which were previously in other sections. Specifically, § 202.4(a) contains the general rule against discrimination; § 202.4(b) (former § 202.5(a)) contains the general rule against discouraging applications; and

§ 202.4(c) (former § 202.5(e)) contains the requirement for written applications in mortgage transactions covered by § 202.13(a).

Section 202.4(d) is new and generally requires written notices and other disclosures to be provided in a clear and conspicuous manner and in a form an applicant may retain. Most of the other consumer protection regulations administered by the Board already contain these standards.

The clear and conspicuous and the retainability standards have been revised in response to commenters' concerns. Some commenters stated that the proposed language appeared to suggest that disclosures under the sections specified (§§ 202.5, 202.5a (now § 202.14), 202.9, and 202.13(c)) are required to be given in writing. While certain disclosures under §§ 202.9 and 202.14 are required to be in writing, others may be provided orally. Accordingly, the final rule provides generally that if a disclosure is given in writing, it must be clear and conspicuous and in a form the applicant may retain.

Other commenters suggested that the retainability requirement should not apply to certain disclosures given on or with an application, such as those under §§ 202.5 and 202.13. These disclosures relate, for example, to the option not to list income from alimony, child support, or separate maintenance, and to the collection of information about an applicant's national origin, race, sex, marital status, and age for mortgage credit. These disclosures are relevant primarily at the time of application. In addition, since the application will be submitted to the creditor, the only way to provide the disclosures to the applicant in retainable form would be to provide an extra copy of the application. The final rule exempts disclosures under §§ 202.5 and 202.13 (even if provided in writing) from the retainability requirement.

In addition, the Board issued an interim final rule in April 2001 concerning the electronic delivery of disclosures under Regulation B. (66 FR 17779, April 4, 2001.) A new § 202.4(b) was added in that rulemaking to provide rules on foreign-language disclosures. The present rulemaking re-designates that revision as § 202.4(e).

Section 202.5—Rules Concerning Requests for Information

Section 202.5 has been revised from the proposal. The final rule adopted by the Board retains the general prohibition against creditors' inquiring about, or noting, an applicant's sex, race, color, religion, or national origin for nonmortgage credit products, subject to some exceptions, including a new exception that permits collection for the purpose of conducting a self-test that meets the requirements of § 202.15, as discussed below.

Because the ECOA makes it unlawful for creditors to consider any prohibited bases of discrimination in a credit transaction, Regulation B has generally prohibited creditors from inquiring about, or noting, an applicant's sex, race, color, religion and national origin. This general prohibition was intended to discourage discrimination, based on the premise that if creditors cannot inquire about or note applicants' personal characteristics, such as national origin or race, they are less likely unlawfully to consider the information in connection with a credit transaction.

For home mortgage lending, there were specific concerns at the time the regulation was adopted in the 1970s about discrimination based on applicants' personal characteristics; and thus Regulation B requires creditors to record the applicant's national origin or race, marital status, sex, and age in applications for purchasing or refinancing home loans. (This requirement was added in 1977 when the regulation was amended to

implement expanded coverage of the ECOA to include national origin, race, and other prohibited bases of discrimination. As enacted by the Congress in 1974, the ECOA initially barred discrimination only on the basis of sex and marital status.) The data collection enables enforcement agencies to better monitor home mortgage lenders' compliance with the ECOA. In 1989, the Congress amended the Home Mortgage Disclosure Act (HMDA), implemented by the Board's Regulation C, to impose a similar data collection requirement that applies to mortgage loans more broadly, encompassing home improvement loans in addition to purchase-money and refinanced home loans.

In 1995, the Board proposed to remove the prohibition against noting applicants' personal characteristics for nonmortgage credit products. The proposed revision was published at the time the federal financial regulatory agencies were revising regulations that implement the Community Reinvestment Act to respond to concerns about whether creditors were meeting the needs of their communities, particularly for small business and small farm lending. The majority of commenters on the 1995 proposal opposed removal of the prohibition. After extensive deliberation, the Board withdrew the proposal in December 1996, and stated that, given the political sensitivity of the issues, the matter was better left to the Congress.

In 1998, the Board again solicited comment in its Advance Notice of Proposed Rulemaking on removal of the prohibition. The Board raised the issue in response to concerns that continued to be expressed by the Department of Justice and some of the federal financial regulatory agencies. These agencies pointed to anecdotal evidence of discrimination in connection with small business and other types of credit. Comments

received in response to the Advance Notice were fairly evenly divided between those in support of, and those in opposition to, lifting the ban. Most of those who favored lifting the prohibition were focused, however, on removing it for small business lending only.

In its August 1999 proposed rule to amend Regulation B, the Board proposed to remove the general prohibition against inquiring about or noting information about an applicant's race, national origin, religion, color, or sex to allow voluntary collection of such data for nonmortgage credit products. Consideration of applicant characteristics such as race in evaluating creditworthiness, except as permitted by law, would continue to be prohibited. The Board recognized that removing the prohibition could give loan officers access to information on applicants' personal characteristics that might not otherwise be available and, thus, could provide the opportunity for unlawful discrimination. Also, the usefulness of the data for fair lending enforcement would depend on whether creditors implemented standards for uniform collection of the data—such as by product, for all applicants, or for all borrowers. Nevertheless, the Board believed that removing the prohibition for all nonmortgage credit might allow issues of credit discrimination to be better addressed. Because data notation by the creditor would be on a voluntary basis, creditors could target those products where they might have particular concern about potential discrimination.

The proposed rule lifting the prohibition also provided that applicants could not be required to provide information about their race, national origin, religion, color, or sex. Creditors that chose to engage in data notation would have been required to disclose—at the time they requested the information—that providing the data was optional, and that the creditor would not take the information (or the applicant's decision not to provide it)

into account in any aspect of the credit transaction. A proposed model notice was included.

More than 600 commenters addressed the issue of data notation raised by the 1999 proposal. Many commenters—including most of the federal financial regulatory agencies, the Department of Justice, the Department of Housing and Urban Development, small businesses and their trade associations, consumer advocates, community organizations, individual consumers, and a few banks—favored removing the prohibition. Enforcement agencies and others believed that creditors' ability to collect and analyze information about the ethnicity and race of applicants and an agency's ability to review that information could provide a better fair lending tool than prohibiting the notation of such information. A significant number of these commenters favored removing the prohibition for all nonmortgage credit products, but most of those who favored lifting the ban focused their comments on small business lending.

Most of the commenters favoring removal of the prohibition believed that mandatory collection is the more effective way to monitor and enforce fair lending compliance for small business and other nonmortgage loans. Consumer advocate and community group commenters generally endorsed voluntary data collection, but often as a first step toward mandatory data collection and disclosure. These commenters also believed that standards for data collection were needed and urged the Board to develop HMDA-like standards for data collection on nonmortgage loans. These commenters said that allowing data notation would enable creditors and government agencies to monitor for possible discriminatory practices, and might enable creditors to better target underserved markets. Some commenters believed that, in the case of home mortgage

lending, the mandatory collection and disclosure of data have increased access to those products for low-income and minority consumers.

Most industry commenters preferred to retain the general prohibition. A number of them indicated that they would not collect data if the prohibition were removed. These commenters expressed reservations about the Board's lifting the prohibition, including concerns about the likely pressure to collect data and the risk of litigation based on unreliable data. Commenters also expressed concern that creditors that obtained data about ethnicity, race, and other personal characteristics would be placed at a competitive disadvantage relative to other lenders because some consumers might find notation offensive. Some commenters expressed concern that a requirement for mandatory collection of data would soon follow the lifting of the prohibition, which would impose substantial burdens and costs on institutions. Many commenters criticized the lack of standards to ensure the collection of accurate and reliable data. They expressed concern, for example, that the lack of any uniform guidance regarding how to determine the minority-owned or women-owned status of small businesses would render any data meaningless. Some commenters believed the current rule has been effective in discouraging discrimination by denying creditors access to information that would enable them to discriminate on a prohibited basis. Some commenters, including individual consumers, asserted that data notation intrudes upon consumers' privacy.

Some commenters indicated that if the prohibition were removed, they would likely not collect information about applicants' personal characteristics unless collection was subject to the ECOA's self-test privilege, and urged the Board to extend the self-test privilege to information about applicants' personal characteristics. (Under the statutory

amendments of 1996, the self-test privilege protects creditors against disclosure of the results of a self-test to a government agency in an examination or investigation or by an agency or an applicant in any proceeding or lawsuit alleging a violation of the ECOA or Regulation B.) In the August 1999 proposal, the Board noted that creditors choosing to collect applicant characteristics would likely do so on the application form or in the application process, and therefore the privilege would not apply to this data collection. Industry commenters challenged this view of the scope of the self-test privilege.

Some congressional commenters submitted a legal analysis which included the argument that the prohibition against inquiring about applicants' personal characteristics is required by the ECOA and must be enforced by the Board, and which stated that creditors would continue to be barred from collecting information about personal characteristics even if the Board amended Regulation B to remove the regulatory prohibition. They argued in their legal analysis that the ECOA's enumeration of exceptions to the general prohibition against discrimination on the basis of race, color, sex, national origin, religion, age and certain other characteristics implied a prohibition on any other collection by creditors of data regarding these personal characteristics of applicants. The Board disagrees with this analysis; the fact that the ECOA provides that certain types of inquiries regarding personal characteristics are permitted does not mean that other inquiries are prohibited.

The Board believes that it has the authority under the ECOA to permit data collection. The Board has express authority under the ECOA to adopt regulations that carry out the purposes of the Act. The ECOA does not contain an express prohibition against inquiring about an applicant's personal characteristics; it prohibits the practice of

discriminating on a prohibited basis, a prohibition that the Board's amendment does not change. The Board adopted its regulatory provision prohibiting collection of personal characteristics data in order to further the purpose of the ECOA. The Board believes it is well within its authority to adopt the self-testing exception to its regulatory prohibition because it better achieves the purposes of both the central prohibition against discrimination contained in the ECOA and the self-testing provision in the ECOA.

The fact that the ECOA provides that certain types of inquiries regarding personal characteristics are permitted does not imply that other inquiries are prohibited. The list of exceptions in the ECOA is needed for another purpose. The list allows creditors to inquire about characteristics of an applicant and to use that information in the credit decision—such as asking about marital status to determine property rights. Without expressly permitting these inquiries, a creditor could not use information about an applicant's personal characteristics in making its decision without violating the ECOA's central prohibition. Removal by the Board in whole or in part of the regulatory prohibition on inquiring about characteristics of applicants does not allow the creditor to consider this information in violation of the ECOA.

Based on comments received and its own analysis and for the reasons stated below, the Board has retained the general prohibition on inquiring about, or noting, information about nonmortgage credit applicants' personal characteristics, such as race and national origin; and has created an exception for collection of this information by a creditor for the purpose of conducting a self-test under § 202.15.

The Board adopted its regulatory provision prohibiting collection of personal characteristic data for nonmortgage credit in order to further the purposes of the ECOA.

The Board believes that the existing prohibition, by restricting creditors' access to information about applicants' personal characteristics, contributes to reducing or avoiding credit discrimination. Lifting the prohibition and permitting creditors to collect and use data on applicant characteristics for any purpose without limitation, as was proposed, would create some risk of use of the data for discriminatory purposes. For example, lifting the prohibition without constraints could have resulted in selective inquiries or notation. Moreover, without standards, the reliability of voluntarily collected data is questionable.

At the same time, creditors desiring to monitor and assure compliance with the ECOA by collecting information about applicants' personal characteristics should not be prevented from doing so. The Board believes that creating an exception for collecting such information as part of a self-test would further the purposes of the ECOA by providing creditors with an additional tool for measuring and improving their levels of compliance with the ECOA and Regulation B. Permitting data notation as part of a self-test would enable creditors to develop compliance programs that utilize data about applicant characteristics in a controlled and targeted manner. The Board has, therefore, created an exception to the general regulatory prohibition to permit creditors to inquire about, and note, information about nonmortgage credit applicants' personal characteristics for the purpose of conducting self-tests under § 202.15.

The Congress adopted the self-test privilege in 1996 as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Pub. L. 104-208, 110 Stat. 3009). The purpose for creating a self-test privilege was "to encourage institutions to undertake candid and complete self-tests for possible fair lending violations and to act

decisively to correct any discovered problems." S. Rep. No. 104-185, at 15 (Dec. 14, 1995). Section 202.15 of Regulation B, which implements the self-test provision, defines a self-test as a program, practice, or study designed and used specifically to determine compliance with the Act and regulation, that creates data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions. The privilege applies only if the creditor takes appropriate corrective action when it determines that it is more likely than not that a violation has occurred. The results of the self-test cannot be obtained by a government agency in an examination or investigation, or by an agency or an applicant in any proceeding or lawsuit alleging a violation of the ECOA or Regulation B.

As adopted by the Board, § 202.5 of the final rule retains the general prohibition on collecting information about applicants' personal characteristics and creates an exception to permit the collection of personal characteristics for the purpose of conducting a self-test. Section 202.5(a) now contains the general rules previously contained in former § 202.5(b). Section 202.5(a)(1) has been revised to apply to information requests in connection with a credit transaction to reflect more accurately the scope of the regulation. Certain headings in § 202.5(a) have been revised for clarity. Former §§ 202.5(a) and (e) have been moved to § 202.4 to facilitate compliance with the regulation.

New § 202.5(b) sets forth the general prohibition against a creditor's inquiring about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction. The general prohibition incorporates the rules

previously contained in the first sentences of former § 202.5(d)(3) and (5). The general prohibition is subject to the exceptions found in subsections (b)(1) and (2).

Section 202.5(b)(1), which is new, permits creditors to inquire about, and note, personal characteristics such as race or national origin for the purpose of conducting a self-test under § 202.15 to determine the creditor's compliance with the ECOA or Regulation B. To qualify for this exception, the creditor must satisfy all the elements of a self-test as set forth in § 202.15, and must provide the disclosures required by § 202.5(b)(1) at the time the information is requested. (A model notice is included in Appendix C.)

This exception to the general prohibition applies to a self-test even if the creditor should subsequently lose or waive the self-test privilege by disclosing any privileged information as provided in § 202.15(d)(2)(i) and (ii). Other laws or regulations, such as the Gramm-Leach-Bliley Act privacy regulations, may restrict other disclosure of such data.

Creditors that opt to conduct a self-test may rely upon the principles discussed below. Much of this guidance is set forth in § 202.15 and the accompanying official staff commentary and this preamble. Any additional guidance, including the guidance provided in this preamble, will be incorporated into the official staff commentary at a later date, as appropriate. A "self-test" is defined as any program, practice, or study that is designed and used specifically to determine the extent or effectiveness of a creditor's compliance with the Act or Regulation B and creates new data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions. 12 C.F.R. § 202.15(b)(1).

The constraints imposed by the regulation's self-test provision will help ensure that the information is not used to discriminate on a prohibited basis and is only collected and used for the purpose of monitoring compliance with the ECOA and Regulation B and for taking appropriate corrective action. Any information about applicant personal characteristics collected as part of a self-test would have to be kept separate from the loan or application files and from other business records related to credit transactions, in order for the privilege to apply. Thus, creditors may not place such data with non-privileged business records, such as the credit application, loan documents, or minutes of loan-committee meetings. See 12 C.F.R. Supp. I, §§ 202.15(b)(1)(ii)-2 and 202.15(b)(3)(ii)-1. In response to the issue raised by certain commenters, the Board notes that the existing regulation regarding the self-test privilege does not prohibit collection of data in the application process. Although creditors may collect the information during the application process, the information may not be placed with nonprivileged business records, such as the credit application or loan documents, and may not be considered in extending credit.

Information about applicants' personal characteristics that is collected pursuant to this exception should be analyzed in a timely fashion as part of a program, practice, or study under the self-test provision. Timely analysis of data is essential to ensure that a self-test was conducted to determine compliance with the ECOA and Regulation B. Creditors retain the flexibility to establish the time, place, scope, and methodology of any self-test. See 12 C.F.R. Supp. I, § 202.15(b)(3)(i)-1. In preparing to conduct a self-test that involves the collection of applicants' personal characteristics, creditors would be expected to develop a written plan that describes, among other things, the specific

purpose of the self-test, the methodology to be used, the geographic area covered by the test, the types of credit transactions involved, the identity of the entity that will conduct the test and analyze the data (such as the creditor's audit department), and the timing of the test, including the expected start date and end date or the expected duration of the test. The creditor is generally required to retain records regarding a self-test, including personal-characteristics data and all other written or recorded information about the self-test for 25 months after a test has been completed (and longer in the case of an investigation or enforcement proceeding or civil action of which the creditor has received notice.) See 12 C.F.R. § 202.12(b)(6).

Currently, creditors may use "mystery shoppers" or fictitious applicants ("testers") to determine compliance with the ECOA at the pre-application stage. With the recommended revision to the regulation, creditors would have the flexibility to utilize and develop a variety of self-testing techniques (internally or using independent third-parties) to ensure ECOA compliance at various stages of a credit transaction using information collected about applicant characteristics combined with other information. For example, a self-test using information about actual applicants' personal characteristics might better determine whether, at the application stage, persons seeking credit are being treated differently from other applicants on the basis of race, age, sex, religion, or national origin; or, for loan originations, whether disparities based on race or other prohibited bases of discrimination may exist in the terms and conditions of loan agreements entered into by similarly situated applicants. A self-test might also be conducted to test account review or collection procedures, or other aspects of the credit transaction where unlawful discrimination might occur. A creditor may not use the data collected under the new

exception for other purposes, such as marketing, unless necessary to take corrective action, without losing the self-test privilege.

The data about applicant characteristics collected as part of a self-test may only be used and evaluated by persons conducting the self-test. The data may not be used or evaluated by persons involved in a credit transaction, except in the context of taking corrective action when it is more likely than not that a violation has occurred. The data may not be used in a credit decision. In collecting information about personal characteristics as part of a self-test, creditors must disclose to applicants that providing the information is optional, that the information is being collected to monitor for compliance with the ECOA and will not be used in making a credit decision, and where applicable, that certain information will be noted based on visual observation or surname.

The self-test provision requires that creditors take appropriate and timely corrective action when the self-test shows that it is "more likely than not" that a violation of the ECOA or Regulation B has occurred, even though no violation has been formally adjudicated. 12 C.F.R. § 202.15(c)(1) (emphasis added). Creditors should ensure that corrective action is taken on a timely basis and is "reasonably likely to remedy the cause and effect of a likely violation." 12 C.F.R. §§ 202.15(a)(2) and 202.15(c)(1). The commentary to § 202.15(c) suggests various forms of corrective action that may be appropriate, such as correcting institutional policies or procedures that may have contributed to the likely violation and adopting new policies as appropriate, or improving audit and oversight systems to avoid a recurrence of the likely violation. See 12 C.F.R. Supp. I, § 202.15(c)(2)-3. The appropriateness of a particular form of corrective action is determined on a case-by-case basis and the scope of the corrective action that is required

depends upon the scope of the self-test. See 12 C.F.R. Supp. I, § 202.15(c)(2)-1. No corrective action is required if a self-test does not identify any likely violation of the ECOA or Regulation B. See 12 C.F.R. Supp. I, § 202.15(a)(2)-1.

Section 202.5(b)(2) permits a limited inquiry that may indicate the sex of an applicant through an optional designation of title on an application form. This exception is identical to the exception previously contained in former § 202.5(d)(3). No substantive change is intended.

Section 202.5(c) is substantially unchanged. Section 202.5(d)(1)-(3) incorporates the provisions previously contained in former § 202.5(d)(1), (d)(2), and (d)(4) without substantive change.

New § 202.5(e) permits creditors to inquire about the permanent residency and immigration status of an applicant or any other person in connection with a credit transaction. This rule was previously contained in former § 202.5(d)(5). The exception for inquiries about the permanent residence and immigration status has been conformed to the general rule in § 202.5(b), which explicitly covers both an applicant and any other person in connection with a credit transaction, such as a guarantor or co-signer.

Section 202.5a—Rules on Providing Appraisal Reports

This section now appears as § 202.14.

Section 202.6—Rules Concerning Evaluation of Applications

Sections 202.6(b)(8) and (9) have been adopted, as proposed.

6(b) Specific rules concerning use of information

6(b)(8)

Section 202.6(b)(8) of the regulation, adopted as proposed, makes clear that a creditor may not evaluate married and unmarried applicants by different standards. Some commenters were concerned that the rule would prevent creditors from considering state property laws. The rule provides that the requirement applies except as otherwise permitted or required by law. Thus, a creditor may consider the rules in §§ 202.5, 202.6, and 202.7 in evaluating applications. But a creditor that aggregates the incomes of married co-applicants, for example, is required to aggregate the incomes of unmarried co-applicants under this rule.

6(b)(9)

Section 202.6(b)(9) has been adopted as proposed, consistent with the Board's decision to create an exception to the general prohibition in § 202.5 (against collecting applicants' personal characteristics) for the purpose of conducting a self-test under § 202.15. This provision clarifies that data collected for a self-test may not be used in any aspect of a credit transaction.

Section 202.7—Rules Concerning Extensions of Credit

Section 202.7(d)(1) has been revised.

7(d) Signature of spouse or other person

Section 202.7(d)(1) provides that a creditor may not require the signature of a person other than the applicant, or joint applicant, on any credit instrument if the applicant is individually creditworthy. Over the years, the Board has received questions about how creditors can establish that applicants intend to apply jointly. Although the

issue arises in consumer credit, it is more prevalent in the context of business credit. Some creditors have sought to treat the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit. The proposed rule bars a creditor from presuming that the submission of joint financial information constitutes an application for joint credit.

Some commenters disagreed with the proposal, stating that a creditor should always be able to deem the submission of joint information as an application for joint credit. Other commenters believed the rule should simply state that the mere submission of joint information may not be used to establish intent and something more is needed.

Evidence of intent to apply for joint credit requires more than the submission of joint financial information. The fact that a credit applicant owns property with another and submits information concerning the property and the joint owner in order to establish creditworthiness does not mean that both owners intend to be obligated for the extension of credit; other evidence must expressly reflect that intent. Section 202.7(d)(1) has been adopted as proposed. Additional guidance concerning how to evidence intent to apply for joint credit is provided in the official staff commentary in comment 7(d)(1)-3. Also, see the supplementary information to Appendix B concerning revisions to Model Application Forms 1-4.

Section 202.8—Special-Purpose Credit Programs

The proposed revisions to § 202.8(a)(3) have not been adopted.

8(a) Standards for programs

Section 202.8(a)(3) addresses special-purpose credit programs offered by for-profit organizations, or in which for-profit organizations participate. Under the proposed

rule, that section would have been revised to delete the phrase "special social needs." The meaning of the phrase is specifically set forth in § 202.8(a)(3)(i) and (ii). Although few commenters addressed the issue, there was some concern that by removing the phrase, a creditor might not understand that the program must meet special social needs. Upon further analysis, because the legislative history of this provision is clear that special-purpose credit programs offered by for-profit organizations must meet special social needs, and because the statute includes the phrase, the proposed revision was not adopted.

Section 202.9—Notifications

A technical revision has been made to § 202.9(a)(3)(i)(B). The proposed revision to § 202.9(a)(3)(ii)(A) has not been adopted. Section 202.9(b)(2) has been revised as proposed.

9(a) Notification of action taken, ECOA notice, and statement of specific reasons

9(a)(3) Notification to business credit applicants

A technical revision has been made to § 202.9(a)(3)(i)(B) to omit the proposed language requiring a creditor to provide the disclosure of an applicant's right to a statement of reasons in a form the applicant may retain. New § 202.4(d) requires that disclosures provided in writing be clear and conspicuous and in a form the applicant may retain. Since the disclosure required by § 202.9(a)(3)(i)(B) must be in writing, the language referring to retention is deleted as unnecessary.

The regulation provides for exceptions from certain notification and record retention requirements for business credit. The Board is required periodically to review the exceptions to determine whether they should be retained. The ECOA provides that

the Board may extend an exception if the Board determines, after making an express finding, "that the application of [the Act] or of any provision of [the Act] of such transaction would not contribute substantially to effecting the purposes of [the Act]." 15 U.S.C. 1691b. As discussed below, the Board expressly finds that application of additional provisions of the ECOA to business credit would not contribute substantially to effectuating the purposes of the Act.

In the proposal, the Board stated its belief that applying the notification rules in full, or changing the current threshold of $1 million in gross revenues to distinguish between large and small businesses for purposes of Regulation B, would not contribute substantially to effectuating the purposes of the ECOA. The $1 million threshold is consistent with the legislative history of the Women's Business Ownership Act of 1988 (Pub. L. No. 100-533, 102 Stat. 2692), which amended the ECOA. That history suggests that the amendments were intended primarily to apply to small businesses. When the rule was adopted in 1989, 86 percent of all businesses had gross revenues of $1 million or less a year; nearly the same percentage of all businesses (85 percent) currently fall below that threshold. In addition, a gross revenue test is likely easier for creditors to administer than other suggested tests, such as basing the exceptions on the sophistication of the applicant. Commenters did not oppose this aspect of the proposal.

The Board proposed to revise § 202.9(a)(3)(ii)(A) to require that creditors disclose, to businesses with gross revenues in excess of $1 million in the preceding fiscal year, the right to a written statement of reasons for denial or other adverse action. Under the regulation, creditors must provide a written statement of reasons for adverse action if the applicant requests the statement within 60 days of being notified of adverse action.

But although the regulation requires creditors to notify business credit applicants (orally or in writing) of the adverse action, it does not require notification of the right to obtain the statement of reasons. The Board stated in its proposal that requiring the disclosure should not significantly increase the compliance burden for creditors, and would benefit applicants who may not be aware of their right to the written statement of reasons.

Some commenters supported or did not oppose the proposed change; some commenters urged that creditors be required to provide business applicants with a written notice of reasons for adverse action, or of the right to request such reasons. Other commenters suggested that notification of the right to reasons is unnecessary because businesses in this category are sophisticated and communication between the creditor and the applicant is extensive and ongoing.

Based on the comments and further analysis, the Board believes that notification of the right to request the reasons for adverse action would not contribute substantially to effectuating the purposes of the ECOA. Accordingly, the final rule does not include the requirement.

9(b) Form of ECOA notice and statement of specific reasons

9(b)(2) Statement of specific reasons

Section 202.9(b)(2), adopted as proposed, clarifies that whether a creditor's denial of credit is based on the creditworthiness of the applicant, a joint applicant, or guarantor, the reasons for adverse action must be specific. For example, a general statement that "the guarantor did not meet the creditor's standards of creditworthiness" is insufficient.

The legislative history of the requirement to provide specific reasons for adverse action indicates that the purposes of the disclosure are to help achieve the anti-

discrimination goals of the ECOA and to educate and inform consumers. These dual purposes are served by the clarification in § 202.9(b)(2). For example, the disclosure may discourage a creditor from discriminating based on a co-applicant's or guarantor's race, sex, age, or other prohibited basis. Also, the disclosure may help educate and inform applicants, co-applicants, or guarantors as to reasons for denial that are not apparent from looking at their credit report.

Many commenters were concerned about the co-applicant's or guarantor's privacy when the reasons for adverse action pertaining to creditworthiness are given to the primary applicant. When a person agrees to be a co-applicant, guarantor, or similar party, however, there is (or should be) a general understanding that information will be shared. Accordingly, the rule has been adopted as proposed.

Section 202.10—Furnishing of Credit Information

There are no revisions to this section.

Section 202.11—Relation to State Law

There are no revisions to this section.

Section 202.12—Record Retention

The proposed revisions to § 202.12(b)(1)-4 have not been adopted. New § 202.12(b)(7) has been adopted, as proposed.

12(b) Preservation of records

Section 703(a)(4) of the ECOA requires creditors to retain records or other data related to business loans as may be necessary to evidence compliance with the Act. These records must be retained for no less than one year, unless otherwise excepted. Section 202.12(b) requires creditors to retain credit applications and other records for 12

months for credit extended to businesses with gross revenues of $1 million or less. For businesses with gross revenues in excess of $1 million, a creditor must retain records for 60 days. If within that time the applicant requests in writing the reasons for adverse action, or requests that records be retained, the creditor must retain the records for 12 months.

The Board proposed to extend the record retention period to 25 months for credit applications involving businesses with gross revenues of $1 million or less in response to concerns expressed by some Reserve Banks and enforcement agencies about the short duration of the record retention period for business credit. (The rule would remain unchanged for credit applications involving larger businesses or extensions of trade credit, credit incident to a factoring agreement, or other similar types of business credit.) The volume of business loans on a yearly basis for some financial institutions is low, and the banking agencies have changed the frequency of examinations (from 18 to 24 months or, in some instances, to 36 months). Thus, it is sometimes difficult for examiners to obtain an adequate sample in order to determine whether the creditor is complying with the requirements of Regulation B. The Board believed that extending the record retention period would better enable the federal financial regulatory agencies to monitor and enforce compliance with the ECOA. Also, the Board believed that previously expressed concerns about storing business credit files might no longer be compelling given technological advances and the increased use of electronic storage.

Community groups and a civil rights organization supported the proposed extension of the record retention period, to better determine patterns of unlawful discrimination in connection with business credit. Some industry commenters also

supported the proposed extension; they believed compliance would be easier with consistent rules for consumer and small business credit. Most industry commenters opposed the proposal, however, stating that it would impose a significant burden by increasing the need for storage space and equipment and for additional employees. Some of these commenters noted that business documentation is typically more voluminous than documentation for consumer loans, and that a substantial amount of business loan documentation is kept in paper form. One commenter stated that the burden would be greater for smaller creditors than for larger creditors; larger creditors likely benefit from the development of standardized business loan products and credit scoring models, while smaller creditors may rely more heavily on judgmental evaluation and paper documentation. Some commenters believed that records for the 12-month period preceding an examination are sufficient to establish lending patterns within a financial institution.

The final rule retains the current record retention period of 12 months. Although an expanded retention period could assist the enforcement agencies in monitoring and enforcing compliance with the Act, the Board believes that the benefits of expanding the record retention requirement are outweighed by the compliance burdens. For example, the use of electronic record storage for many business credit records is not as prevalent as the Board believed when it issued the proposal.

12(b)(7) Prescreened solicitations

Section 202.12(b)(7) is new and has been adopted to require record retention for certain information used in prescreened credit solicitations so that enforcement agencies can review and analyze creditors' possible use of prohibited bases in connection with

such solicitations. The ECOA prohibits discrimination by a creditor against an *applicant*—a person who has requested or received credit—on a prohibited basis regarding any aspect of a credit transaction. A credit transaction is defined by Regulation B as covering every aspect of an applicant's dealings with a creditor, beginning with requests for information. Thus, the coverage of the ECOA encompasses a person who has, at a minimum, sought credit. But because a person could be discouraged from seeking credit or credit information, the regulation expressly prohibits a creditor from engaging in any practice (including its advertisements) that would *discourage* a reasonable person, on a prohibited basis, from applying for credit.

In some circumstances, consumers do not have to initiate a request for credit, but rather respond to a solicitation from the creditor. Creditors use a number of techniques to identify potential customers. For instance, creditors will often specify criteria to consumer reporting agencies, which then draw on information from credit files to compile lists of persons who meet those criteria. This marketing technique—involving prescreened solicitations—is typically carried out through mailed solicitations as well as by telemarketing. In the marketing of some credit products through prescreened solicitations, creditors often offer discounted introductory rates, attractive credit terms, and enhancements (such as purchase discounts, in the case of credit cards) that may not be available through other application channels.

Prescreened credit solicitations, particularly for credit cards, are not new. With advances in technology that facilitate the building of databases, however, the use of prescreened solicitations has become more commonplace and more sophisticated. Prescreened solicitations can be used to target consumers most likely to use a particular

credit product, or to target segments of the population that are most likely to respond to the offer of credit. Conversely, prescreened solicitations can be used to exclude some consumers from receiving offers of credit. They can potentially be used to target consumers in low-income neighborhoods (which are often predominantly minority) for less favorable credit products or credit terms on the supposition that these consumers are less creditworthy. The Board has become aware (through the compliance examination function of the Board and other federal financial regulatory agencies) of instances in which creditors, primarily in the credit card industry, have used age to identify potential recipients of preapproved credit.

Over the years, there has been concern that Regulation B generally does not apply to marketing through prescreened solicitations. When the regulation was originally implemented in 1975, the definition of "credit transaction" included "solicitation of prospective applicants by advertising or other means." Thus, the prohibition against discrimination based on marital status and sex applied to solicitations. In December 1976—when Regulation B was revised to prohibit discrimination based on national origin, race, and other specified bases—the definition of credit transaction omitted any reference to solicitations. In the final rule, the regulation instead prohibited creditors from discouraging persons on a prohibited basis from applying for credit.

Under the proposed rule, the Board proposed to require that creditors retain their existing records for those prescreened solicitations defined as "firm offers of credit" under the Fair Credit Reporting Act (FCRA). Creditors would retain information about the criteria used to select potential customers, the text of any solicitation, complaints that

might be received about the solicitation, and the portion of the marketing plan related to the solicitation.

The Board received about 100 comment letters on this proposal. Commenters generally acknowledged that prospective applicants and advertisements are covered by the regulation's rule against discouraging prospective applicants on a prohibited basis. But some of them questioned the Board's legal authority to require record retention for prescreened solicitations given that the ECOA and the regulation's protections generally apply only to persons who have requested credit.

The Board has clear authority to require the retention of information regarding prescreened solicitation practices. In enacting the ECOA, the Congress found that there is a need to ensure that creditors exercise their responsibility to make credit available with fairness and impartiality and without discrimination on a prohibited basis. Thus, creditors must make credit available equally to all creditworthy customers regardless of race, national origin, sex, or other prohibited bases of credit discrimination. In this regard, Regulation B prohibits a creditor from making any statement, in advertising or otherwise, that would discourage on a prohibited basis a reasonable person from making or pursuing an application for credit.

The ECOA authorizes the Board to prescribe regulations to carry out the purposes of the Act including, in particular, regulations that "in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C.

§ 1691b(a)(1). This provides the Board authority to require creditors to retain records that the Board believes are necessary to assure that creditors are not circumventing or evading the requirements of the ECOA and Regulation B.

Prescreened solicitations are an increasingly important mechanism for making certain types of credit available to consumers, and can be an effective way of enhancing a creditor's compliance with the ECOA. On the other hand, prescreened solicitations also could provide a means for creditors to circumvent or evade the ECOA and defeat its purposes by excluding prospective applicants on a prohibited basis. The Board believes that, in order to help monitor solicitation practices and prevent evasion or circumvention of the ECOA, creditors should be required to retain records related to prescreened solicitations, so that enforcement agencies can review and analyze creditor practices in generating offers of credit. The Board believes that imposing this recordkeeping requirement is within its authority and is consistent with the Act's purpose.

Some commenters criticized the proposed requirements as burdensome. In particular, they expressed concern about the retention of correspondence relating to complaints and the retention of "components of marketing plans related to solicitations." They did not, however, quantify in cost or time the additional burdens associated with the requirements.

Commenters focused on how correspondence about complaints is kept and organized, rather than suggesting that creditors do not retain such correspondence. They said that complaint correspondence may not be stored and tracked by solicitation in existing complaint tracking systems, and may not be retained in a central location within a financial institution. Also, commenters noted that marketing plans may vary

significantly from creditor to creditor; some plans may not have a specific "component" devoted to prescreened solicitations.

Consumer representatives and others supporting the proposed record retention believed that the benefit of the requirement substantially outweighs any compliance burden. They believed that creditors already retain most, if not all, of the documents required by the proposal for business or other reasons, such as to monitor the effectiveness of their marketing approach. Many of these commenters believed that Regulation B should cover creditors' pre-application marketing practices more generally, beyond credit advertisements and beyond the record retention requirements that were proposed.

Based on comments and its own further analysis, the Board is adopting the proposal requiring creditors to retain records related to the criteria used to select potential customers for prescreened solicitations, and correspondence related to consumer complaints. The Board believes that record retention will provide useful information without imposing excessive burden for determining at some future date whether additional steps might be warranted for coverage of prescreened solicitations by Regulation B.

Nothing in the final rule requires creditors to establish a separate database or set of files for correspondence relating to complaints about prescreened solicitations. Creditors will not be required to match consumer complaints with specific solicitation programs. Creditors have the flexibility to retain correspondence in any manner that would make it reasonably accessible and understandable to examiners.

The Board has made one modification to reduce compliance burden. Upon further analysis, the Board believes that the proposed requirement to identify and retain the component of the marketing plan to which the solicitation relates may be overly burdensome. And since prescreened solicitations may be one aspect of a creditor's overall marketing program, reviewing a single component may not provide the proper context. Therefore, the Board is not adopting the proposed requirement related to creditors' marketing plans.

The Board believes that these steps will enable the Board to monitor solicitation practices, based on information that creditors currently maintain, in a systematic way. Generally, for business and other reasons, creditors retain much of the required information. For example, under the Fair Credit Reporting Act (FCRA), persons that use information in consumer reports to select consumers to receive offers of credit are required to maintain the criteria used to select the consumers for three years after the date the offer is made to the consumer. The Board's rule requires a 25-month retention period.

There will be some incremental burden associated with retaining information in a form necessary to demonstrate compliance. The Board believes, however, that the costs of retaining these records for purposes of examination under Regulation B will not likely be substantial; and commenters did not provide evidence to the contrary.

Section 202.13—Information for Monitoring Purposes

Technical revisions have been made to this section to conform to a directive issued in 1997 by the U.S. Office of Management and Budget. For ethnicity, the standards provide for requesting data on whether (or not) individuals are Hispanic or

Latino. The standards prescribe five racial designations: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White. The standards eliminate the option of designating "Other," which Regulation B currently allows. The standards also require that respondents be offered the option of selecting more than one racial designation. 62 Fed. Reg. 58782, 58786 (October 30, 1997).

The Appendix B model application form for use in complying with § 202.13 is issued by Fannie Mae and Freddie Mac, which are in the process of making revisions to their forms. Creditors may continue to use the current model form until the Board publishes a revised form that reflects the new ethnicity and racial designations.

Section 202.14—Rules on Providing Appraisal Reports

The rules previously contained in § 202.14, Enforcement, Penalties, and Liabilities, have been moved to § 202.17. Section 202.14 now contains the rules from former § 202.5a. There are no revisions to this section.

Section 202.15—Incentives for Self-testing and Self-correction

Technical revisions have been made to § 202.15(d)(1).

Section 202.16—Requirements for Electronic Communication

Section 202.16 now contains the rules from former § 202.17. Section 202.16 contains an interim final rule published in April 2001, incorporating the requirements of the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) into Regulation B for disclosures provided by electronic communication (66 FR 17779, April 4, 2001). The interim final rule is republished for convenience; the Board lifted the mandatory compliance date for the interim final rule in August 2001 (66 FR 41439,

August 8, 2001). Any substantive revisions to the interim final rule for § 202.16—as well as for other electronic disclosures under Regulations E, M, Z, and DD—will be made at a future date.

Section 202.17—Enforcement, Penalties, and Liabilities

Section 202.17 now contains the rules from former § 202.14. Technical revisions have been made to § 202.17(a) and (b). Proposed revisions to § 202.17(c) have not been adopted.

17(c) Failure of compliance

The Board proposed to delete the third sentence of § 202.17(c) to conform with the proposal to remove the general prohibition against data notation. Consistent with the Board's decision to retain the general prohibition in § 202.5 against noting applicants' personal characteristics in nonmortgage credit transactions, except for the purpose of conducting a self-test, the proposed revisions have not been adopted. Section 202.17(c) is retained in its current form.

Appendix A to Part 202—Federal Enforcement Agencies

Appendix A has been revised to reflect changes in the names and addresses of some agencies.

Appendix B to Part 202—Model Application Forms

Technical revisions have been made to the introductory paragraphs. As proposed, the "Residential Loan Application" has been replaced with an updated "Uniform Residential Loan Application" (Freddie Mac 65/Fannie Mae 1003). Also, the first four model forms have been revised to clarify the guidance in the official staff commentary in

comment 7(d)(1)-3 concerning how to evidence applicants' intent to apply for joint credit.

Appendix C—Sample Notification Forms

Appendix C has been revised in the final rule, consistent with the Board's decision to retain the general prohibition in § 202.5 against notation of applicants' personal characteristics for nonmortgage credit except for the purpose of conducting a self-test. New model form C-10 is added to provide the disclosure requirements for creditors that request applicants' race, ethnicity, and other such characteristics for conducting a self-test under § 202.15.

A number of commenters suggested revisions to the sample forms, such as using consistent language for all references to the Fair Credit Reporting Act, and adding or rearranging adverse action reasons. Some of these suggestions are adopted, with no substantive change intended.

Appendix D—Issuance of Staff Interpretations

There are no revisions to this section.

V. Summary of Revisions to the Commentary

Major revisions to the commentary include clarifying that the definition of application includes certain preapproval requests (§ 202.2(f)); providing an exception from the requirement to provide a notice of incompleteness for preapprovals that constitute applications (§ 202.9(c)(1)); and clarifying the record retention requirements for prescreened solicitations (§ 202.12(b)(7)). The commentary also clarifies when an inquiry about credit becomes an application for credit (§§ 202.2(f) and 202.9).

VI. Section-by-Section Analysis

The following discussion addresses the commentary revisions section-by-section. Technical and non-substantive revisions generally are not separately discussed.

Section 202.1—Authority, Scope and Purpose

There are no revisions to this section.

Section 202.2—Definitions

Revisions have been made to comments in § 202.2(f) concerning the definition of application; and § 202.2(l) concerning the definition of creditor. A technical revision has been made to a comment in § 202.2(z).

2(c) Adverse action

Proposed comments 2(c)(1)(i)-2; 2(c)(1)(ii)–1; 2(c)(2)(i)-1; 2(c)(2)(ii)-3; and a revision to 2(c)(2)(ii)-2 are not being adopted at this time. These interpretations will be reviewed and reissued for additional public comment.

2(f) Application

A technical change (replacing "established" with "used") has been made to comment 2(f)-2 to conform the comment to the technical change in the definition of application in § 202.2(f) of the regulation.

Comments 2(f)-3 and -5 have been adopted as proposed with some modifications. Comment 2(f)-3 clarifies that prequalification requests are subject to the same test applicable to inquiries. In addition, the term "applicant" has been changed to "consumer." Using "applicant" presumes that an application exists, while the point of the comment is that, in the case of an inquiry or prequalification request, an application may or may not exist depending upon the circumstances. Also, cross-references have been

added to comment 9-5, which provides a more detailed discussion of when a prequalification request becomes an application, and to new comment 2(f)-5, which clarifies when a request for a preapproval constitutes an application.

The treatment of inquiries and prequalification requests, on the one hand, and certain preapproval requests, on the other, now differs for purposes of determining whether an application exists. Comment 2(f)-5 clarifies this difference. As discussed in the supplementary information to § 202.2(f) of the regulation, the Board proposed to include within the definition of application a request for a preapproved loan under procedures in which a creditor issues creditworthy persons a written commitment to extend credit up to a designated amount that is valid for a designated period of time, even if subject to conditions. The Board further stated that a "preapproval" without procedures involving a written commitment would be treated as a prequalification.

Some commenters supported the proposed revision, noting that preapprovals should be considered applications since creditors require applicants to complete applications before issuing written commitments to lend. Other commenters opposed the proposal, arguing that it would have a chilling effect on lenders offering preapproval programs, and would discourage potential applicants; that the utility of covering preapprovals as applications is questionable since they generally contain contingencies and are subject to verification; and that many applicants requesting preapprovals never return to the creditor to pursue the request, suggesting that notices required by § 202.9 would not be useful.

The Board believes that preapproval requests are applications, because they involve requests for extensions of credit made in accordance with creditors' procedures.

The fact that a preapproval request is not a completed application is not relevant, because Regulation B generally applies even to applications that are incomplete. (But see comment 9(c)(1)-1). In addition, Regulation C (Home Mortgage Disclosure) as revised (67 FR 7222, February 15, 2002) includes preapproval requests as applications for purposes of that regulation. In general, the Board believes that the coverage of applications under Regulations B and C should be consistent, to the extent possible. Accordingly, comment 2(f)-5 clarifies that certain preapproval requests constitute applications for purposes of Regulation B. The text of the final comment has been revised slightly to more closely parallel the Regulation C amendment relating to preapprovals.

Commenters raised an issue concerning the treatment of an inquiry in regard to a creditor's preapproval program. For example, if a creditor has a preapproval program involving written commitments and other features discussed in comment 2(f)-5, a request for preapproval under the program constitutes an application. If, however, a consumer merely inquires about the program, but does not initiate a preapproval request under it, commenters questioned whether the creditor must treat the inquiry as an application. The Board believes that whether the inquiry in this case is an application should be determined under the criteria set forth in comments 2(f)-3 and 9-5.

Finally, some commenters asked whether a preapproval that constitutes an application includes preapproved credit solicitations. Prescreened solicitations are not applications for purposes of Regulation B. (See § 202.12(b)(7)).

2(l) Creditor

Comment 2(l)-2 has been revised to clarify the type of creditors subject only to the general prohibitions against discrimination and discouragement in §§ 202.4(a) and (b), respectively.

Some industry commenters expressed concern that the clarification would include in the definition of creditor persons without discretion to decide whether credit will be extended. The Board recognizes that in the credit application process persons may play a variety of roles, from accepting applications through extending or denying credit. Comment 2(l)-2 is intended to clarify that where the only role a person plays is accepting and referring applications for credit, or selecting creditors to whom applications will be made, the person meets the definition of creditor, but only for purposes of the prohibitions against discrimination and discouragement. For example, an automobile dealer may merely accept and refer applications for credit, or it may accept applications, perform underwriting, and make a decision whether to extend credit. Where the automobile dealer only accepts applications for credit and refers those applications to another creditor who makes the credit decision—for example, where the dealer does not participate in setting the terms of the credit or making the credit decision—the dealer is subject only to §§ 202.4(a) and (b) for purposes of compliance with Regulation B.

2(z) Prohibited Basis

A technical revision has been made to comment 2(z)-1 for clarity. Comment 2(z)-3 has been amended to reflect the change in the name of the Aid to Families with Dependent Children program.

Section 202.3—Limited Exceptions for Certain Classes of Transactions

A technical revision has been made to comment 3-1.

Section 202.4—General Rule Prohibiting Discrimination

Section 202.4 has been substantially revised, as proposed. Former comment 4(a)-1 has been divided into comments 4(a)-1 and -2. Additional examples of disparate treatment have been included in comment 4(a)-2. Comments 4(b)-1 and -2 are former comments 5(a)-1 and -2, respectively, with minor revisions. References to "potential" applicants in former comment 5(a)-1, which is now comment 4(b)-1, have been changed to "prospective" applicants with no substantive change intended. Comments 4(c)-1, -2, and -3 are former comments 5(e)-1, -2, and -3, respectively. New comment 4(d)-1 clarifies the "clear and conspicuous" requirement.

Section 202.5—Rules Concerning Taking of Applications

Section 202.5 has been substantially revised. Comments 5(a)-1 and -2 have been moved to comments 4(b)-1 and -2, respectively, consistent with changes to the regulation. Comment 5(b)-1 has been re-designated as comment 5(a)(1)-1. Comments 5(b)(2)-1, -2, and -3 have been re-designated as comments 5(a)(2)-1, -2, and -3, respectively, consistent with the restructuring of the regulation and the Board's decision to retain the general prohibition against inquiring about, or noting, applicants' personal characteristics for nonmortgage credit, with some exceptions. Comments 5(d)(1)-1 and 5(d)(2)-1, -2, and -3 have not been revised. Comments 5(e)-1, -2, and -3 have been moved to comments 4(c)-1, -2, and -3, respectively, consistent with changes to the regulation.

Section 202.5a—Rules on Providing Appraisal Reports

Former § 202.5a is now § 202.14.

Section 202.6—Rules Concerning Evaluation of Applications

Comments to §§ 202.6(a), 202.6(b)(1), (2), (5) and (8) have been revised.

6(a) General rule concerning use of information

Comment 6(a)-1 has been revised to reflect the exception for collecting applicant characteristics for purposes of a self-test.

6(b) Specific rules concerning use of information

6(b)(1)

As proposed, former comment 6(b)(1)-1 has been divided and certain portions have been moved to § 202.6(b)(8) of the regulation and other portions have been moved to § 202.6(b)(8) of the commentary for clarity. Comment 6(b)(1)-2 has been re-designated as 6(b)(1)-1.

6(b)(2)

Technical revisions have been made to comments 6(b)(2)-2 and -3, with no substantive change intended. A technical amendment to comment 6(b)(2)-6 reflects the change in the name of the Aid to Families with Dependent Children program.

6(b)(5)

Comments 6(b)(5)-1, -3, and -4 have been revised for clarity, with no substantive change intended.

6(b)(8)

New comment 6(b)(8)-1 incorporates a portion of former comment 6(b)(1)-1 and clarifies that a creditor may consider the marital status of an applicant or joint applicant to ascertain its rights and remedies under state law for the particular extension of credit.

Section 202.7—Rules Concerning Extensions of Credit

Revisions have been made in comments to §202.7(d)(1).

7(d)(1)

Comment 7(d)(1)-1, adopted substantially as proposed, clarifies that when an applicant is individually creditworthy, a creditor may not require the signature of any person besides the applicant on a credit instrument. A cross-reference has been added to note the special rule under comment 7(d)(6)-1 for guarantors of closely held corporations.

Comment 7(d)(1)-3 provides guidance on how to evidence applicants' intent to apply for joint credit. The proposed rule clarified that creditors must document in some manner a person's intent to become jointly liable for a credit obligation, and provided examples. Some commenters expressed concern that the Board is requiring written applications for business credit. Other commenters believed that the best method to evidence intent is to require written applications. A few commenters asked that the Board afford creditors the flexibility to determine how to evidence intent for joint credit.

Written applications for business credit are not required, nor has the Board proposed to require such applications. While creditors are required to have documentation evidencing intent to apply for joint credit, creditors have the flexibility to determine the methods used to establish intent. The comment has been adopted substantially as proposed, with revisions for clarity. First, the comment clarifies that

evidence of intent must be provided at the time of application. Accordingly, a creditor could not use the fact that two parties signed the note, for example, as evidence of intent to be jointly liable at the time of application. Second, the examples in the proposed rule have been revised to provide greater clarity. Consistent with providing greater clarity in the examples, some of the model forms in Appendix B have been modified slightly to reflect this guidance.

Section 202.8—Special Purpose Credit Programs

Minor revisions have been made in comments to § 202.8(a). Proposed revisions to comments in § 202.8(c) and (d) have not been adopted.

8(a) Standards for programs

Comment 8(a)-5 adds an example of how creditors designing a special purpose credit program may determine need, and has been adopted as proposed.

8(c) Special rule concerning requests and use of information

Proposed revisions to comment 8(c)-1 have not been adopted, reflecting the Board's decision to retain the general prohibition under § 202.5 against the collection of applicant characteristic information, except for the purpose of conducting a self-test. Technical revisions have been made for clarity.

8(d) Special rule in the case of financial need

Proposed revisions to comment 8(d)-1 have not been adopted, reflecting the Board's decision to retain the general prohibition under § 202.5 against the collection of applicant characteristic information, except for the purpose of conducting a self-test. Technical revisions have been made for clarity.

Section 202.9—Notifications

Revisions have been made in comments to §§ 202.9, 202.9(b)(2), 202.9(c), and 202.9(g). In comment 9-5 concerning prequalifications, the discussion of preapprovals has been removed as proposed, and certain preapproval requests are now treated differently from prequalification requests, as clarified in comments 2(f)-3 and 2(f)-5. Also, in response to public comments, language has been added to clarify that a creditor may tell consumers not only the maximum amount they may borrow under various loan programs, but also the rates and other terms available, without turning prequalification requests into applications for credit.

Some commenters suggested adding language to clarify that the specific information that a creditor may evaluate about a consumer in a prequalification includes credit information. The Board believes that the language in the comment as revised is sufficiently broad to cover credit information. Creditors should bear in mind, however, that unless an application for credit has been made by the consumer, or the creditor has written instructions from the consumer to obtain a credit report, a permissible purpose for obtaining a credit report on the consumer may not exist under the Fair Credit Reporting Act.

9(b) Form of ECOA notice and statement of specific reasons

9(b)(2)

Comment 9(b)(2)-7 has been adopted as proposed with minor revisions for clarity. The proposed comment clarified that in a combined credit scoring and judgmental system where an applicant is neither approved nor denied based on the first component of the system but is denied based on the second component, the adverse action reasons must

come from both components of the system. Several commenters found the comment confusing. These commenters believed that the proposed language of the comment contradicts the general rule of the comment that the reasons for denial must come from the component of the system the applicant failed. The comment, however, is intended to address several distinct situations.

The comment applies when applications are automatically denied based on the first component, for example the credit scoring component, and are not forwarded to the judgmental component. In those cases, the adverse action reasons must come solely from the credit scoring component. The comment also applies when applications pass the credit scoring system, are automatically forwarded to the judgmental component, and are denied based on the judgmental component. In those cases, the adverse action reasons must come solely from the judgmental component. These examples are consistent with the rule that the reasons for denial must come from the component the applicant failed.

The amendments to the comment apply when a creditor utilizes a scorecard with "gray bands," meaning that the applicant's score does not pass or fail the credit scoring component but falls within a range where referral to an analyst for judgmental review is required. If credit is denied, the adverse action reasons must come from both the credit scoring component and the judgmental component of the system. Providing one or more adverse action reasons from the credit scoring component will help educate consumers about why their credit score did not pass the credit scoring component. In all situations addressed by the comment, a combination of more than four principal adverse action reasons is not likely to be helpful to applicants.

9(c) Incomplete applications

9(c)(1) Notice alternatives

As discussed in the supplementary information to § 202.2(f) of the regulation and commentary, the definition of application includes certain preapproval requests. Some commenters expressed concern that in many cases applicants make preapproval requests and then fail to follow through on the request. Under § 202.9(c), within 30 days of receiving an application that is incomplete regarding matters that the applicant can complete, the creditor must notify the applicant of action taken or of the incompleteness. According to some commenters, where a preapproval request remains incomplete, sending the applicant a notice of incompleteness does not appear useful.

The Board believes that in the case of a traditional application, the applicant is interested in pursuing a loan, but may be unaware that the application remains incomplete in some respect; in this situation, a notice of incompleteness can serve an important function. This seems less likely in the case of a preapproval request, which is often a less complicated and more expeditious process. Therefore, comment 9(c)(1)-1 has been added to include an exception from the requirement to provide a notice of incompleteness for preapprovals that meet the definition of "application" as clarified in comment 2(f)-5. This exception parallels the amendment to Regulation C (Home Mortgage Disclosure), which treats preapproval requests as applications, but does not require reporting of preapproval requests that remain incomplete. (See 67 FR 7222, February 15, 2002.)

9(g) Applications Submitted Through a Third Party

The proposed revisions to comment 9(g)-1 clarified that the requirements of § 202.9(a)(2) apply to applications submitted through a third party. The requirement to include the address of each creditor gives the applicant the information necessary to request a statement of specific reasons for the adverse action or an explanation of the reasons. Accordingly, comment 9(g)-1 has been adopted as proposed.

Section 202.10—Furnishing of Credit Information

There are no revisions to this section.

Section 202.11—Relation to State Law

There are no revisions to this section.

Section 202.12—Record Retention

As proposed, comments in § 202.12(b) have been added to reflect changes to the regulation concerning retention of certain records related to prescreened solicitations.

12(b)(7) Prescreened solicitations

The Board proposed to add three new comments to new § 202.12(b)(7) to clarify the record retention requirements for prescreened solicitations. With one exception, the comments have been adopted as proposed, with technical revisions for clarity. Proposed comment 12(b)(7)-3 would have clarified the regulatory requirement to retain the portion of the marketing plan to which the solicitation relates. Since the final rule eliminates the marketing plan requirement, the proposed comment has not been adopted. Comment 12(b)(7)-3 now clarifies the requirement to retain records of correspondence relating to complaints (whether formal or informal) about prescreened solicitations. (See detailed discussion in the supplementary information to § 202.12(b)(7) of the regulation.)

Section 202.13—Information for Monitoring Purposes

The proposed revision to a comment in § 202.13(a) has not been adopted. A technical revision has been made for clarity. Comments in § 202.13(b) have been revised.

13(a) Information to be Requested

Comment 13(a)-7 has been retained, consistent with the Board's decision to retain the general prohibition against the notation of applicant characteristics for nonmortgage credit transactions, subject to certain exceptions. The citation in the comment has been revised to conform with the reorganization of the regulation.

13(b) Obtaining of Information

Consistent with a revision to § 202.13(a) of the regulation, comment 13(b)-1 has been revised to clarify the guidance issued in 1997 by the Office of Management and Budget.

Comment 13(b)-3 has been revised to make the treatment of applications received by telephone consistent with Appendix A, V., D., 2. of Regulation C (Home Mortgage Disclosure) for the purpose of collecting monitoring information. Comment 13(b)-4 combines existing comments 13(b)-4 and -5, and has been revised to make the treatment of applications received electronically consistent with comment 203.4(a)(7)-5 of Regulation C.

Comment 13(b)-7 has been retained and re-designated as comment 13(b)-6, consistent with the Board's decision to retain the general prohibition against the notation of applicant characteristics for nonmortgage credit transactions, except for the purpose of conducting a self-test.

Section 202.14—Rules on Providing Appraisal Reports

Section 202.14 is former § 202.5a. There are no revisions to comments in this section.

Section 202.15—Incentives for Self-testing and Self-correction

The proposed revision to a comment in § 202.15(b)(3) has not been adopted.

15(b)(3)

As discussed earlier, the Board is retaining the general prohibition against inquiring about, or noting, information about an applicant's personal characteristics, such as race or national origin, except for the purpose of conducting a self-test under § 202.15. Accordingly, proposed comment 15(b)(3)(ii)-2—which would have clarified that the collection of information about an applicant's characteristics does not qualify for the self-test privilege—has not been adopted. For a discussion of the exception for self-testing, see § 202.5(b)(1) and the supplementary information to that section.

Section 202.16—Requirements for Electronic Communication

Section 202.16 is former § 202.17. The comments in § 202.16 have been republished for convenience. Consistent with the Board's decision to lift the mandatory compliance date for the interim final rule in § 202.16 (66 FR 41439, August 8, 2001), the comments in this section are not currently in effect and will be separately finalized. Accordingly, there are no revisions to comments in this section.

Section 202.17—Enforcement, Penalties, and Liabilities

Section 202.17 is former § 202.14. There are no revisions to comments in this section.

Appendix B to Part 202—Model Application Forms

Comment 1 to Appendix B has been revised to delete a reference to U.S. Office of Management and Budget classifications. Other proposed changes to comment 1 have not been adopted, reflecting the Board's decision to retain the general prohibition against the collection of applicant characteristics for nonmortgage credit. Consistent with that decision, comment 2 has been retained.

Appendix C—Sample Notification Forms

There are no revisions to the comment in Appendix C.

VII. Reorganization of the Regulation

Provisions of the regulation and commentary are re-designated as indicated in the tables below. While the tables present a substantially complete summary of the reorganization, they should not be used as a substitute for a detailed comparison of the revised regulation with the old regulation.

Table 1—Section 202.2—Definitions

Current	**Revised**
Comment 2(f)-5	Comment 2(f)-6

Table 2—Section 202.3—Limited Exceptions for Certain Classes of Transactions

Current	**New**
Regulation 202.3(a)(2)(ii)	Deleted
Regulation 202.3(a)(2)(iii)	Regulation 202.3(a)(2)(ii)
Regulation 202.3(b)(2)(i)	Regulation 202.3(b)(2)(ii)
Regulation 202.3(b)(2)(ii)	Regulation 202.3(b)(2)(iii)
Regulation 202.3(b)(2)(iii)	Regulation 202.3(b)(2)(i)
Regulation 202.3(c)(2)(i)	Regulation 202.3(c)(2)(ii)
Regulation 202.3(c)(2)(ii)	Regulation 202.3(c)(2)(iii)
Regulation 202.3(c)(2)(iii)	Regulation 202.3(c)(2)(iv)
Regulation 202.3(c)(2)(iv)	Regulation 202.3(c)(2)(i)

Table 3—Section 202.4—General Rules

Current	**Revised**
Comment 202.4-1	Comment 4(a)-1, -2
Regulation 202.4(b)	Regulation 202.4(e)

Table 4—Section 202.5—Rules Concerning Requests for Information

Current	**Revised**
Regulation 202.5(a)	Regulation 202.4(b)
Comment 202.5(a)-1	Comment 202.4(b)-1
Comment 202.5(a)-2	Comment 202.4(b)-2
Comment 202.5(b)-1	Comment 202.5(a)(1)-1
Regulation 202.5(b)(1)	Regulation 202.5(a)(1)
Regulation 202.5(b)(2)	Regulation 202.5(a)(2)
Comment 202.5(b)(2)-1	Comment 202.5(a)(2)-1
Comment 202.5(b)(2)-2	Comment 202.5(a)(2)-2
Comment 202.5(b)(2)-3	Comment 202.5(a)(2)-3
Regulation 202.5(d)(3)	Regulation 202.5(b), (b)(3)
Regulation 202.5(d)(4)	Regulation 202.5(d)(3)
Regulation 202.5(d)(5)	Regulation 202.5(b), (b)(2)
Regulation 202.5(e)	Regulation 202.4(c)
Comment 202.5(e)-1	Comment 202.4(c)-1
Comment 202.5(e)-2	Comment 202.4(c)-2
Comment 202.5(e)-3	Comment 202.4(c)-3

Table 5—Section 202.5a—Rules on Providing Appraisal Reports

Current	**Revised**
Regulation 202.5a(a)	Regulation 202.14(a)
Comment 202.5a(a)-1	Comment 202.14(a)-1
Comment 202.5a(a)-2	Comment 202.14(a)-2
Comment 202.5a(a)(2)(i)-1	Comment 202.14(a)(2)(i)-1
Comment 202.5a(a)(2)(ii)-1	Comment 202.14(a)(2)(ii)-1
Comment 202.5a(c)-1	Comment 202.14(c)-1
Comment 202.5a(c)-2	Comment 202.14(c)-2

Table 6—Section 202.6—Rules Concerning Evaluation of Applications

Current	**Revised**
Comment 202.6(b)(1)-1	Regulation 202.6(b)(8), Comment 202.6(b)(8)-1
Comment 202.6(b)(1)-2	Comment 202.6(b)(1)-1

Table 7—Section 202.7—Rules Concerning Extensions of Credit

Current	**Revised**
Comment 7(d)(1)-1	Comment 7(d)(1)-2

Table 8—Section 202.13—Information for Monitoring Purposes

Current	**Revised**
Regulation 202.13(a)	Regulation 202.13(a)(1) , (a)(2)
Regulation 202.13(a)(1)	Regulation 202.13(a)(1)(i)
Regulation 202.13(a)(2)	Regulation 202.13(a)(1)(ii)
Regulation 202.13(a)(3)	Regulation 202.13(a)(1)(iii)
Regulation 202.13(a)(4)	Regulation 202.13(a)(1)(iv)
Comment 202.13(b)-4, -5	Comment 202.13(b)-4
Comment 202.13(b)-6	Comment 202.13(b)-5
Comment 202.13(b)-7	Comment 202.13(b)-6

Table 9—Section 202.14—Enforcement, Penalties and Liabilities

Current	**Revised**
Regulation 202.14(a)	Regulation 202.17(a)
Regulation 202.14(b)	Regulation 202.17(b)
Regulation 202.14(c)	Regulation 202.17(c)
Comment 202.14(c)-1	Comment 202.17(c)-1
Comment 202.14(c)-2	Comment 202.17(c)-2

Table 10—Section 202.17—Requirements for Electronic Communications

Current	**Revised**
Regulation 202.17(a)	Regulation 202.16(a)
Regulation 202.17(b)	Regulation 202.16(b)
Comment 202.17(b)-1	Comment 202.16(b)-1
Comment 202.17(b)-2	Comment 202.16(b)-2
Comment 202.17(b)-3	Comment 202.16(b)-3

Comment 202.17(b)-4	Comment 202.16(b)-4
Comment 202.17(b)-5	Comment 202.16(b)-5
Comment 202.17(d)(1)-1	Comment 202.16(d)(1)-1
Comment 202.17(d)(2)-1	Comment 202.16(d)(2)-1
Comment 202.17(d)(2)-2	Comment 202.16(d)(2)-2
Comment 202.17(e)-1	Comment 202.16(e)-1
Comment 202.17(f)-1	Comment 202.16(f)-1

VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the U.S. Office of Management and Budget. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OMB control number for this final rule is 7100-0201.

The information collection that is revised by this rulemaking is found in 12 CFR Part 202. This information collection is mandatory to evidence compliance with the requirements of 15 USC 1691(b)(a)(1) and Public Law 104-208, § 2302(a), and also to ensure that credit is made available to all creditworthy customers without discrimination on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), receipt of public assistance income, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act (15 USC 1600 et seq.).

Regulation B applies to all types of creditors, not just state member banks (SMBs). However, under the Paperwork Reduction Act, the Federal Reserve accounts are supervised by the Federal Reserve, which number 1,312 respondents. Appendix A of Regulation B defines these creditors as SMBs, branches and agencies of foreign banks

(other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden for the institutions they supervise. Creditors are required to retain records for 12 to 25 months as evidence of compliance.

The estimated annual burden for entities supervised by the Federal Reserve is approximately 175,711 hours for the 1,312 creditors that are "respondents" for purposes of the Paperwork Reduction Act. The increase in the estimated annual burden, from previously published burden estimates, is due to the new disclosure requirement associated with § 202.5(b)(1) and an incremental in the number of creditors that maintain records in connection with the voluntary self-test set forth in section 202.15. The estimated annual burden for the new disclosure is approximately 10,000 hours. Previously, staff estimated that approximately 25 percent of respondents maintained records related to the self-test. In this final rule staff is estimating a 5 percent increase in the number of respondents maintaining self-test records; this is an increase of 88 hours. The estimated annual burden represents about 3.5 percent of total Federal Reserve System burden.

Section 202.5(b)(1) requires creditors that collect applicant characteristics for purposes of conducting a self-test to disclose to credit applicants that providing the information is optional, that the creditor will not take the information into account in any aspect of the credit transaction, and, if applicable, that the information will be noted by visual observation or surname if the applicant chooses not to provide it. To help ease burden, a model notice is provided in Appendix C to Regulation B.

In conjunction with the proposed revisions to Regulation B, the Board sought comment on the burden estimate for the proposed changes. Approximately 750 comments were received on the proposed rulemaking. Commenters opposed most of the major proposed revisions to the regulation, but provided suggestions for additional revisions to help facilitate compliance with the regulation. No comments quantifying the paperwork burden estimate were received.

For purposes of the PRA, no paperwork burden is associated with the recordkeeping requirement for information about prescreened solicitations (202.12(b)(7)). The final rule generally requires creditors to retain information they already retain for business purposes. Thus, there will likely be no additional paperwork burden; and commenters did not provide any comments to the contrary.

Because the records would be maintained at state member banks and the notices are not provided to the Federal Reserve, no issue of confidentiality normally arises. However, the information may be protected from disclosure under exemptions (b)(4), (6), and (8) of the Freedom of Information Act (5 USC 522(b)).

The Board has a continuing interest in the public's opinions of the Federal Reserve's collections of information. At any time, comments regarding the burden estimate, or any other aspect of this information collection, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0201), Washington, DC 20503.

IX. Regulatory Flexibility Analysis

In accordance with section 3(a) of the Regulatory Flexibility Act (5 USC 604(a)), the Board has prepared a final regulatory flexibility analysis of these revisions to Regulation B. The final rule is a consequence of Board policy to review and update its regulations periodically. The Board's previous comprehensive review of Regulation B was completed in 1985.

The Board received no comments specifically responding to the initial regulatory flexibility analysis published in conjunction with the proposed rule. As discussed in the supplementary information presented above, however, many comments the Board received discussed the compliance burdens arising from particular proposals. Such comments are summarized throughout the supplementary information, as are the Board's responses. The supplementary information also contains discussions of the alternative measures the Board considered, and in some cases adopted, to reduce burden.

Some changes in the final rule should not impose additional burden on institutions. The general prohibition on data notation for nonmortgage credit products has been retained, subject to an exception to allow the collection of applicants' personal characteristics for the purpose of conducting a self-test under § 202.15. To the extent creditors choose to collect these data, however, the final rule requires a disclosure to be made to applicants. The Board has tried to minimize any burden imposed by the disclosure requirement by publishing a model disclosure form. The exact burden of the disclosure requirement is difficult to quantify; it is uncertain how many creditors will choose to conduct self-tests and collect these data.

The final rule imposes a new requirement upon creditors to retain certain records in connection with certain prescreened solicitations. This requirement will enable the Board and the other enforcement agencies to monitor solicitation practices in a systematic way that to date has not been possible, based on information that creditors currently maintain. The Board will at some future date determine whether additional steps might be warranted for coverage of prescreened solicitations by Regulation B.

Although the new rule will impose some burden on creditors, the Board has sought to minimize burden by tracking existing legal requirements and current business practice. For example, users of consumer reports are required to retain some prescreening information under the Fair Credit Reporting Act. The final rule under Regulation B parallels this requirement. In addition, many creditors retain part or much of the solicitation information for business purposes, such as to evaluate marketing plans.

The Board has modified the final rule to further reduce compliance burden. The proposed rule would have required creditors to keep the marketing plan to which a solicitation relates. The Board has not adopted this requirement because it may be overly burdensome. And since prescreened solicitations may be one aspect of a creditor's overall marketing program, reviewing a single component might not have provided the proper context. While creditors will be required to keep information relating to complaints about solicitations, creditors will not be required to store the information in a centralized database or set of files. Creditors will have the flexibility to retain such correspondence in any manner that would be reasonably accessible and understandable to examiners.

Burdens associated with the requirement to retain records relating to prescreened solicitations likely will be greater for large creditors than for small creditors, because large creditors are more active in this area. The number of small creditors affected by the recordkeeping requirement is unknown but is likely to be small.

The proposed rule would have required creditors to retain records for 25 months rather than 12 months for certain types of business credit. The Board has not adopted the proposed rule, based on its belief that the compliance burden would outweigh the benefits. For example, the use of electronic record storage for many business credit records is not as prevalent as the Board believed when it issued the proposal. Thus, no additional burden is imposed by the final rule.

In light of the purposes of the Equal Credit Opportunity Act, the Board believes it is not feasible to create different rules for large and small creditors.

List of Subjects in 12 CFR Part 202

Aged, Banks, banking, Civil rights, Consumer protections, Credit, Discrimination, Federal Reserve System, Marital status discrimination, Penalties, Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination.

For the reasons set forth in the preamble, 12 CFR part 202 is revised as follows:

Part 202 – EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)

REGULATION B (EQUAL CREDIT OPOPORTUNITY)

Sec.

AUTHORITY: 15 U.S.C. 1691-1691f.

§ 202.1 Authority, scope and purpose.

(a) Authority and scope. This regulation is issued by the Board of Governors of the Federal Reserve System pursuant to title VII (Equal Credit Opportunity Act) of the Consumer Credit Protection Act, as amended (15 U.S.C. 1601 et seq.). Except as otherwise provided herein, this regulation applies to all persons who are creditors, as defined in § 202.2(1). Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 et seq. and have been assigned OMB No. 7100-0201.

(b) Purpose. The purpose of this regulation is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The regulation prohibits creditor practices that

discriminate on the basis of any of these factors. The regulation also requires creditors to notify applicants of action taken on their applications; to report credit history in the names of both spouses on an account; to retain records of credit applications; to collect information about the applicant's race and other personal characteristics in applications for certain dwelling-related loans; and to provide applicants with copies of appraisal reports used in connection with credit transactions.

§ 202.2 Definitions.

For the purposes of this regulation, unless the context indicates otherwise, the following definitions apply.

(a) Account means an extension of credit. When employed in relation to an account, the word use refers only to open-end credit.

(b) Act means the Equal Credit Opportunity Act (title VII of the Consumer Credit Protection Act).

(c) Adverse action—(1) The term means:

(i) A refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered;

(ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts; or

(iii) A refusal to increase the amount of credit available to an applicant who has made an application for an increase.

(2) The term does not include:

(i) A change in the terms of an account expressly agreed to by an applicant.

(ii) Any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account;

(iii) A refusal or failure to authorize an account transaction at point of sale or loan, except when the refusal is a termination or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts, or when the refusal is a denial of an application for an increase in the amount of credit available under the account;

(iv) A refusal to extend credit because applicable law prohibits the creditor from extending the credit requested; or

(v) A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested.

(3) An action that falls within the definition of both paragraphs (c)(1) and (c)(2) of this section is governed by paragraph (c)(2) of this section.

(d) Age refers only to the age of natural persons and means the number of fully elapsed years from the date of an applicant's birth.

(e) Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties.

(f) Application means an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested. The term application does not include the use of an account or line of credit to obtain an

amount of credit that is within a previously established credit limit. A completed application means an application in connection with which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral). The creditor shall exercise reasonable diligence in obtaining such information.

(g) Business credit refers to extensions of credit primarily for business or commercial (including agricultural) purposes, but excluding extensions of credit of the types described in § 202.3(a)-(d).

(h) Consumer credit means credit extended to a natural person primarily for personal, family, or household purposes.

(i) Contractually liable means expressly obligated to repay all debts arising on an account by reason of an agreement to that effect.

(j) Credit means the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.

(k) Credit card means any card, plate, coupon book, or other single credit device that may be used from time to time to obtain money, property, or services on credit.

(l) Creditor means a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates. For

purposes of § 202.4(a) and (b), the term creditor also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made. A person is not a creditor regarding any violation of the Act or this regulation committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction. The term does not include a person whose only participation in a credit transaction involves honoring a credit card.

(m) Credit transaction means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures).

(n) Discriminate against an applicant means to treat an applicant less favorably than other applicants.

(o) Elderly means age 62 or older.

(p) Empirically derived and other credit scoring systems—(1) A credit scoring system is a system that evaluates an applicant's creditworthiness mechanically, based on key attributes of the applicant and aspects of the transaction, and that determines, alone or in conjunction with an evaluation of additional information about the applicant, whether an applicant is deemed creditworthy. To qualify as an empirically derived, demonstrably and statistically sound, credit scoring system, the system must be:

(i) Based on data that are derived from an empirical comparison of sample groups or the population of creditworthy and noncreditworthy applicants who applied for credit within a reasonable preceding period of time;

(ii) Developed for the purpose of evaluating the creditworthiness of applicants with respect to the legitimate business interests of the creditor utilizing the system (including, but not limited to, minimizing bad debt losses and operating expenses in accordance with the creditor's business judgment);

(iii) Developed and validated using accepted statistical principles and methodology; and

(iv) Periodically revalidated by the use of appropriate statistical principles and methodology and adjusted as necessary to maintain predictive ability.

(2) A creditor may use an empirically derived, demonstrably and statistically sound, credit scoring system obtained from another person or may obtain credit experience from which to develop such a system. Any such system must satisfy the criteria set forth in paragraph (p)(1)(i) through (iv) of this section; if the creditor is unable during the development process to validate the system based on its own credit experience in accordance with paragraph (p)(1) of this section, the system must be validated when sufficient credit experience becomes available. A system that fails this validity test is no longer an empirically derived, demonstrably and statistically sound, credit scoring system for that creditor.

(q) Extend credit and extension of credit mean the granting of credit in any form (including, but not limited to, credit granted in addition to any existing credit or credit limit; credit granted pursuant to an open-end credit plan; the refinancing or other renewal

of credit, including the issuance of a new credit card in place of an expiring credit card or in substitution for an existing credit card; the consolidation of two or more obligations; or the continuance of existing credit without any special effort to collect at or after maturity).

(r) Good faith means honesty in fact in the conduct or transaction.

(s) Inadvertent error means a mechanical, electronic, or clerical error that a creditor demonstrates was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid such errors.

(t) Judgmental system of evaluating applicants means any system for evaluating the creditworthiness of an applicant other than an empirically derived, demonstrably and statistically sound, credit scoring system.

(u) Marital status means the state of being unmarried, married, or separated, as defined by applicable state law. The term "unmarried" includes persons who are single, divorced, or widowed.

(v) Negative factor or value, in relation to the age of elderly applicants, means utilizing a factor, value, or weight that is less favorable regarding elderly applicants than the creditor's experience warrants or is less favorable than the factor, value, or weight assigned to the class of applicants that are not classified as elderly and are most favored by a creditor on the basis of age.

(w) Open-end credit means credit extended under a plan in which a creditor may permit an applicant to make purchases or obtain loans from time to time directly from the creditor or indirectly by use of a credit card, check, or other device.

(x) Person means a natural person, corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(y) Pertinent element of creditworthiness, in relation to a judgmental system of evaluating applicants, means any information about applicants that a creditor obtains and considers and that has a demonstrable relationship to a determination of creditworthiness.

(z) Prohibited basis means race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); the fact that all or part of the applicant's income derives from any public assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act or any state law upon which an exemption has been granted by the Board.

(aa) State means any state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 202.3 Limited exceptions for certain classes of transactions.

(a) Public utilities credit—(1) Definition. Public utilities credit refers to extensions of credit that involve public utility services provided through pipe, wire, or other connected facilities, or radio or similar transmission (including extensions of such facilities), if the charges for service, delayed payment, and any discount for prompt payment are filed with or regulated by a government unit.

(2) Exceptions. The following provisions of this regulation do not apply to public utilities credit:

(i) Section 202.5(d)(1) concerning information about marital status; and

(ii) Section 202.12(b) relating to record retention.

(b) Securities credit—(1) Definition. Securities credit refers to extensions of credit subject to regulation under section 7 of the Securities Exchange Act of 1934 or extensions of credit by a broker or dealer subject to regulation as a broker or dealer under the Securities Exchange Act of 1934.

(2) Exceptions. The following provisions of this regulation do not apply to securities credit:

(i) Section 202.5(b) concerning information about the sex of an applicant;

(ii) Section 202.5(c) concerning information about a spouse or former spouse;

(iii) Section 202.5(d)(1) concerning information about marital status;

(iv) Section 202.7(b) relating to designation of name to the extent necessary to comply with rules regarding an account in which a broker or dealer has an interest, or rules regarding the aggregation of accounts of spouses to determine controlling interests, beneficial interests, beneficial ownership, or purchase limitations and restrictions;

(v) Section 202.7(c) relating to action concerning open-end accounts, to the extent the action taken is on the basis of a change of name or marital status;

(vi) Section 202.7(d) relating to the signature of a spouse or other person;

(vii) Section 202.10 relating to furnishing of credit information; and

(viii) Section 202.12(b) relating to record retention.

(c) Incidental credit—(1) Definition. Incidental credit refers to extensions of consumer credit other than the types described in paragraphs (a) and (b) of this section:

(i) That are not made pursuant to the terms of a credit card account;

(ii) That are not subject to a finance charge (as defined in Regulation Z, 12 CFR 226.4); and

(iii) That are not payable by agreement in more than four installments.

(2) Exceptions. The following provisions of this regulation do not apply to incidental credit:

(i) Section 202.5(b) concerning information about the sex of an applicant, but only to the extent necessary for medical records or similar purposes;

(ii) Section 202.5(c) concerning information about a spouse or former spouse;

(iii) Section 202.5(d)(1) concerning information about marital status;

(iv) Section 202.5(d)(2) concerning information about income derived from alimony, child support, or separate maintenance payments;

(v) Section 202.7(d) relating to the signature of a spouse or other person;

(vi) Section 202.9 relating to notifications;

(vii) Section 202.10 relating to furnishing of credit information; and

(viii) Section 202.12(b) relating to record retention.

(d) Government credit—(1) Definition. Government credit refers to extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities.

(2) Applicability of regulation. Except for § 202.4(a), the general rule against discrimination on a prohibited basis, the requirements of this regulation do not apply to government credit.

§ 202.4 General rules.

(a) Discrimination. A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.

(b) Discouragement. A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.

(c) Written applications. A creditor shall take written applications for the dwelling-related types of credit covered by § 202.13(a).

(d) Form of disclosures. A creditor that provides in writing any disclosures or information required by this regulation must provide the disclosures in a clear and conspicuous manner and, except for the disclosures required by §§ 202.5 and 202.13, in a form the applicant may retain.

(e) Foreign-language disclosures. Disclosures may be made in languages other than English, provided they are available in English upon request.

§ 202.5 Rules concerning requests for information.

(a) General rules—(1) Requests for information. Except as provided in paragraphs (b) through (d) of this section, a creditor may request any information in connection with a credit transaction.[1]

(2) Required collection of information. Notwithstanding paragraphs (b) through (d) of this section, a creditor shall request information for monitoring purposes as required by § 202.13 for credit secured by the applicant's dwelling. In addition, a creditor may obtain information required by a regulation, order, or agreement issued by, or entered into with, a court or an enforcement agency (including the Attorney General of the United States or a similar state official) to monitor or enforce compliance with the Act, this regulation, or other federal or state statutes or regulations.

[1] This paragraph does not limit or abrogate any federal or state law regarding privacy, privileged information, credit reporting limitations, or similar restrictions on obtainable information.

(3) Special-purpose credit. A creditor may obtain information that is otherwise restricted to determine eligibility for a special purpose credit program, as provided in § 202.8(b), (c), and (d).

(b) Limitation on information about race, color, religion, national origin, or sex. A creditor shall not inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction that is not subject to § 202.13, except as provided in paragraphs (b)(1) and (b)(2) of this section.

(1) Self-test. A creditor may inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction for the purpose of conducting a self-test that meets the requirements of § 202.15. A creditor that makes such an inquiry shall disclose orally or in writing, at the time the information is requested, that:

(i) The applicant will not be required to provide the information;

(ii) The creditor is requesting the information to monitor its compliance with the federal Equal Credit Opportunity Act;

(iii) Federal law prohibits the creditor from discriminating on the basis of this information, or on the basis of an applicant's decision not to furnish the information; and

(iv) If applicable, certain information will be collected based on visual observation or surname if not provided by the applicant or other person.

(2) Sex. An applicant may be requested to designate a title on an application form (such as Ms., Miss, Mr., or Mrs.) if the form discloses that the designation of a title is optional. An application form shall otherwise use only terms that are neutral as to sex.

(c) Information about a spouse or former spouse—(1) General rule. Except as permitted in this paragraph, a creditor may not request any information concerning the spouse or former spouse of an applicant.

(2) Permissible inquiries. A creditor may request any information concerning an applicant's spouse (or former spouse under paragraph (c)(2)(v) of this section) that may be requested about the applicant if:

(i) The spouse will be permitted to use the account;

(ii) The spouse will be contractually liable on the account;

(iii) The applicant is relying on the spouse's income as a basis for repayment of the credit requested;

(iv) The applicant resides in a community property state or is relying on property located in such a state as a basis for repayment of the credit requested; or

(v) The applicant is relying on alimony, child support, or separate maintenance payments from a spouse or former spouse as a basis for repayment of the credit requested.

(3) Other accounts of the applicant. A creditor may request that an applicant list any account on which the applicant is contractually liable and to provide the name and address of the person in whose name the account is held. A creditor may also ask an applicant to list the names in which the applicant has previously received credit.

(d) Other limitations on information requests—(1) Marital status. If an applicant applies for individual unsecured credit, a creditor shall not inquire about the applicant's marital status unless the applicant resides in a community property state or is relying on property located in such a state as a basis for repayment of the credit requested. If an

application is for other than individual unsecured credit, a creditor may inquire about the applicant's marital status, but shall use only the terms married, unmarried, and separated. A creditor may explain that the category unmarried includes single, divorced, and widowed persons.

(2) Disclosure about income from alimony, child support, or separate maintenance. A creditor shall not inquire whether income stated in an application is derived from alimony, child support, or separate maintenance payments unless the creditor discloses to the applicant that such income need not be revealed if the applicant does not want the creditor to consider it in determining the applicant's creditworthiness.

(3) Childbearing, childrearing. A creditor shall not inquire about birth control practices, intentions concerning the bearing or rearing of children, or capability to bear children. A creditor may inquire about the number and ages of an applicant's dependents or about dependent-related financial obligations or expenditures, provided such information is requested without regard to sex, marital status, or any other prohibited basis.

(e) Permanent residency and immigration status. A creditor may inquire about the permanent residency and immigration status of an applicant or any other person in connection with a credit transaction.

§ 202.6 Rules concerning evaluation of applications.

(a) General rule concerning use of information. Except as otherwise provided in the Act and this regulation, a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis.[2]

(b) Specific rules concerning use of information—(1) Except as provided in the Act and this regulation, a creditor shall not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants.

(2) Age, receipt of public assistance. (i) Except as permitted in this paragraph, a creditor shall not take into account an applicant's age (provided that the applicant has the capacity to enter into a binding contract) or whether an applicant's income derives from any public assistance program.

(ii) In an empirically derived, demonstrably and statistically sound, credit scoring system, a creditor may use an applicant's age as a predictive variable, provided that the age of an elderly applicant is not assigned a negative factor or value.

(iii) In a judgmental system of evaluating creditworthiness, a creditor may consider an applicant's age or whether an applicant's income derives from any public assistance program only for the purpose of determining a pertinent element of creditworthiness.

(iv) In any system of evaluating creditworthiness, a creditor may consider the age of an elderly applicant when such age is used to favor the elderly applicant in extending credit.

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[2] The legislative history of the Act indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness.

(3) Childbearing, childrearing. In evaluating creditworthiness, a creditor shall not make assumptions or use aggregate statistics relating to the likelihood that any category of persons will bear or rear children or will, for that reason, receive diminished or interrupted income in the future.

(4) Telephone listing. A creditor shall not take into account whether there is a telephone listing in the name of an applicant for consumer credit but may take into account whether there is a telephone in the applicant's residence.

(5) Income. A creditor shall not discount or exclude from consideration the income of an applicant or the spouse of an applicant because of a prohibited basis or because the income is derived from part-time employment or is an annuity, pension, or other retirement benefit; a creditor may consider the amount and probable continuance of any income in evaluating an applicant's creditworthiness. When an applicant relies on alimony, child support, or separate maintenance payments in applying for credit, the creditor shall consider such payments as income to the extent that they are likely to be consistently made.

(6) Credit history. To the extent that a creditor considers credit history in evaluating the creditworthiness of similarly qualified applicants for a similar type and amount of credit, in evaluating an applicant's creditworthiness a creditor shall consider:

(i) The credit history, when available, of accounts designated as accounts that the applicant and the applicant's spouse are permitted to use or for which both are contractually liable;

(ii) On the applicant's request, any information the applicant may present that tends to indicate the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness; and

(iii) On the applicant's request, the credit history, when available, of any account reported in the name of the applicant's spouse or former spouse that the applicant can demonstrate accurately reflects the applicant's creditworthiness.

(7) Immigration status. A creditor may consider the applicant's immigration status or status as a permanent resident of the United States, and any additional information that may be necessary to ascertain the creditor's rights and remedies regarding repayment.

(8) Marital status. Except as otherwise permitted or required by law, a creditor shall evaluate married and unmarried applicants by the same standards; and in evaluating joint applicants, a creditor shall not treat applicants differently based on the existence, absence, or likelihood of a marital relationship between the parties.

(9) Race, color, religion, national origin, sex. Except as otherwise permitted or required by law, a creditor shall not consider race, color, religion, national origin, or sex (or an applicant's or other person's decision not to provide the information) in any aspect of a credit transaction.

(c) State property laws. A creditor's consideration or application of state property laws directly or indirectly affecting creditworthiness does not constitute unlawful discrimination for the purposes of the Act or this regulation.

§ 202.7 Rules concerning extensions of credit.

(a) Individual accounts. A creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis.

(b) Designation of name. A creditor shall not refuse to allow an applicant to open or maintain an account in a birth-given first name and a surname that is the applicant's birth-given surname, the spouse's surname, or a combined surname.

(c) Action concerning existing open-end accounts—(1) Limitations. In the absence of evidence of the applicant's inability or unwillingness to repay, a creditor shall not take any of the following actions regarding an applicant who is contractually liable on an existing open-end account on the basis of the applicant's reaching a certain age or retiring or on the basis of a change in the applicant's name or marital status:

(i) Require a reapplication, except as provided in paragraph (c)(2) of this section;

(ii) Change the terms of the account; or

(iii) Terminate the account.

(2) Requiring reapplication. A creditor may require a reapplication for an open-end account on the basis of a change in the marital status of an applicant who is contractually liable if the credit granted was based in whole or in part on income of the applicant's spouse and if information available to the creditor indicates that the applicant's income may not support the amount of credit currently available.

(d) Signature of spouse or other person—(1) Rule for qualified applicant. Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the

applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

(2) Unsecured credit. If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

(3) Unsecured credit—community property states. If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to community property.

(4) Secured credit. If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

(5) Additional parties. If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a cosigner, guarantor, endorser, or similar party. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

(6) Rights of additional parties. A creditor shall not impose requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under this section.

(e) Insurance. A creditor shall not refuse to extend credit and shall not terminate an account because credit life, health, accident, disability, or other credit-related insurance is not available on the basis of the applicant's age.

§ 202.8 Special purpose credit programs.

(a) Standards for programs. Subject to the provisions of paragraph (b) of this section, the Act and this regulation permit a creditor to extend special purpose credit to applicants who meet eligibility requirements under the following types of credit programs:

(1) Any credit assistance program expressly authorized by federal or state law for the benefit of an economically disadvantaged class of persons;

(2) Any credit assistance program offered by a not-for-profit organization, as defined under § 501(c) of the Internal Revenue Code of 1954, as amended, for the benefit of its members or for the benefit of an economically disadvantaged class of persons; or

(3) Any special purpose credit program offered by a for-profit organization, or in which such an organization participates to meet special social needs, if:

(i) The program is established and administered pursuant to a written plan that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program; and

(ii) The program is established and administered to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.

(b) Rules in other sections—(1) General applicability. All the provisions of this regulation apply to each of the special purpose credit programs described in paragraph (a) of this section except as modified by this section.

(2) Common characteristics. A program described in paragraph (a)(2) or (a)(3) of this section qualifies as a special purpose credit program only if it was established and is administered so as not to discriminate against an applicant on any prohibited basis; however, all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) so long as the program was not

established and is not administered with the purpose of evading the requirements of the Act or this regulation.

(c) Special rule concerning requests and use of information. If participants in a special purpose credit program described in paragraph (a) of this section are required to possess one or more common characteristics (for example, race, national origin, or sex) and if the program otherwise satisfies the requirements of paragraph (a) of this section, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.

(d) Special rule in the case of financial need. If financial need is one of the criteria under a special purpose credit program described in paragraph (a) of this section, the creditor may request and consider, in determining an applicant's eligibility for the program, information regarding the applicant's marital status; alimony, child support, and separate maintenance income; and the spouse's financial resources. In addition, a creditor may obtain the signature of an applicant's spouse or other person on an application or credit instrument relating to a special purpose credit program if the signature is required by federal or state law.

§ 202.9 Notifications.

(a) Notification of action taken, ECOA notice, and statement of specific reasons—(1) When notification is required. A creditor shall notify an applicant of action taken within:

(i) 30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application;

(ii) 30 days after taking adverse action on an incomplete application, unless notice is provided in accordance with paragraph (c) of this section;

(iii) 30 days after taking adverse action on an existing account; or

(iv) 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered.

(2) Content of notification when adverse action is taken. A notification given to an applicant when adverse action is taken shall be in writing and shall contain a statement of the action taken; the name and address of the creditor; a statement of the provisions of § 701(a) of the Act; the name and address of the federal agency that administers compliance with respect to the creditor; and either:

(i) A statement of specific reasons for the action taken; or

(ii) A disclosure of the applicant's right to a statement of specific reasons within 30 days, if the statement is requested within 60 days of the creditor's notification. The disclosure shall include the name, address, and telephone number of the person or office from which the statement of reasons can be obtained. If the creditor chooses to provide the reasons orally, the creditor shall also disclose the applicant's right to have them confirmed in writing within 30 days of receiving the applicant's written request for confirmation.

(3) Notification to business credit applicants. For business credit, a creditor shall comply with the notification requirements of this section in the following manner:

(i) With regard to a business that had gross revenues of $1 million or less in its preceding fiscal year (other than an extension of trade credit, credit incident to a factoring

agreement, or other similar types of business credit), a creditor shall comply with paragraphs (a)(1) and (2) of this section, except that:

(A) The statement of the action taken may be given orally or in writing, when adverse action is taken;

(B) Disclosure of an applicant's right to a statement of reasons may be given at the time of application, instead of when adverse action is taken, provided the disclosure contains the information required by paragraph (a)(2)(ii) of this section and the ECOA notice specified in paragraph (b)(1) of this section;

(C) For an application made entirely by telephone, a creditor satisfies the requirements of (a)(3)(i) of this section by an oral statement of the action taken and of the applicant's right to a statement of reasons for adverse action.

(ii) With regard to a business that had gross revenues in excess of $1 million in its preceding fiscal year or an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit, a creditor shall:

(A) Notify the applicant, within a reasonable time, orally or in writing, of the action taken; and

(B) Provide a written statement of the reasons for adverse action and the ECOA notice specified in paragraph (b)(1) of this section if the applicant makes a written request for the reasons within 60 days of the creditor's notification.

(b) Form of ECOA notice and statement of specific reasons—(1) ECOA notice. To satisfy the disclosure requirements of paragraph (a)(2) of this section regarding § 701(a) of the Act, the creditor shall provide a notice that is substantially similar to the following: The federal Equal Credit Opportunity Act prohibits creditors from

discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is [name and address as specified by the appropriate agency listed in appendix A of this regulation].

(2) Statement of specific reasons. The statement of reasons for adverse action required by paragraph (a)(2)(i) of this section must be specific and indicate the principal reason(s) for the adverse action. Statements that the adverse action was based on the creditor's internal standards or policies or that the applicant, joint applicant, or similar party failed to achieve a qualifying score on the creditor's credit scoring system are insufficient.

(c) Incomplete applications—(1) Notice alternatives. Within 30 days after receiving an application that is incomplete regarding matters that an applicant can complete, the creditor shall notify the applicant either:

(i) Of action taken, in accordance with paragraph (a) of this section; or

(ii) Of the incompleteness, in accordance with paragraph (c)(2) of this section.

(2) Notice of incompleteness. If additional information is needed from an applicant, the creditor shall send a written notice to the applicant specifying the information needed, designating a reasonable period of time for the applicant to provide the information, and informing the applicant that failure to provide the information requested will result in no further consideration being given to the application. The

creditor shall have no further obligation under this section if the applicant fails to respond within the designated time period. If the applicant supplies the requested information within the designated time period, the creditor shall take action on the application and notify the applicant in accordance with paragraph (a) of this section.

(3) Oral request for information. At its option, a creditor may inform the applicant orally of the need for additional information. If the application remains incomplete the creditor shall send a notice in accordance with paragraph (c)(1) of this section.

(d) Oral notifications by small-volume creditors. In the case of a creditor that did not receive more than 150 applications during the preceding calendar year, the requirements of this section (including statements of specific reasons) are satisfied by oral notifications.

(e) Withdrawal of approved application. When an applicant submits an application and the parties contemplate that the applicant will inquire about its status, if the creditor approves the application and the applicant has not inquired within 30 days after applying, the creditor may treat the application as withdrawn and need not comply with paragraph (a)(1) of this section.

(f) Multiple applicants. When an application involves more than one applicant, notification need only be given to one of them but must be given to the primary applicant where one is readily apparent.

(g) Applications submitted through a third party. When an application is made on behalf of an applicant to more than one creditor and the applicant expressly accepts or uses credit offered by one of the creditors, notification of action taken by any of the other

creditors is not required. If no credit is offered or if the applicant does not expressly accept or use the credit offered, each creditor taking adverse action must comply with this section, directly or through a third party. A notice given by a third party shall disclose the identity of each creditor on whose behalf the notice is given.

(h) Duties of third parties. A third party may use electronic communication in accordance with the requirements of § 202.16, as applicable, to comply with the requirements of paragraph (g) of this section on behalf of a creditor.

§ 202.10 Furnishing of credit information.

(a) Designation of accounts. A creditor that furnishes credit information shall designate:

(1) Any new account to reflect the participation of both spouses if the applicant's spouse is permitted to use or is contractually liable on the account (other than as a guarantor, surety, endorser, or similar party); and

(2) Any existing account to reflect such participation, within 90 days after receiving a written request to do so from one of the spouses.

(b) Routine reports to consumer reporting agency. If a creditor furnishes credit information to a consumer reporting agency concerning an account designated to reflect the participation of both spouses, the creditor shall furnish the information in a manner that will enable the agency to provide access to the information in the name of each spouse.

(c) Reporting in response to inquiry. If a creditor furnishes credit information in response to an inquiry, concerning an account designated to reflect the participation of

both spouses, the creditor shall furnish the information in the name of the spouse about whom the information is requested.

§ 202.11 Relation to state law.

(a) Inconsistent state laws. Except as otherwise provided in this section, this regulation alters, affects, or preempts only those state laws that are inconsistent with the Act and this regulation and then only to the extent of the inconsistency. A state law is not inconsistent if it is more protective of an applicant.

(b) Preempted provisions of state law—(1) A state law is deemed to be inconsistent with the requirements of the Act and this regulation and less protective of an applicant within the meaning of § 705(f) of the Act to the extent that the law:

(i) Requires or permits a practice or act prohibited by the Act or this regulation;

(ii) Prohibits the individual extension of consumer credit to both parties to a marriage if each spouse individually and voluntarily applies for such credit;

(iii) Prohibits inquiries or collection of data required to comply with the Act or this regulation;

(iv) Prohibits asking about or considering age in an empirically derived, demonstrably and statistically sound, credit scoring system to determine a pertinent element of creditworthiness, or to favor an elderly applicant; or

(v) Prohibits inquiries necessary to establish or administer a special purpose credit program as defined by § 202.8.

(2) A creditor, state, or other interested party may request that the Board determine whether a state law is inconsistent with the requirements of the Act and this regulation.

(c) Laws on finance charges, loan ceilings. If married applicants voluntarily apply for and obtain individual accounts with the same creditor, the accounts shall not be aggregated or otherwise combined for purposes of determining permissible finance charges or loan ceilings under any federal or state law. Permissible loan ceiling laws shall be construed to permit each spouse to become individually liable up to the amount of the loan ceilings, less the amount for which the applicant is jointly liable.

(d) State and federal laws not affected. This section does not alter or annul any provision of state property laws, laws relating to the disposition of decedents' estates, or federal or state banking regulations directed only toward insuring the solvency of financial institutions.

(e) Exemption for state-regulated transactions—(1) Applications. A state may apply to the Board for an exemption from the requirements of the Act and this regulation for any class of credit transactions within the state. The Board will grant such an exemption if the Board determines that:

(i) The class of credit transactions is subject to state law requirements substantially similar to those of the Act and this regulation or that applicants are afforded greater protection under state law; and

(ii) There is adequate provision for state enforcement.

(2) Liability and enforcement. (i) No exemption will extend to the civil liability provisions of § 706 or the administrative enforcement provisions of § 704 of the Act.

(ii) After an exemption has been granted, the requirements of the applicable state law (except for additional requirements not imposed by federal law) will constitute the requirements of the Act and this regulation.

§ 202.12 Record retention.

(a) Retention of prohibited information. A creditor may retain in its files information that is prohibited by the Act or this regulation for use in evaluating applications, without violating the Act or this regulation, if the information was obtained:

(1) From any source prior to March 23, 1977;

(2) From consumer reporting agencies, an applicant, or others without the specific request of the creditor; or

(3) As required to monitor compliance with the Act and this regulation or other federal or state statutes or regulations.

(b) Preservation of records—(1) Applications. For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section) after the date that a creditor notifies an applicant of action taken on an application or of incompleteness, the creditor shall retain in original form or a copy thereof:

(i) Any application that it receives, any information required to be obtained concerning characteristics of the applicant to monitor compliance with the Act and this regulation or other similar law, and any other written or recorded information used in evaluating the application and not returned to the applicant at the applicant's request;

(ii) A copy of the following documents if furnished to the applicant in written form (or, if furnished orally, any notation or memorandum made by the creditor):

(A) The notification of action taken; and

(B) The statement of specific reasons for adverse action; and

(iii) Any written statement submitted by the applicant alleging a violation of the Act or this regulation.

(2) Existing accounts. For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section) after the date that a creditor notifies an applicant of adverse action regarding an existing account, the creditor shall retain as to that account, in original form or a copy thereof:

(i) Any written or recorded information concerning the adverse action; and

(ii) Any written statement submitted by the applicant alleging a violation of the Act or this regulation.

(3) Other applications. For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section) after the date that a creditor receives an application for which the creditor is not required to comply with the notification requirements of § 202.9, the creditor shall retain all written or recorded information in its possession concerning the applicant, including any notation of action taken.

(4) Enforcement proceedings and investigations. A creditor shall retain the information beyond 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section) if the creditor has actual notice that it is under investigation or is subject to an enforcement proceeding for an alleged violation of the Act or this regulation, by the Attorney General of the United States or by an enforcement agency charged with monitoring that creditor's compliance with the Act and this regulation, or if it has been served with notice of an action filed pursuant to § 706 of the Act and § 202.17 of this regulation. The creditor shall retain the information until final disposition of the matter, unless an earlier time is allowed by order of the agency or court.

(5) Special rule for certain business credit applications. With regard to a business that had gross revenues in excess of $1 million in its preceding fiscal year, or an

extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit, the creditor shall retain records for at least 60 days after notifying the applicant of the action taken. If within that time period the applicant requests in writing the reasons for adverse action or that records be retained, the creditor shall retain records for 12 months.

(6) Self-tests. For 25 months after a self-test (as defined in § 202.15) has been completed, the creditor shall retain all written or recorded information about the self-test. A creditor shall retain information beyond 25 months if it has actual notice that it is under investigation or is subject to an enforcement proceeding for an alleged violation, or if it has been served with notice of a civil action. In such cases, the creditor shall retain the information until final disposition of the matter, unless an earlier time is allowed by the appropriate agency or court order.

(7) Prescreened solicitations. For 25 months after the date on which an offer of credit is made to potential customers (12 months for business credit subject to paragraph (b)(5) of this section), the creditor shall retain in original form or a copy thereof:

(i) The text of any prescreened solicitation;

(ii) The list of criteria the creditor used to select potential recipients of the solicitation; and

(iii) Any correspondence related to complaints (formal or informal) about the solicitation.

§ 202.13 Information for monitoring purposes.

(a) Information to be requested—(1) A creditor that receives an application for credit primarily to purchase (or to refinance a home purchase loan) a dwelling occupied

or to be occupied by the applicant as a principal residence, where the extension of credit will be secured by the dwelling, shall request as part of the application the following information regarding the applicant(s):

(i) Ethnicity, using the categories Hispanic or Latino, or not Hispanic or Latino; and race, using the categories American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White;

(ii) Sex;

(iii) Marital status, using the categories married, unmarried, and separated; and

(iv) Age.

(2) Dwelling means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes, but is not limited to, an individual condominium or cooperative unit and a mobile or other manufactured home.

(b) Obtaining information. Questions regarding ethnicity, race, sex, marital status, and age may be listed, at the creditor's option, on the application form or on a separate form that refers to the application. The applicant(s) shall be asked but not required to supply the requested information. If the applicant(s) chooses not to provide the information or any part of it, that fact shall be noted on the form. The creditor shall then also note on the form, to the extent possible, the ethnicity, race, and sex of the applicant(s) on the basis of visual observation or surname.

(c) Disclosure to applicant(s). The creditor shall inform the applicant(s) that the information regarding ethnicity, race, sex, marital status, and age is being requested by the federal government for the purpose of monitoring compliance with federal statutes

that prohibit creditors from discriminating against applicants on those bases. The creditor shall also inform the applicant(s) that if the applicant(s) chooses not to provide the information, the creditor is required to note the ethnicity, race and sex on the basis of visual observation or surname.

(d) Substitute monitoring program. A monitoring program required by an agency charged with administrative enforcement under § 704 of the Act may be substituted for the requirements contained in paragraphs (a), (b), and (c) of this section.

§ 202.14 Rules on providing appraisal reports.

(a) Providing appraisals. A creditor shall provide a copy of an appraisal report used in connection with an application for credit that is to be secured by a lien on a dwelling. A creditor shall comply with either paragraph (a)(1) or (a)(2) of this section.

(1) Routine delivery. A creditor may routinely provide a copy of an appraisal report to an applicant (whether credit is granted or denied or the application is withdrawn).

(2) Upon request. A creditor that does not routinely provide appraisal reports shall provide a copy upon an applicant's written request.

(i) Notice. A creditor that provides appraisal reports only upon request shall notify an applicant in writing of the right to receive a copy of an appraisal report. The notice may be given at any time during the application process but no later than when the creditor provides notice of action taken under § 202.9 of this regulation. The notice shall specify that the applicant's request must be in writing, give the creditor's mailing address, and state the time for making the request as provided in paragraph (a)(2)(ii) of this section.

(ii) Delivery. A creditor shall mail or deliver a copy of the appraisal report promptly (generally within 30 days) after the creditor receives an applicant's request, receives the report, or receives reimbursement from the applicant for the report, whichever is last to occur. A creditor need not provide a copy when the applicant's request is received more than 90 days after the creditor has provided notice of action taken on the application under § 202.9 of this regulation or 90 days after the application is withdrawn.

(b) Credit unions. A creditor that is subject to the regulations of the National Credit Union Administration on making copies of appraisal reports available is not subject to this section.

(c) Definitions. For purposes of paragraph (a) of this section, the term dwelling means a residential structure that contains one to four units whether or not that structure is attached to real property. The term includes, but is not limited to, an individual condominium or cooperative unit, and a mobile or other manufactured home. The term appraisal report means the document(s) relied upon by a creditor in evaluating the value of the dwelling.

§ 202.15 Incentives for self-testing and self-correction.

(a) General rules—(1) Voluntary self-testing and correction. The report or results of a self-test that a creditor voluntarily conducts (or authorizes) are privileged as provided in this section. Data collection required by law or by any governmental authority is not a voluntary self-test.

(2) Corrective action required. The privilege in this section applies only if the creditor has taken or is taking appropriate corrective action.

(3) Other privileges. The privilege created by this section does not preclude the assertion of any other privilege that may also apply.

(b) Self-test defined—(1) Definition. A self-test is any program, practice, or study that:

(i) Is designed and used specifically to determine the extent or effectiveness of a creditor's compliance with the Act or this regulation; and

(ii) Creates data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions.

(2) Types of information privileged. The privilege under this section applies to the report or results of the self-test, data or factual information created by the self-test, and any analysis, opinions, and conclusions pertaining to the self-test report or results. The privilege covers workpapers or draft documents as well as final documents.

(3) Types of information not privileged. The privilege under this section does not apply to:

(i) Information about whether a creditor conducted a self-test, the methodology used or the scope of the self-test, the time period covered by the self-test, or the dates it was conducted; or

(ii) Loan and application files or other business records related to credit transactions, and information derived from such files and records, even if the information has been aggregated, summarized, or reorganized to facilitate analysis.

(c) Appropriate corrective action—(1) General requirement. For the privilege in this section to apply, appropriate corrective action is required when the self-test shows

that it is more likely than not that a violation occurred, even though no violation has been formally adjudicated.

(2) Determining the scope of appropriate corrective action. A creditor must take corrective action that is reasonably likely to remedy the cause and effect of a likely violation by:

(i) Identifying the policies or practices that are the likely cause of the violation; and

(ii) Assessing the extent and scope of any violation.

(3) Types of relief. Appropriate corrective action may include both prospective and remedial relief, except that to establish a privilege under this section:

(i) A creditor is not required to provide remedial relief to a tester used in a self-test;

(ii) A creditor is only required to provide remedial relief to an applicant identified by the self-test as one whose rights were more likely than not violated; and

(iii) A creditor is not required to provide remedial relief to a particular applicant if the statute of limitations applicable to the violation expired before the creditor obtained the results of the self-test or the applicant is otherwise ineligible for such relief.

(4) No admission of violation. Taking corrective action is not an admission that a violation occurred.

(d) Scope of privilege—(1) General rule. The report or results of a privileged self-test may not be obtained or used:

(i) By a government agency in any examination or investigation relating to compliance with the Act or this regulation; or

(ii) By a government agency or an applicant (including a prospective applicant who alleges a violation of § 202.4(b)) in any proceeding or civil action in which a violation of the Act or this regulation is alleged.

(2) Loss of privilege. The report or results of a self-test are not privileged under paragraph (d)(1) of this section if the creditor or a person with lawful access to the report or results:

(i) Voluntarily discloses any part of the report or results, or any other information privileged under this section, to an applicant or government agency or to the public;

(ii) Discloses any part of the report or results, or any other information privileged under this section, as a defense to charges that the creditor has violated the Act or regulation; or

(iii) Fails or is unable to produce written or recorded information about the self-test that is required to be retained under § 202.12(b)(6) when the information is needed to determine whether the privilege applies. This paragraph does not limit any other penalty or remedy that may be available for a violation of § 202.12.

(3) Limited use of privileged information. Notwithstanding paragraph (d)(1) of this section, the self-test report or results and any other information privileged under this section may be obtained and used by an applicant or government agency solely to determine a penalty or remedy after a violation of the Act or this regulation has been adjudicated or admitted. Disclosures for this limited purpose may be used only for the particular proceeding in which the adjudication or admission was made. Information disclosed under this paragraph (d)(3) remains privileged under paragraph (d)(1) of this section.

§ 202.16 Requirements for electronic communication.

(a) Definition. Electronic communication means a message transmitted electronically between a creditor and an applicant in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

(b) General rule. In accordance with the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) (15 U.S.C. 7001 et seq.) and the rules set forth in this regulation, a creditor may provide by electronic communication any disclosure required by this regulation to be in writing. Disclosures provided by electronic communication must be provided in a clear and conspicuous manner and in a form the applicant may retain.

(c) When consent is required. For disclosures required by this regulation to be in writing, a creditor shall obtain an applicant's affirmative consent in accordance with the requirements of the E-Sign Act. Disclosures under §§ 202.9(a)(3)(i)(B), 202.13(a), and 202.14(a)(2)(i) are not subject to this requirement if provided on or with the application.

(d) Address or location to receive electronic communication. A creditor that uses electronic communication to provide disclosures required by this part shall:

(1) Send the disclosure to the applicant's electronic address; or

(2) Make the disclosure available at another location such as an Internet web site; and

(i) Alert the applicant of the disclosure's availability by sending a notice to the applicant's electronic address (or to a postal address, at the creditor's option). The notice shall identify the account involved and the address of the Internet web site or other location where the disclosure is available; and

(ii) Make the disclosure available for at least 90 days from the date the disclosure first becomes available or from the date of the notice alerting the applicant of the disclosure, whichever comes later.

(3) Exceptions. A creditor need not comply with paragraph (d)(2)(i) and (ii) of this section for the disclosure required by § 202.13(a).

(e) Redelivery. When a disclosure provided by electronic communication is returned to a creditor undelivered, the creditor shall take reasonable steps to attempt redelivery using information in its files.

(f) Electronic signatures. An electronic signature as defined under the E-Sign Act satisfies any requirement under this part for an applicant's signature or initials.

§ 202.17 Enforcement, penalties and liabilities.

(a) Administrative enforcement—(1) As set forth more fully in § 704 of the Act, administrative enforcement of the Act and this regulation regarding certain creditors is assigned to the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Board of Directors of the Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, Surface Transportation Board, Secretary of Agriculture, Farm Credit Administration, Securities and Exchange Commission, Small Business Administration, and Secretary of Transportation.

(2) Except to the extent that administrative enforcement is specifically assigned to other authorities, compliance with the requirements imposed under the Act and this regulation is enforced by the Federal Trade Commission.

(b) Penalties and liabilities—(1) Sections 702(g) and 706(a) and (b) of the Act provide that any creditor that fails to comply with a requirement imposed by the Act or

this regulation is subject to civil liability for actual and punitive damages in individual or class actions. Pursuant to §§ 702(g) and 704(b), (c), and (d) of the Act, violations of the Act or this regulation also constitute violations of other federal laws. Liability for punitive damages can apply only to nongovernmental entities and is limited to $10,000 in individual actions and the lesser of $500,000 or 1 percent of the creditor's net worth in class actions. Section 706(c) provides for equitable and declaratory relief and § 706(d) authorizes the awarding of costs and reasonable attorney's fees to an aggrieved applicant in a successful action.

(2) As provided in § 706(f), a civil action under the Act or this regulation may be brought in the appropriate United States district court without regard to the amount in controversy or in any other court of competent jurisdiction within two years after the date of the occurrence of the violation, or within one year after the commencement of an administrative enforcement proceeding or of a civil action brought by the Attorney General of the United States within two years after the alleged violation.

(3) If an agency responsible for administrative enforcement is unable to obtain compliance with the Act or this regulation, it may refer the matter to the Attorney General of the United States. If the Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration has reason to believe that one or more creditors have engaged in a pattern or practice of discouraging or denying applications in violation of the Act or this regulation, the agency shall refer the matter to the Attorney General. If the agency has reason to believe that one or more creditors violated § 701(a) of the Act, the agency may refer a matter to the Attorney General.

(4) On referral, or whenever the Attorney General has reason to believe that one or more creditors have engaged in a pattern or practice in violation of the Act or this regulation, the Attorney General may bring a civil action for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

(5) If the Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration has reason to believe (as a result of a consumer complaint, a consumer compliance examination, or some other basis) that a violation of the Act or this regulation has occurred which is also a violation of the Fair Housing Act, and the matter is not referred to the Attorney General, the agency shall:

(i) Notify the Secretary of Housing and Urban Development; and

(ii) Inform the applicant that the Secretary of Housing and Urban Development has been notified and that remedies may be available under the Fair Housing Act.

(c) Failure of compliance. A creditor's failure to comply with §§ 202.6(b)(6), 202.9, 202.10, 202.12 or 202.13 is not a violation if it results from an inadvertent error. On discovering an error under §§ 202.9 and 202.10, the creditor shall correct it as soon as possible. If a creditor inadvertently obtains the monitoring information regarding the ethnicity, race, and sex of the applicant in a dwelling-related transaction not covered by § 202.13, the creditor may retain information and act on the application without violating the regulation.

APPENDIX A TO PART 202—FEDERAL ENFORCEMENT AGENCIES

The following list indicates the federal agencies that enforce Regulation B for particular classes of creditors. Any questions concerning a particular creditor should be

directed to its enforcement agency. Terms that are not defined in the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in the International Banking Act of 1978 (12 U.S.C. 3101).

National Banks, and Federal Branches and Federal Agencies of Foreign Banks

Office of the Comptroller of the Currency
Customer Assistance Group, 1301 McKinney Street
Suite 3710, Houston, Texas 77010

State Member Banks, Branches and Agencies of Foreign Banks (other than federal branches, federal agencies, and insured state branches of foreign banks), Commercial Lending Companies Owned or Controlled by Foreign Banks, and Organizations Operating under Section 25 or 25A of the Federal Reserve Act

Federal Reserve Bank serving the district in which the institution is located.

Nonmember Insured Banks and Insured State Branches of Foreign Banks

FDIC Consumer Response Center
2345 Grand Boulevard, Suite 100
Kansas City, Missouri 64108

Savings institutions insured under the Savings Association Insurance Fund of the FDIC and federally chartered savings banks insured under the Bank Insurance Fund of the FDIC (but not including state-chartered savings banks insured under the Bank Insurance Fund).

Office of Thrift Supervision Regional Director for the region in which the institution is located.

Federal Credit Unions

Regional office of the National Credit Union Administration serving the area in which the federal credit union is located.

Air carriers

Assistant General Counsel for Aviation Enforcement and Proceedings
Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Creditors Subject to Surface Transportation Board

Office of Proceedings
Surface Transportation Board
Department of Transportation
1925 K Street NW
Washington, DC 20423

Creditors Subject to Packers and Stockyards Act

Nearest Packers and Stockyards Administration area supervisor.

Small Business Investment Companies

U.S. Small Business Administration
409 Third Street, SW
Washington, DC 20416

Brokers and Dealers

Securities and Exchange Commission
Washington, DC 20549

Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations

Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

Retailers, Finance Companies, and All Other Creditors Not Listed Above

FTC Regional Office for region in which the creditor operates or Federal Trade Commission, Equal Credit Opportunity, Washington, DC 20580.

APPENDIX B TO PART 202—MODEL APPLICATION FORMS

1. This appendix contains five model credit application forms, each designated for use in a particular type of consumer credit transaction as indicated by the bracketed caption on each form. The first sample form is intended for use in open-end, unsecured transactions; the second for closed-end, secured transactions; the third for closed-end transactions, whether unsecured or secured; the fourth in transactions involving

community property or occurring in community property states; and the fifth in residential mortgage transactions which contains a model disclosure for use in complying with § 202.13 for certain dwelling-related loans. All forms contained in this appendix are models; their use by creditors is optional.

2. The use or modification of these forms is governed by the following instructions. A creditor may change the forms: by asking for additional information not prohibited by § 202.5; by deleting any information request; or by rearranging the format without modifying the substance of the inquiries. In any of these three instances, however, the appropriate notices regarding the optional nature of courtesy titles, the option to disclose alimony, child support, or separate maintenance, and the limitation concerning marital status inquiries must be included in the appropriate places if the items to which they relate appear on the creditor's form.

3. If a creditor uses an appropriate Appendix B model form, or modifies a form in accordance with the above instructions, that creditor shall be deemed to be acting in compliance with the provisions of paragraphs (c) and (d) of § 202.5 of this regulation.

APPENDIX C TO PART 202—SAMPLE NOTIFICATION FORMS

1. This appendix contains ten sample notification forms. Forms C-1 through C-4 are intended for use in notifying an applicant that adverse action has been taken on an application or account under §§ 202.9(a)(1) and (2)(i) of this regulation. Form C-5 is a notice of disclosure of the right to request specific reasons for adverse action under §§ 202.9(a)(1) and (2)(ii). Form C-6 is designed for use in notifying an applicant, under § 202.9(c)(2), that an application is incomplete. Forms C-7 and C-8 are intended for use in connection with applications for business credit under § 202.9(a)(3). Form C-9 is designed for use in notifying an applicant of the right to receive a copy of an appraisal under § 202.14. Form C-10 is designed for use in notifying an applicant for nonmortgage credit that the creditor is requesting applicant characteristic information.

2. Form C-1 contains the Fair Credit Reporting Act disclosure as required by §§ 615(a) and (b) of that act. Forms C-2 through C-5 contain only the § 615(a) disclosure (that a creditor obtained information from a consumer reporting agency that played a part in the credit decision). A creditor must provide the § 615(a) disclosure when adverse action is taken against a consumer based on information from a consumer reporting agency. A creditor must provide the § 615(b) disclosure when adverse action is taken based on information from an outside source other than a consumer reporting agency. In addition, a creditor must provide the § 615(b) disclosure if the creditor obtained information from an affiliate other than information in a consumer report or other than information concerning the affiliate's own transactions or experiences with the consumer. Creditors may comply with the disclosure requirements for adverse action based on

information in a consumer report obtained from an affiliate by providing either the § 615(a) or § 615(b) disclosure.

3. The sample forms are illustrative and may not be appropriate for all creditors. They were designed to include some of the factors that creditors most commonly consider. If a creditor chooses to use the checklist of reasons provided in one of the sample forms in this appendix and if reasons commonly used by the creditor are not provided on the form, the creditor should modify the checklist by substituting or adding other reasons. For example, if "inadequate down payment" or "no deposit relationship with us" are common reasons for taking adverse action on an application, the creditor ought to add or substitute such reasons for those presently contained on the sample forms.

4. If the reasons listed on the forms are not the factors actually used, a creditor will not satisfy the notice requirement by simply checking the closest identifiable factor listed. For example, some creditors consider only references from banks or other depository institutions and disregard finance company references altogether; their statement of reasons should disclose "insufficient bank references," not "insufficient credit references." Similarly, a creditor that considers bank references and other credit references as distinct factors should treat the two factors separately and disclose them as appropriate. The creditor should either add such other factors to the form or check "other" and include the appropriate explanation. The creditor need not, however, describe how or why a factor adversely affected the application. For example, the notice may say "length of residence" rather than "too short a period of residence."

5. A creditor may design its own notification forms or use all or a portion of the forms contained in this appendix. Proper use of Forms C-1 through C-4 will satisfy the requirement of § 202.9(a)(2)(i). Proper use of Forms C-5 and C-6 constitutes full compliance with §§ 202.9(a)(2)(ii) and 202.9(c)(2), respectively. Proper use of Forms C-7 and C-8 will satisfy the requirements of §§ 202.9(a)(2)(i) and (ii), respectively, for applications for business credit. Proper use of Form C-9 will satisfy the requirements of § 202.14 of this part. Proper use of Form C-10 will satisfy the requirements of § 202.5(b)(1).

FORM C-1—SAMPLE NOTICE OF ACTION TAKEN AND STATEMENT OF REASONS
Statement of Credit Denial, Termination or Change

Date: _____

Applicant's Name: _____
Applicant's Address: _____

Description of Account, Transaction, or Requested Credit:
_____

Description of Action Taken:
_____
_____

Part I – PRINCIPAL REASON(S) FOR CREDIT DENIAL, TERMINATION, OR OTHER ACTION TAKEN CONCERNING CREDIT.
This section must be completed in all instances.

_____ Credit application incomplete
_____ Insufficient number of credit references provided
_____ Unacceptable type of credit references provided
_____ Unable to verify credit references
_____ Temporary or irregular employment
_____ Unable to verify employment
_____ Length of employment
_____ Income insufficient for amount of credit requested
_____ Excessive obligations in relation to income
_____ Unable to verify income
_____ Length of residence

_____ Temporary residence
_____ Unable to verify residence
_____ No credit file
_____ Limited credit experience
_____ Poor credit performance with us
_____ Delinquent past or present credit obligations with others
_____ Collection action or judgment
_____ Garnishment or attachment
_____ Foreclosure or repossession
_____ Bankruptcy
_____ Number of recent inquiries on credit bureau report
_____ Value or type of collateral not sufficient
_____ Other, specify:_____

Part II— DISCLOSURE OF USE OF INFORMATION OBTAINED FROM AN OUTSIDE SOURCE.

This section should be completed if the credit decision was based in whole or in part on information that has been obtained from an outside source.

_____Our credit decision was based in whole or in part on information obtained in a report from the consumer reporting agency listed below. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency.

Name: _____
Address: _____
_____
[Toll-free] Telephone number: _____

_____Our credit decision was based in whole or in part on information obtained from an affiliate or from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, no later than 60 days after you receive this notice, for disclosure of the nature of this information.

If you have any questions regarding this notice, you should contact:
Creditor's name: _____
Creditor's address: _____
Creditor's telephone number: _____

NOTICE

The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

FORM C-2—SAMPLE NOTICE OF ACTION TAKEN AND STATEMENT OF REASONS

Date

Dear Applicant:

Thank you for your recent application. Your request for [a loan/a credit card/an increase in your credit limit] was carefully considered, and we regret that we are unable to approve your application at this time, for the following reason(s):

Your Income:

_____is below our minimum requirement.
_____is insufficient to sustain payments on the amount of credit requested.
_____could not be verified.

Your Employment:

_____is not of sufficient length to qualify.
_____could not be verified.

Your Credit History:

_____of making payments on time was not satisfactory.
_____could not be verified.

Your Application:

_____lacks a sufficient number of credit references.
_____lacks acceptable types of credit references.
_____reveals that current obligations are excessive in relation to income.

Other: _____

The consumer reporting agency contacted that provided information that influenced our decision in whole or in part was [name, address and [toll-free] telephone number of the reporting agency]. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency. Any questions regarding such information should be directed to [consumer reporting agency]. If you have any questions regarding this letter, you should contact us at [creditor's name, address and telephone number].

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

FORM C-3—SAMPLE NOTICE OF ACTION TAKEN AND STATEMENT OF REASONS (CREDIT SCORING)

Date

Dear Applicant:

Thank you for your recent application for _____. We regret that we are unable to approve your request.

Your application was processed by a credit scoring system that assigns a numerical value to the various items of information we consider in evaluating an application. These numerical values are based upon the results of analyses of repayment histories of large numbers of customers.

The information you provided in your application did not score a sufficient number of points for approval of the application. The reasons you did not score well compared with other applicants were:

- Insufficient bank references
- Type of occupation
- Insufficient credit experience
- Number of recent inquiries on credit bureau report

In evaluating your application the consumer reporting agency listed below provided us with information that in whole or in part influenced our decision. The consumer reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. It can be obtained by contacting: [name, address, and [toll-free] telephone number of the consumer reporting agency]. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency.

If you have any questions regarding this letter, you should contact us at

Creditor's Name: _____
Address: _____
_____
Telephone: _____

Sincerely,

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (with certain limited exceptions); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

FORM C-4—SAMPLE NOTICE OF ACTION TAKEN, STATEMENT OF REASONS AND COUNTEROFFER

Date

Dear Applicant:

Thank you for your application for _____. We are unable to offer you credit on the terms that you requested for the following reason(s):

_____.

We can, however, offer you credit on the following terms: _____.
_____.
If this offer is acceptable to you, please notify us within [amount of time] at the following address: _____.

Our credit decision on your application was based in whole or in part on information obtained in a report from [name, address and [toll-free] telephone number of the consumer reporting agency]. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. You also have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency.

You should know that the federal Equal Credit Opportunity Act prohibits creditors, such as ourselves, from discriminating against credit applicants on the basis of their race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract), because they receive income from a public assistance program, or because they may have exercised their rights under the Consumer Credit Protection Act. If you believe there has been discrimination in handling your application you should contact the [name and address of the appropriate federal enforcement agency listed in appendix A].

Sincerely,

FORM C-5—SAMPLE DISCLOSURE OF RIGHT TO REQUEST SPECIFIC REASONS FOR CREDIT DENIAL

Date

Dear Applicant:

Thank you for applying to us for _____.

After carefully reviewing your application, we are sorry to advise you that we cannot [open an account for you/grant a loan to you/increase your credit limit] at this time. If you would like a statement of specific reasons why your application was denied, please contact [our credit service manager] shown below within 60 days of the date of this letter. We will provide you with the statement of reasons within 30 days after receiving your request.

Creditor's Name
Address
Telephone Number

If we obtained information from a consumer reporting agency as part of our consideration of your application, its name, address, and [toll-free] telephone number is shown below. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you. [You have a right under the Fair Credit

Reporting Act to know the information contained in your credit file at the consumer reporting agency.] You have a right to a free copy of your report from the reporting agency, if you request it no later than 60 days after you receive this notice. In addition, if you find that any information contained in the report you received is inaccurate or incomplete, you have the right to dispute the matter with the reporting agency. You can find out about the information contained in your file (if one was used) by contacting:

Consumer reporting agency's name
Address
[Toll-free] Telephone number

Sincerely,

NOTICE

The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A).

FORM C-6—SAMPLE NOTICE OF INCOMPLETE APPLICATION AND REQUEST FOR ADDITIONAL INFORMATION

Creditor's name
Address
Telephone number

Date

Dear Applicant:

Thank you for your application for credit. The following information is needed to make a decision on your application: _____
_____.
We need to receive this information by ____(date). If we do not receive it by that date, we will regrettably be unable to give further consideration to your credit request.

Sincerely,

FORM C-7—SAMPLE NOTICE OF ACTION TAKEN AND STATEMENT OF REASONS (BUSINESS CREDIT)

Creditor's Name
Creditor's address

Date

Dear Applicant:

Thank you for applying to us for credit. We have given your request careful consideration, and regret that we are unable to extend credit to you at this time for the following reasons:

(Insert appropriate reason, such as: Value or type of collateral not sufficient; Lack of established earnings record; Slow or past due in trade or loan payments)

Sincerely,

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is [name and address as specified by the appropriate agency listed in appendix A].

FORM C-8—SAMPLE DISCLOSURE OF RIGHT TO REQUEST SPECIFIC REASONS FOR CREDIT DENIAL GIVEN AT TIME OF APPLICATION (BUSINESS CREDIT)

Creditor's name

Creditor's address

If your application for business credit is denied, you have the right to a written statement of the specific reasons for the denial. To obtain the statement, please contact [name, address and telephone number of the person or office from which the statement of reasons can be obtained] within 60 days from the date you are notified of our decision. We will send you a written statement of reasons for the denial within 30 days of receiving your request for the statement.

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a

binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is [name and address as specified by the appropriate agency listed in appendix A].

FORM C-9—SAMPLE DISCLOSURE OF RIGHT TO RECEIVE A COPY OF AN APPRAISAL

You have the right to a copy of the appraisal report used in connection with your application for credit. If you wish a copy, please write to us at the mailing address we have provided. We must hear from you no later than 90 days after we notify you about the action taken on your credit application or you withdraw your application.

[In your letter, give us the following information:]

FORM C-10—SAMPLE DISCLOSURE ABOUT VOLUNTARY DATA NOTATION

We are requesting the following information to monitor our compliance with the federal Equal Credit Opportunity Act, which prohibits unlawful discrimination. You are not required to provide this information. We will not take this information (or your decision not to provide this information) into account in connection with your application or credit transaction. The law provides that a creditor may not discriminate based on this information, or based on whether or not you choose to provide it. [If you choose not to provide the information, we will note it by visual observation or surname].

APPENDIX D TO PART 202—ISSUANCE OF STAFF INTERPRETATIONS

1. Official Staff Interpretations. Officials in the Board's Division of Consumer and Community Affairs are authorized to issue official staff interpretations of this regulation. These interpretations provide the protection afforded under § 706(e) of the Act. Except in unusual circumstances, such interpretations will not be issued separately but will be incorporated in an official commentary to the regulation, which will be amended periodically.

2. Requests for Issuance of Official Staff Interpretations. A request for an official staff interpretation should be in writing and addressed to the Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System,

Washington, DC 20551. The request should contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents.

3. Scope of Interpretations. No staff interpretations will be issued approving creditors' forms or statements. This restriction does not apply to forms or statements whose use is required or sanctioned by a government agency.

SUPPLEMENT I TO PART 202—OFFICIAL STAFF INTERPRETATIONS

Following is an official staff interpretation of Regulation B (12 CFR Part 202) issued under authority delegated by the Federal Reserve Board to officials in the Division of Consumer and Community Affairs. References are to sections of the regulation or the Equal Credit Opportunity Act (15 U.S.C. 1601 et seq.).

INTRODUCTION

1. Official status. Section 706(e) of the Equal Credit Opportunity Act protects a creditor from civil liability for any act done or omitted in good faith in conformity with an interpretation issued by a duly authorized official of the Federal Reserve Board. This commentary is the means by which the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation B. Good-faith compliance with this commentary affords a creditor protection under § 706(e) of the Act.

2. Issuance of interpretations. Under Appendix D to the regulation, any person may request an official staff interpretation. Interpretations will be issued at the discretion of designated officials and incorporated in this commentary following publication for comment in the Federal Register. Except in unusual circumstances, official staff interpretations will be issued only by means of this commentary.

3. Status of previous interpretations. Interpretations of Regulation B previously issued by the Federal Reserve Board and its staff have been incorporated into this commentary as appropriate. All other previous Board and staff interpretations, official and unofficial, are superseded by this commentary.

4. Footnotes. Footnotes in the regulation have the same legal effect as the text of the regulation, whether they are explanatory or illustrative in nature.

5. Comment designations. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. Each comment in the commentary is identified by a number and the regulatory section or paragraph that it interprets. For example, comments to § 202.2(c) are further divided by subparagraph, such as comment 2(c)(1)(ii)-1 and comment 2(c)(2)(ii)-1.

Section 202.1—Authority, Scope, and Purpose

1(a) Authority and scope.

1. Scope. The Equal Credit Opportunity Act and Regulation B apply to all credit—commercial as well as personal—without regard to the nature or type of the credit or the creditor. If a transaction provides for the deferral of the payment of a debt, it is credit covered by Regulation B even though it may not be a credit transaction covered by Regulation Z (Truth in Lending) (12 CFR Part 226). Further, the definition of creditor is not restricted to the party or person to whom the obligation is initially payable, as is the case under Regulation Z. Moreover, the Act and regulation apply to all methods of credit evaluation, whether performed judgmentally or by use of a credit scoring system.

2. Foreign applicability. Regulation B generally does not apply to lending activities that occur outside the United States. The regulation does apply to lending

activities that take place within the United States (as well as the Commonwealth of Puerto Rico and any territory or possession of the United States), whether or not the applicant is a citizen.

3. Board. The term Board, as used in this regulation, means the Board of Governors of the Federal Reserve System.

Section 202.2—Definitions

2(c) Adverse action.

Paragraph 2(c)(1)(i)

1. Application for credit. If the applicant applied in accordance with the creditor's procedures, a refusal to refinance or extend the term of a business or other loan is adverse action.

Paragraph 2(c)(1)(ii)

1. Move from service area. If a credit card issuer terminates the open-end account of a customer because the customer has moved out of the card issuer's service area, the termination is adverse action unless termination on this ground was explicitly provided for in the credit agreement between the parties. In cases where termination is adverse action, notification is required under § 202.9.

2. Termination based on credit limit. If a creditor terminates credit accounts that have low credit limits (for example, under $400) but keeps open accounts with higher credit limits, the termination is adverse action and notification is required under § 202.9.

Paragraph 2(c)(2)(ii)

1. Default—exercise of due-on-sale clause. If a mortgagor sells or transfers mortgaged property without the consent of the mortgagee, and the mortgagee exercises

its contractual right to accelerate the mortgage loan, the mortgagee may treat the mortgagor as being in default. An adverse action notice need not be given to the mortgagor or the transferee. (See comment 2(e)-1 for treatment of a purchaser who requests to assume the loan.)

2. Current delinquency or default. The term adverse action does not include a creditor's termination of an account when the accountholder is currently in default or delinquent on that account. Notification in accordance with § 202.9 of the regulation generally is required, however, if the creditor's action is based on a past delinquency or default on the account.

Paragraph 2(c)(2)(iii)

1. Point-of-sale transactions. Denial of credit at point of sale is not adverse action except under those circumstances specified in the regulation. For example, denial at point of sale is not adverse action in the following situations:

i. A credit cardholder presents an expired card or a card that has been reported to the card issuer as lost or stolen.

ii. The amount of a transaction exceeds a cash advance or credit limit.

iii. The circumstances (such as excessive use of a credit card in a short period of time) suggest that fraud is involved.

iv. The authorization facilities are not functioning.

v. Billing statements have been returned to the creditor for lack of a forwarding address.

2. Application for increase in available credit. A refusal or failure to authorize an account transaction at the point of sale or loan is not adverse action except when the

refusal is a denial of an application, submitted in accordance with the creditor's procedures, for an increase in the amount of credit.

Paragraph 2(c)(2)(v)

1. Terms of credit versus type of credit offered. When an applicant applies for credit and the creditor does not offer the credit terms requested by the applicant (for example, the interest rate, length of maturity, collateral, or amount of downpayment), a denial of the application for that reason is adverse action (unless the creditor makes a counteroffer that is accepted by the applicant) and the applicant is entitled to notification under § 202.9.

2(e) Applicant.

1. Request to assume loan. If a mortgagor sells or transfers the mortgaged property and the buyer makes an application to the creditor to assume the mortgage loan, the mortgagee must treat the buyer as an applicant unless its policy is not to permit assumptions.

2(f) Application.

1. General. A creditor has the latitude under the regulation to establish its own application process and to decide the type and amount of information it will require from credit applicants.

2. Procedures used. The term "procedures" refers to the actual practices followed by a creditor for making credit decisions as well as its stated application procedures. For example, if a creditor's stated policy is to require all applications to be in writing on the creditor's application form, but the creditor also makes credit decisions based on oral requests, the creditor's procedures are to accept both oral and written applications.

3. When an inquiry or prequalification request becomes an application. A creditor is encouraged to provide consumers with information about loan terms. However, if in giving information to the consumer the creditor also evaluates information about the consumer, decides to decline the request, and communicates this to the consumer, the creditor has treated the inquiry or prequalification request as an application and must then comply with the notification requirements under § 202.9. Whether the inquiry or prequalification request becomes an application depends on how the creditor responds to the consumer, not on what the consumer says or asks. (See comment 9-5 for further discussion of prequalification requests; see comment 2(f)-5 for a discussion of preapproval requests.)

4. Examples of inquiries that are not applications. The following examples illustrate situations in which only an inquiry has taken place:

i. A consumer calls to ask about loan terms and an employee explains the creditor's basic loan terms, such as interest rates, loan-to-value ratio, and debt-to-income ratio.

ii. A consumer calls to ask about interest rates for car loans, and, in order to quote the appropriate rate, the loan officer asks for the make and sales price of the car and the amount of the downpayment, then gives the consumer the rate.

iii. A consumer asks about terms for a loan to purchase a home and tells the loan officer her income and intended downpayment, but the loan officer only explains the creditor's loan-to-value ratio policy and other basic lending policies, without telling the consumer whether she qualifies for the loan.

iv. A consumer calls to ask about terms for a loan to purchase vacant land and states his income and the sales price of the property to be financed, and asks whether he qualifies for a loan; the employee responds by describing the general lending policies, explaining that he would need to look at all of the consumer's qualifications before making a decision, and offering to send an application form to the consumer.

5. Examples of an application. An application for credit includes the following situations:

i. A person asks a financial institution to "preapprove" her for a loan (for example, to finance a house or a vehicle she plans to buy) and the institution reviews the request under a program in which the institution, after a comprehensive analysis of her creditworthiness, issues a written commitment valid for a designated period of time to extend a loan up to a specified amount. The written commitment may not be subject to conditions other than conditions that require the identification of adequate collateral, conditions that require no material change in the applicant's financial condition or creditworthiness prior to funding the loan, and limited conditions that are not related to the financial condition or creditworthiness of the applicant that the lender ordinarily attaches to a traditional application (such as certification of a clear termite inspection for a home purchase loan, or a maximum mileage requirement for a used car loan). But if the creditor's program does not provide for giving written commitments, requests for preapprovals are treated as prequalification requests for purposes of the regulation.

ii. Under the same facts as above, the financial institution evaluates the person's creditworthiness and determines that she does not qualify for a preapproval.

6. Completed application—diligence requirement. The regulation defines a completed application in terms that give a creditor the latitude to establish its own information requirements. Nevertheless, the creditor must act with reasonable diligence to collect information needed to complete the application. For example, the creditor should request information from third parties, such as a credit report, promptly after receiving the application. If additional information is needed from the applicant, such as an address or a telephone number to verify employment, the creditor should contact the applicant promptly. (But see comment 9(a)(1)-3, which discusses the creditor's option to deny an application on the basis of incompleteness.)

2(g) Business credit.

1. Definition. The test for deciding whether a transaction qualifies as business credit is one of primary purpose. For example, an open-end credit account used for both personal and business purposes is not business credit unless the primary purpose of the account is business-related. A creditor may rely on an applicant's statement of the purpose for the credit requested.

2(j) Credit.

1. General. Regulation B covers a wider range of credit transactions than Regulation Z (Truth in Lending). Under Regulation B, a transaction is credit if there is a right to defer payment of a debt—regardless of whether the credit is for personal or commercial purposes, the number of installments required for repayment, or whether the transaction is subject to a finance charge.

2(l) Creditor.

1. Assignees. The term creditor includes all persons participating in the credit decision. This may include an assignee or a potential purchaser of the obligation who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated.

2. Referrals to creditors. For certain purposes, the term creditor includes persons such as real estate brokers, automobile dealers, home builders, and home-improvement contractors who do not participate in credit decisions but who only accept applications and refer applicants to creditors, or select or offer to select creditors to whom credit requests can be made. These persons must comply with § 202.4(a), the general rule prohibiting discrimination, and with § 202.4(b), the general rule against discouraging applications.

2(p) Empirically derived and other credit scoring systems.

1. Purpose of definition. The definition under § 202.2(p)(1)(i) through (iv) sets the criteria that a credit system must meet in order to use age as a predictive factor. Credit systems that do not meet these criteria are judgmental systems and may consider age only for the purpose of determining a "pertinent element of creditworthiness." (Both types of systems may favor an elderly applicant. See § 202.6(b)(2).)

2. Periodic revalidation. The regulation does not specify how often credit scoring systems must be revalidated. The credit scoring system must be revalidated frequently enough to ensure that it continues to meet recognized professional statistical standards for statistical soundness. To ensure that predictive ability is being maintained, the creditor must periodically review the performance of the system. This could be done,

for example, by analyzing the loan portfolio to determine the delinquency rate for each score interval, or by analyzing population stability over time to detect deviations of recent applications from the applicant population used to validate the system. If this analysis indicates that the system no longer predicts risk with statistical soundness, the system must be adjusted as necessary to reestablish its predictive ability. A creditor is responsible for ensuring its system is validated and revalidated based on the creditor's own data.

3. Pooled data scoring systems. A scoring system or the data from which to develop such a system may be obtained from either a single credit grantor or multiple credit grantors. The resulting system will qualify as an empirically derived, demonstrably and statistically sound, credit scoring system provided the criteria set forth in paragraph (p)(1)(i) through (iv) are met. A creditor is responsible for ensuring its system is validated and revalidated based on the creditor's own data when it becomes available.

4. Effects test and disparate treatment. An empirically derived, demonstrably and statistically sound, credit scoring system may include age as a predictive factor (provided that the age of an elderly applicant is not assigned a negative factor or value). Besides age, no other prohibited basis may be used as a variable. Generally, credit scoring systems treat all applicants objectively and thus avoid problems of disparate treatment. In cases where a credit scoring system is used in conjunction with individual discretion, disparate treatment could conceivably occur in the evaluation process. In addition, neutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test. (See comment 6(a)-2 for a discussion of the effects test).

2(w) Open-end credit.

1. Open-end real estate mortgages. The term "open-end credit" does not include negotiated advances under an open-end real estate mortgage or a letter of credit.

2(z) Prohibited basis.

1. Persons associated with applicant. As used in this regulation, prohibited basis refers not only to characteristics—the race, color, religion, national origin, sex, marital status, or age—of an applicant (or officers of an applicant in the case of a corporation) but also to the characteristics of individuals with whom an applicant is affiliated or with whom the applicant associates. This means, for example, that under the general rule stated in § 202.4(a), a creditor may not discriminate against an applicant because of that person's personal or business dealings with members of a certain religion, because of the national origin of any persons associated with the extension of credit (such as the tenants in the apartment complex being financed), or because of the race of other residents in the neighborhood where the property offered as collateral is located.

2. National origin. A creditor may not refuse to grant credit because an applicant comes from a particular country but may take the applicant's immigration status into account. A creditor may also take into account any applicable law, regulation, or executive order restricting dealings with citizens (or the government) of a particular country or imposing limitations regarding credit extended for their use.

3. Public assistance program. Any federal, state, or local governmental assistance program that provides a continuing, periodic income supplement, whether premised on entitlement or need, is "public assistance" for purposes of the regulation. The term includes (but is not limited to) Temporary Aid to Needy Families, food stamps,

rent and mortgage supplement or assistance programs, social security and supplemental security income, and unemployment compensation. Only physicians, hospitals, and others to whom the benefits are payable need consider Medicare and Medicaid as public assistance.

Section 202.3—Limited Exceptions for Certain Classes of Transactions

1. Scope. Under this section, procedural requirements of the regulation do not apply to certain types of credit. All classes of transactions remain subject to § 202.4(a), the general rule barring discrimination on a prohibited basis, and to any other provision not specifically excepted.

3(a) Public-utilities credit.

1. Definition. This definition applies only to credit for the purchase of a utility service, such as electricity, gas, or telephone service. Credit provided or offered by a public utility for some other purpose—such as for financing the purchase of a gas dryer, telephone equipment, or other durable goods, or for insulation or other home improvements—is not excepted.

2. Security deposits. A utility company is a creditor when it supplies utility service and bills the user after the service has been provided. Thus, any credit term (such as a requirement for a security deposit) is subject to the regulation's bar against discrimination on a prohibited basis.

3. Telephone companies. A telephone company's credit transactions qualify for the exceptions provided in § 202.3(a)(2) only if the company is regulated by a government unit or files the charges for service, delayed payment, or any discount for prompt payment with a government unit.

3(c) Incidental credit.

1. Examples. If a service provider (such as a hospital, doctor, lawyer, or merchant) allows the client or customer to defer the payment of a bill, this deferral of debt is credit for purposes of the regulation, even though there is no finance charge and no agreement for payment in installments. Because of the exceptions provided by this section, however, these particular credit extensions are excepted from compliance with certain procedural requirements as specified in § 202.3(c).

3(d) Government credit.

1. Credit to governments. The exception relates to credit extended to (not by) governmental entities. For example, credit extended to a local government is covered by this exception, but credit extended to consumers by a federal or state housing agency does not qualify for special treatment under this category.

Section 202.4—General Rules

Paragraph 4(a)

1. Scope of rule. The general rule stated in § 202.4(a) covers all dealings, without exception, between an applicant and a creditor, whether or not addressed by other provisions of the regulation. Other provisions of the regulation identify specific practices that the Board has decided are impermissible because they could result in credit discrimination on a basis prohibited by the Act. The general rule covers, for example, application procedures, criteria used to evaluate creditworthiness, administration of accounts, and treatment of delinquent or slow accounts. Thus, whether or not specifically prohibited elsewhere in the regulation, a credit practice that treats applicants differently on a prohibited basis violates the law because it violates the general rule. Disparate

treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate.

2. Examples.

i. Disparate treatment would exist, for example, in the following situations:

A. A creditor provides information only on "subprime" and similar products to minority applicants who request information about the creditor's mortgage products, but provides information on a wider variety of mortgage products to similarly situated nonminority applicants.

B. A creditor provides more comprehensive information to men than to similarly situated women.

C. A creditor requires a minority applicant to provide greater documentation to obtain a loan than a similarly situated nonminority applicant.

D. A creditor waives or relaxes credit standards for a nonminority applicant but not for a similarly situated minority applicant.

ii. Treating applicants differently on a prohibited basis is unlawful if the creditor lacks a legitimate nondiscriminatory reason for its action, or if the asserted reason is found to be a pretext for discrimination.

Paragraph 4(b)

1. Prospective applicants. Generally, the regulation's protections apply only to persons who have requested or received an extension of credit. In keeping with the purpose of the Act—to promote the availability of credit on a nondiscriminatory basis—§ 202.4(b) covers acts or practices directed at prospective applicants that could

discourage a reasonable person, on a prohibited basis, from applying for credit. Practices prohibited by this section include:

i. A statement that the applicant should not bother to apply, after the applicant states that he is retired.

ii. The use of words, symbols, models or other forms of communication in advertising that express, imply, or suggest a discriminatory preference or a policy of exclusion in violation of the Act.

iii. The use of interview scripts that discourage applications on a prohibited basis.

2. Affirmative advertising. A creditor may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor.

Paragraph 4(c)

1. Requirement for written applications. Model application forms are provided in Appendix B to the regulation, although use of a printed form is not required. A creditor will satisfy the requirement by writing down the information that it normally considers in making a credit decision. The creditor may complete an application on behalf of an applicant and need not require the applicant to sign the application.

2. Telephone applications. A creditor that accepts applications by telephone for dwelling-related credit covered by § 202.13 can meet the requirement for written applications by writing down pertinent information that is provided by the applicant.

3. Computerized entry. Information entered directly into and retained by a computerized system qualifies as a written application under this paragraph. (See the

commentary to § 202.13(b), Applications through electronic media and Applications through video.)

Paragraph 4(d)

1. Clear and conspicuous. This standard requires that disclosures be presented in a reasonably understandable format in a way that does not obscure the required information. No minimum type size is mandated, but the disclosures must be legible, whether typewritten, handwritten, or printed by computer.

Section 202.5—Rules Concerning Information Requests

5(a) General rules.

Paragraph 5(a)(1)

1. Requests for information. This section governs the types of information that a creditor may gather. Section 202.6 governs how information may be used.

Paragraph 5(a)(2)

1. Local laws. Information that a creditor is allowed to collect pursuant to a "state" statute or regulation includes information required by a local statute, regulation, or ordinance.

2. Information required by Regulation C. Regulation C generally requires creditors covered by the Home Mortgage Disclosure Act (HMDA) to collect and report information about the race, ethnicity, and sex of applicants for home-improvement loans and home-purchase loans, including some types of loans not covered by § 202.13.

3. Collecting information on behalf of creditors. Persons such as loan brokers and correspondents do not violate the ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the

information is to provide it to a creditor that is subject to the Home Mortgage Disclosure Act or another federal or state statute or regulation requiring data collection.

5(d) Other limitations on information requests.

Paragraph 5(d)(1)

1. Indirect disclosure of prohibited information. The fact that certain credit-related information may indirectly disclose marital status does not bar a creditor from seeking such information. For example, the creditor may ask about:

i. The applicant's obligation to pay alimony, child support, or separate maintenance income.

ii. The source of income to be used as the basis for repaying the credit requested, which could disclose that it is the income of a spouse.

iii. Whether any obligation disclosed by the applicant has a co-obligor, which could disclose that the co-obligor is a spouse or former spouse.

iv. The ownership of assets, which could disclose the interest of a spouse.

Paragraph 5(d)(2)

1. Disclosure about income. The sample application forms in appendix B to the regulation illustrate how a creditor may inform an applicant of the right not to disclose alimony, child support, or separate maintenance income.

2. General inquiry about source of income. Since a general inquiry about the source of income may lead an applicant to disclose alimony, child support, or separate maintenance income, a creditor making such an inquiry on an application form should preface the request with the disclosure required by this paragraph.

3. Specific inquiry about sources of income. A creditor need not give the disclosure if the inquiry about income is specific and worded in a way that is unlikely to lead the applicant to disclose the fact that income is derived from alimony, child support, or separate maintenance payments. For example, an application form that asks about specific types of income such as salary, wages, or investment income need not include the disclosure.

Section 202.6—Rules Concerning Evaluation of Applications

6(a) General rule concerning use of information.

1. General. When evaluating an application for credit, a creditor generally may consider any information obtained. However, a creditor may not consider in its evaluation of creditworthiness any information that it is barred by § 202.5 from obtaining or from using for any purpose other than to conduct a self-test under § 202.15.

2. Effects test. The effects test is a judicial doctrine that was developed in a series of employment cases decided by the U.S. Supreme Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), and the burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991 (42 U.S.C. 2000e-2). Congressional intent that this doctrine apply to the credit area is documented in the Senate Report that accompanied H.R. 6516, No. 94-589, pp. 4-5; and in the House Report that accompanied H.R. 6516, No. 94-210, p.5. The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by

means that are less disparate in their impact. For example, requiring that applicants have income in excess of a certain amount to qualify for an overdraft line of credit could mean that women and minority applicants will be rejected at a higher rate than men and nonminority applicants. If there is a demonstrable relationship between the income requirement and creditworthiness for the level of credit involved, however, use of the income standard would likely be permissible.

6(b) Specific rules concerning use of information.

Paragraph 6(b)(1)

1. Prohibited basis—special purpose credit. In a special purpose credit program, a creditor may consider a prohibited basis to determine whether the applicant possesses a characteristic needed for eligibility. (See § 202.8.)

Paragraph 6(b)(2)

1. Favoring the elderly. Any system of evaluating creditworthiness may favor a credit applicant who is age 62 or older. A credit program that offers more favorable credit terms to applicants age 62 or older is also permissible; a program that offers more favorable credit terms to applicants at an age lower than 62 is permissible only if it meets the special-purpose credit requirements of § 202.8.

2. Consideration of age in a credit scoring system. Age may be taken directly into account in a credit scoring system that is "demonstrably and statistically sound," as defined in § 202.2(p), with one limitation: applicants age 62 years or older must be treated at least as favorably as applicants who are under age 62. If age is scored by assigning points to an applicant's age category, elderly applicants must receive the same or a greater number of points as the most favored class of nonelderly applicants.

i. Age-split scorecards. Some credit systems segment the population and use different scorecards based on the age of an applicant. In such a system, one card may cover a narrow age range (for example, applicants in their twenties or younger) who are evaluated under attributes predictive for that age group. A second card may cover all other applicants, who are evaluated under the attributes predictive for that broader class. When a system uses a card covering a wide age range that encompasses elderly applicants, the credit scoring system is not deemed to score age. Thus, the system does not raise the issue of assigning a negative factor or value to the age of elderly applicants. But if a system segments the population by age into multiple scorecards, and includes elderly applicants in a narrower age range, the credit scoring system does score age. To comply with the Act and regulation in such a case, the creditor must ensure that the system does not assign a negative factor or value to the age of elderly applicants as a class.

3. Consideration of age in a judgmental system. In a judgmental system, defined in § 202.2(t), a creditor may not decide whether to extend credit or set the terms and conditions of credit based on age or information related exclusively to age. Age or age-related information may be considered only in evaluating other "pertinent elements of creditworthiness" that are drawn from the particular facts and circumstances concerning the applicant. For example, a creditor may not reject an application or terminate an account because the applicant is 60 years old. But a creditor that uses a judgmental system may relate the applicant's age to other information about the applicant that the creditor considers in evaluating creditworthiness. As the following examples illustrate, the evaluation must be made in an individualized, case-by-case manner:

i. A creditor may consider the applicant's occupation and length of time to retirement to ascertain whether the applicant's income (including retirement income) will support the extension of credit to its maturity.

ii. A creditor may consider the adequacy of any security offered when the term of the credit extension exceeds the life expectancy of the applicant and the cost of realizing on the collateral could exceed the applicant's equity. An elderly applicant might not qualify for a 5 percent down, 30-year mortgage loan but might qualify with a larger downpayment or a shorter loan maturity.

iii. A creditor may consider the applicant's age to assess the significance of length of employment (a young applicant may have just entered the job market) or length of time at an address (an elderly applicant may recently have retired and moved from a long-term residence).

4. Consideration of age in a reverse mortgage. A reverse mortgage is a home-secured loan in which the borrower receives payments from the creditor, and does not become obligated to repay these amounts (other than in the case of default) until the borrower dies, moves permanently from the home, or transfers title to the home, or upon a specified maturity date. Disbursements to the borrower under a reverse mortgage typically are determined by considering the value of the borrower's home, the current interest rate, and the borrower's life expectancy. A reverse mortgage program that requires borrowers to be age 62 or older is permissible under § 202.6(b)(2)(iv). In addition, under § 202.6(b)(2)(iii), a creditor may consider a borrower's age to evaluate a pertinent element of creditworthiness, such as the amount of the credit or monthly payments that the borrower will receive, or the estimated repayment date.

5. Consideration of age in a combined system. A creditor using a credit scoring system that qualifies as "empirically derived" under § 202.2(p) may consider other factors (such as a credit report or the applicant's cash flow) on a judgmental basis. Doing so will not negate the classification of the credit scoring component of the combined system as "demonstrably and statistically sound." While age could be used in the credit scoring portion, however, in the judgmental portion age may not be considered directly. It may be used only for the purpose of determining a "pertinent element of creditworthiness." (See comment 6(b)(2)-3.)

6. Consideration of public assistance. When considering income derived from a public assistance program, a creditor may take into account, for example:

i. The length of time an applicant will likely remain eligible to receive such income.

ii. Whether the applicant will continue to qualify for benefits based on the status of the applicant's dependents (as in the case of Temporary Aid to Needy Families, or social security payments to a minor).

iii. Whether the creditor can attach or garnish the income to assure payment of the debt in the event of default.

Paragraph 6(b)(5)

1. Consideration of an individual applicant. A creditor must evaluate income derived from part-time employment, alimony, child support, separate maintenance payments, retirement benefits, or public assistance on an individual basis, not on the basis of aggregate statistics; and must assess its reliability or unreliability by analyzing the

applicant's actual circumstances, not by analyzing statistical measures derived from a group.

2. Payments consistently made. In determining the likelihood of consistent payments of alimony, child support, or separate maintenance, a creditor may consider factors such as whether payments are received pursuant to a written agreement or court decree; the length of time that the payments have been received; whether the payments are regularly received by the applicant; the availability of court or other procedures to compel payment; and the creditworthiness of the payor, including the credit history of the payor when it is available to the creditor.

3. Consideration of income.

i. A creditor need not consider income at all in evaluating creditworthiness. If a creditor does consider income, there are several acceptable methods, whether in a credit scoring or a judgmental system:

A. A creditor may score or take into account the total sum of all income stated by the applicant without taking steps to evaluate the income for reliability.

B. A creditor may evaluate each component of the applicant's income, and then score or take into account income determined to be reliable separately from other income; or the creditor may disregard that portion of income that is not reliable when it aggregates reliable income.

C. A creditor that does not evaluate all income components for reliability must treat as reliable any component of protected income that is not evaluated.

ii. In considering the separate components of an applicant's income, the creditor may not automatically discount or exclude from consideration any protected income. Any discounting or exclusion must be based on the applicant's actual circumstances.

4. Part-time employment, sources of income. A creditor may score or take into account the fact that an applicant has more than one source of earned income—a full-time and a part-time job or two part-time jobs. A creditor may also score or treat earned income from a secondary source differently than earned income from a primary source. The creditor may not, however, score or otherwise take into account the number of sources for income such as retirement income, social security, supplemental security income, and alimony. Nor may the creditor treat negatively the fact that an applicant's only earned income is derived from, for example, a part-time job.

Paragraph 6(b)(6)

1. Types of credit references. A creditor may restrict the types of credit history and credit references that it will consider, provided that the restrictions are applied to all credit applicants without regard to sex, marital status, or any other prohibited basis. On the applicant's request, however, a creditor must consider credit information not reported through a credit bureau when the information relates to the same types of credit references and history that the creditor would consider if reported through a credit bureau.

Paragraph 6(b)(7)

1. National origin—immigration status. The applicant's immigration status and ties to the community (such as employment and continued residence in the area) could have a bearing on a creditor's ability to obtain repayment. Accordingly, the creditor may

consider immigration status and differentiate, for example, between a noncitizen who is a long-time resident with permanent resident status and a noncitizen who is temporarily in this country on a student visa.

2. National origin—citizenship. A denial of credit on the ground that an applicant is not a United States citizen is not per se discrimination based on national origin.

Paragraph 6(b)(8)

1. Prohibited basis—marital status. A creditor may consider the marital status of an applicant or joint applicant for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit. For example, in a secured transaction involving real property, a creditor could take into account whether state law gives the applicant's spouse an interest in the property being offered as collateral.

Section 202.7—Rules Concerning Extensions of Credit

7(a) Individual accounts.

1. Open-end credit—authorized user. A creditor may not require a creditworthy applicant seeking an individual credit account to provide additional signatures. But the creditor may condition the designation of an authorized user by the account holder on the authorized user's becoming contractually liable for the account, as long as the creditor does not differentiate on any prohibited basis in imposing this requirement.

2. Open-end credit—choice of authorized user. A creditor that permits an account holder to designate an authorized user may not restrict this designation on a prohibited basis. For example, if the creditor allows the designation of spouses as authorized users, the creditor may not refuse to accept a nonspouse as an authorized user.

3. Overdraft authority on transaction accounts. If a transaction account (such as a checking account or NOW account) includes an overdraft line of credit, the creditor may require that all persons authorized to draw on the transaction account assume liability for any overdraft.

7(b) Designation of name.

1. Single name on account. A creditor may require that joint applicants on an account designate a single name for purposes of administering the account and that a single name be embossed on any credit cards issued on the account. But the creditor may not require that the name be the husband's name. (See § 202.10 for rules governing the furnishing of credit history on accounts held by spouses.)

7(c) Action concerning existing open-end accounts.

Paragraph 7(c)(1)

1. Termination coincidental with marital status change. When an account holder's marital status changes, a creditor generally may not terminate the account unless it has evidence that the account holder is now unable or unwilling to repay. But the creditor may terminate an account on which both spouses are jointly liable, even if the action coincides with a change in marital status, when one or both spouses:

i. Repudiate responsibility for future charges on the joint account.

ii. Request separate accounts in their own names.

iii. Request that the joint account be closed.

2. Updating information. A creditor may periodically request updated information from applicants but may not use events related to a prohibited basis—such as

an applicant's retirement or reaching a particular age, or a change in name or marital status—to trigger such a request.

Paragraph 7(c)(2)

1. Procedure pending reapplication. A creditor may require a reapplication from an account holder, even when there is no evidence of unwillingness or inability to repay, if (1) the credit was based on the qualifications of a person who is no longer available to support the credit and (2) the creditor has information indicating that the account holder's income may be insufficient to support the credit. While a reapplication is pending, the creditor must allow the account holder full access to the account under the existing contract terms. The creditor may specify a reasonable time period within which the account holder must submit the required information.

7(d) Signature of spouse or other person.

1. Qualified applicant. The signature rules ensure that qualified applicants are able to obtain credit in their own names. Thus, when an applicant requests individual credit, a creditor generally may not require the signature of another person unless the creditor has first determined that the applicant alone does not qualify for the credit requested.

2. Unqualified applicant. When an applicant requests individual credit but does not meet a creditor's standards, the creditor may require a cosigner, guarantor, endorser, or similar parties—but cannot require that it be the spouse. (See commentary to § 202.7(d)(5) and (6).)

Paragraph 7(d)(1)

1. Signature of another person. It is impermissible for a creditor to require an applicant who is individually creditworthy to provide a cosigner—even if the creditor applies the requirement without regard to sex, marital status, or any other prohibited basis. (But see comment 7(d)(6)-1 concerning guarantors of closely held corporations.)

2. Joint applicant. The term "joint applicant" refers to someone who applies contemporaneously with the applicant for shared or joint credit. It does not refer to someone whose signature is required by the creditor as a condition for granting the credit requested.

3. Evidence of joint application. A person's intent to be a joint applicant must be evidenced at the time of application. Signatures on a promissory note may not be used to show intent to apply for joint credit. On the other hand, signatures or initials on a credit application affirming applicants' intent to apply for joint credit may be used to establish intent to apply for joint credit. (See Appendix B). The method used to establish intent must be distinct from the means used by individuals to affirm the accuracy of information. For example, signatures on a joint financial statement affirming the veracity of information are not sufficient to establish intent to apply for joint credit.

Paragraph 7(d)(2)

1. Jointly owned property. If an applicant requests unsecured credit, does not own sufficient separate property, and relies on joint property to establish creditworthiness, the creditor must value the applicant's interest in the jointly owned property. A creditor may not request that a nonapplicant joint owner sign any instrument

as a condition of the credit extension unless the applicant's interest does not support the amount and terms of the credit sought.

i. Valuation of applicant's interest. In determining the value of an applicant's interest in jointly owned property, a creditor may consider factors such as the form of ownership and the property's susceptibility to attachment, execution, severance, or partition; the value of the applicant's interest after such action; and the cost associated with the action. This determination must be based on the existing form of ownership, and not on the possibility of a subsequent change. For example, in determining whether a married applicant's interest in jointly owned property is sufficient to satisfy the creditor's standards of creditworthiness for individual credit, a creditor may not consider that the applicant's separate property could be transferred into tenancy by the entirety after consummation. Similarly, a creditor may not consider the possibility that the couple may divorce. Accordingly, a creditor may not require the signature of the nonapplicant spouse in these or similar circumstances.

ii. Other options to support credit. If the applicant's interest in jointly owned property does not support the amount and terms of credit sought, the creditor may offer the applicant other options to qualify for the extension of credit. For example:

A. Providing a co-signer or other party (§ 202.7(d)(5));

B. Requesting that the credit be granted on a secured basis (§ 202.7(d)(4)); or

C. Providing the signature of the joint owner on an instrument that ensures access to the property in the event of the applicant's death or default, but does not impose personal liability unless necessary under state law (such as a limited guarantee). A creditor may not routinely require, however, that a joint owner sign an instrument (such

as a quitclaim deed) that would result in the forfeiture of the joint owner's interest in the property.

2. Need for signature—reasonable belief. A creditor's reasonable belief as to what instruments need to be signed by a person other than the applicant should be supported by a thorough review of pertinent statutory and decisional law or an opinion of the state attorney general.

Paragraph 7(d)(3)

1. Residency. In assessing the creditworthiness of a person who applies for credit in a community property state, a creditor may assume that the applicant is a resident of the state unless the applicant indicates otherwise.

Paragraph 7(d)(4)

1. Creation of enforceable lien. Some state laws require that both spouses join in executing any instrument by which real property is encumbered. If an applicant offers such property as security for credit, a creditor may require the applicant's spouse to sign the instruments necessary to create a valid security interest in the property. The creditor may not require the spouse to sign the note evidencing the credit obligation if signing only the mortgage or other security agreement is sufficient to make the property available to satisfy the debt in the event of default. However, if under state law both spouses must sign the note to create an enforceable lien, the creditor may require the signatures.

2. Need for signature—reasonable belief. Generally, a signature to make the secured property available will only be needed on a security agreement. A creditor's reasonable belief that, to ensure access to the property, the spouse's signature is needed on an instrument that imposes personal liability should be supported by a thorough

review of pertinent statutory and decisional law or an opinion of the state attorney general.

3. Integrated instruments. When a creditor uses an integrated instrument that combines the note and the security agreement, the spouse cannot be asked to sign the integrated instrument if the signature is only needed to grant a security interest. But the spouse could be asked to sign an integrated instrument that makes clear—for example, by a legend placed next to the spouse's signature—that the spouse's signature is only to grant a security interest and that signing the instrument does not impose personal liability.

Paragraph 7(d)(5)

1. Qualifications of additional parties. In establishing guidelines for eligibility of guarantors, cosigners, or similar additional parties, a creditor may restrict the applicant's choice of additional parties but may not discriminate on the basis of sex, marital status, or any other prohibited basis. For example, the creditor could require that the additional party live in the creditor's market area.

2. Reliance on income of another person—individual credit. An applicant who requests individual credit relying on the income of another person (including a spouse in a non-community property state) may be required to provide the signature of the other person to make the income available to pay the debt. In community property states, the signature of a spouse may be required if the applicant relies on the spouse's separate income. If the applicant relies on the spouse's future earnings that as a matter of state law cannot be characterized as community property until earned, the creditor may require the spouse's signature, but need not do so—even if it is the creditor's practice to require

the signature when an applicant relies on the future earnings of a person other than a spouse. (See § 202.6(c) on consideration of state property laws.)

3. Renewals. If the borrower's creditworthiness is reevaluated when a credit obligation is renewed, the creditor must determine whether an additional party is still warranted and, if not warranted, release the additional party.

Paragraph 7(d)(6)

1. Guarantees. A guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation. A creditor may require the personal guarantee of the partners, directors, or officers of a business, and the shareholders of a closely held corporation, even if the business or corporation is creditworthy. The requirement must be based on the guarantor's relationship with the business or corporation, however, and not on a prohibited basis. For example, a creditor may not require guarantees only for women-owned or minority-owned businesses. Similarly, a creditor may not require guarantees only of the married officers of a business or the married shareholders of a closely held corporation.

2. Spousal guarantees. The rules in § 202.7(d) bar a creditor from requiring the signature of a guarantor's spouse just as they bar the creditor from requiring the signature of an applicant's spouse. For example, although a creditor may require all officers of a closely held corporation to personally guarantee a corporate loan, the creditor may not automatically require that spouses of married officers also sign the guarantee. If an evaluation of the financial circumstances of an officer indicates that an additional signature is necessary, however, the creditor may require the signature of another person in appropriate circumstances in accordance with § 202.7(d)(2).

7(e) Insurance.

1. Differences in terms. Differences in the availability, rates, and other terms on which credit-related casualty insurance or credit life, health, accident, or disability insurance is offered or provided to an applicant does not violate Regulation B.

2. Insurance information. A creditor may obtain information about an applicant's age, sex, or marital status for insurance purposes. The information may only be used for determining eligibility and premium rates for insurance, however, and not in making the credit decision.

Section 202.8—Special Purpose Credit Programs

8(a) Standards for programs.

1. Determining qualified programs. The Board does not determine whether individual programs qualify for special purpose credit status, or whether a particular program benefits an "economically disadvantaged class of persons." The agency or creditor administering or offering the loan program must make these decisions regarding the status of its program.

2. Compliance with a program authorized by federal or state law. A creditor does not violate Regulation B when it complies in good faith with a regulation promulgated by a government agency implementing a special purpose credit program under § 202.8(a)(1). It is the agency's responsibility to promulgate a regulation that is consistent with federal and state law.

3. Expressly authorized. Credit programs authorized by federal or state law include programs offered pursuant to federal, state, or local statute, regulation or ordinance, or pursuant to judicial or administrative order.

4. Creditor liability. A refusal to grant credit to an applicant is not a violation of the Act or regulation if the applicant does not meet the eligibility requirements under a special purpose credit program.

5. Determining need. In designing a special purpose credit program under § 202.8(a), a for-profit organization must determine that the program will benefit a class of people who would otherwise be denied credit or would receive it on less favorable terms. This determination can be based on a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies. For example, a creditor might design new products to reach consumers who would not meet, or have not met, its traditional standards of creditworthiness due to such factors as credit inexperience or the use of credit sources that may not report to consumer reporting agencies. Or, a bank could review Home Mortgage Disclosure Act data along with demographic data for its assessment area and conclude that there is a need for a special purpose credit program for low-income minority borrowers.

6. Elements of the program. The written plan must contain information that supports the need for the particular program. The plan also must either state a specific period of time for which the program will last, or contain a statement regarding when the program will be reevaluated to determine if there is a continuing need for it.

8(b) Rules in other sections.

1. Applicability of rules. A creditor that rejects an application because the applicant does not meet the eligibility requirements (common characteristic or financial need, for example) must nevertheless notify the applicant of action taken as required by § 202.9.

8(c) Special rule concerning requests and use of information.

1. Request of prohibited basis information. This section permits a creditor to request and consider certain information that would otherwise be prohibited by §§ 202.5 and 202.6 to determine an applicant's eligibility for a particular program.

2. Examples. Examples of programs under which the creditor can ask for and consider information about a prohibited basis are:

i. Energy conservation programs to assist the elderly, for which the creditor must consider the applicant's age.

ii. Programs under a Minority Enterprise Small Business Investment Corporation, for which a creditor must consider the applicant's minority status.

8(d) Special rule in the case of financial need.

1. Request of prohibited basis information. This section permits a creditor to request and consider certain information that would otherwise be prohibited by §§ 202.5 and 202.6, and to require signatures that would otherwise be prohibited by § 202.7(d).

2. Examples. Examples of programs in which financial need is a criterion are:

i. Subsidized housing programs for low- to moderate-income households, for which a creditor may have to consider the applicant's receipt of alimony or child support, the spouse's or parents' income, etc.

ii. Student loan programs based on the family's financial need, for which a creditor may have to consider the spouse's or parents' financial resources.

3. Student loans. In a guaranteed student loan program, a creditor may obtain the signature of a parent as a guarantor when required by federal or state law or agency regulation, or when the student does not meet the creditor's standards of creditworthiness.

(See § 202.7(d)(1) and (5).) The creditor may not require an additional signature when a student has a work or credit history that satisfies the creditor's standards.

Section 202.9—Notifications

1. Use of the term adverse action. The regulation does not require that a creditor use the term adverse action in communicating to an applicant that a request for an extension of credit has not been approved. In notifying an applicant of adverse action as defined by § 202.2(c)(1), a creditor may use any words or phrases that describe the action taken on the application.

2. Expressly withdrawn applications. When an applicant expressly withdraws a credit application, the creditor is not required to comply with the notification requirements under § 202.9. (The creditor must comply, however, with the record retention requirements of the regulation. See § 202.12(b)(3).)

3. When notification occurs. Notification occurs when a creditor delivers or mails a notice to the applicant's last known address or, in the case of an oral notification, when the creditor communicates the credit decision to the applicant.

4. Location of notice. The notifications required under § 202.9 may appear on either or both sides of a form or letter.

5. Prequalification requests. Whether a creditor must provide a notice of action taken for a prequalification request depends on the creditor's response to the request, as discussed in comment 2(f)-3. For instance, a creditor may treat the request as an inquiry if the creditor evaluates specific information about the consumer and tells the consumer the loan amount, rate, and other terms of credit the consumer could qualify for under various loan programs, explaining the process the consumer must follow to submit a

mortgage application and the information the creditor will analyze in reaching a credit decision. On the other hand, a creditor has treated a request as an application, and is subject to the adverse action notice requirements of § 202.9 if, after evaluating information, the creditor decides that it will not approve the request and communicates that decision to the consumer. For example, if the creditor tells the consumer that it would not approve an application for a mortgage because of a bankruptcy in the consumer's record, the creditor has denied an application for credit.

9(a) Notification of action taken, ECOA notice, and statement of specific reasons.

Paragraph 9(a)(1)

1. Timing of notice—when an application is complete. Once a creditor has obtained all the information it normally considers in making a credit decision, the application is complete and the creditor has 30 days in which to notify the applicant of the credit decision. (See also comment 2(f)-6.)

2. Notification of approval. Notification of approval may be express or by implication. For example, the creditor will satisfy the notification requirement when it gives the applicant the credit card, money, property, or services requested.

3. Incomplete application—denial for incompleteness. When an application is incomplete regarding information that the applicant can provide and the creditor lacks sufficient data for a credit decision, the creditor may deny the application giving as the reason for denial that the application is incomplete. The creditor has the option, alternatively, of providing a notice of incompleteness under § 202.9(c).

4. Incomplete application—denial for reasons other than incompleteness. When an application is missing information but provides sufficient data for a credit decision, the

creditor may evaluate the application, make its credit decision, and notify the applicant accordingly. If credit is denied, the applicant must be given the specific reasons for the credit denial (or notice of the right to receive the reasons); in this instance missing information or "incomplete application" cannot be given as the reason for the denial.

5. Length of counteroffer. Section 202.9(a)(1)(iv) does not require a creditor to hold a counteroffer open for 90 days or any other particular length of time.

6. Counteroffer combined with adverse action notice. A creditor that gives the applicant a combined counteroffer and adverse action notice that complies with § 202.9(a)(2) need not send a second adverse action notice if the applicant does not accept the counteroffer. A sample of a combined notice is contained in form C-4 of Appendix C to the regulation.

7. Denial of a telephone application. When an application is made by telephone and adverse action is taken, the creditor must request the applicant's name and address in order to provide written notification under this section. If the applicant declines to provide that information, then the creditor has no further notification responsibility.

Paragraph 9(a)(3)

1. Coverage. In determining which rules in this paragraph apply to a given business credit application, a creditor may rely on the applicant's assertion about the revenue size of the business. (Applications to start a business are governed by the rules in § 202.9(a)(3)(i).) If an applicant applies for credit as a sole proprietor, the revenues of the sole proprietorship will determine which rules govern the application. However, if an applicant applies for business credit as an individual, the rules in § 202.9(a)(3)(i) apply unless the application is for trade or similar credit.

2. Trade credit. The term trade credit generally is limited to a financing arrangement that involves a buyer and a seller—such as a supplier who finances the sale of equipment, supplies, or inventory; it does not apply to an extension of credit by a bank or other financial institution for the financing of such items.

3. Factoring. Factoring refers to a purchase of accounts receivable, and thus is not subject to the Act or regulation. If there is a credit extension incident to the factoring arrangement, the notification rules in § 202.9(a)(3)(ii) apply, as do other relevant sections of the Act and regulation.

4. Manner of compliance. In complying with the notice provisions of the Act and regulation, creditors offering business credit may follow the rules governing consumer credit. Similarly, creditors may elect to treat all business credit the same (irrespective of revenue size) by providing notice in accordance with § 202.9(a)(3)(i).

5. Timing of notification. A creditor subject to § 202.9(a)(3)(ii)(A) is required to notify a business credit applicant, orally or in writing, of action taken on an application within a reasonable time of receiving a completed application. Notice provided in accordance with the timing requirements of § 202.9(a)(1) is deemed reasonable in all instances.

9(b) Form of ECOA notice and statement of specific reasons.

Paragraph 9(b)(1)

1. Substantially similar notice. The ECOA notice sent with a notification of a credit denial or other adverse action will comply with the regulation if it is "substantially similar" to the notice contained in § 202.9(b)(1). For example, a creditor may add a reference to the fact that the ECOA permits age to be considered in certain credit scoring

systems, or add a reference to a similar state statute or regulation and to a state enforcement agency.

Paragraph 9(b)(2)

1. Number of specific reasons. A creditor must disclose the principal reasons for denying an application or taking other adverse action. The regulation does not mandate that a specific number of reasons be disclosed, but disclosure of more than four reasons is not likely to be helpful to the applicant.

2. Source of specific reasons. The specific reasons disclosed under §§ 202.9(a)(2) and (b)(2) must relate to and accurately describe the factors actually considered or scored by a creditor.

3. Description of reasons. A creditor need not describe how or why a factor adversely affected an applicant. For example, the notice may say "length of residence" rather than "too short a period of residence."

4. Credit scoring system. If a creditor bases the denial or other adverse action on a credit scoring system, the reasons disclosed must relate only to those factors actually scored in the system. Moreover, no factor that was a principal reason for adverse action may be excluded from disclosure. The creditor must disclose the actual reasons for denial (for example, "age of automobile") even if the relationship of that factor to predicting creditworthiness may not be clear to the applicant.

5. Credit scoring—method for selecting reasons. The regulation does not require that any one method be used for selecting reasons for a credit denial or other adverse action that is based on a credit scoring system. Various methods will meet the requirements of the regulation. One method is to identify the factors for which the

applicant's score fell furthest below the average score for each of those factors achieved by applicants whose total score was at or slightly above the minimum passing score. Another method is to identify the factors for which the applicant's score fell furthest below the average score for each of those factors achieved by all applicants. These average scores could be calculated during the development or use of the system. Any other method that produces results substantially similar to either of these methods is also acceptable under the regulation.

6. Judgmental system. If a creditor uses a judgmental system, the reasons for the denial or other adverse action must relate to those factors in the applicant's record actually reviewed by the person making the decision.

7. Combined credit scoring and judgmental system. If a creditor denies an application based on a credit evaluation system that employs both credit scoring and judgmental components, the reasons for the denial must come from the component of the system that the applicant failed. For example, if a creditor initially credit scores an application and denies the credit request as a result of that scoring, the reasons disclosed to the applicant must relate to the factors scored in the system. If the application passes the credit scoring stage but the creditor then denies the credit request based on a judgmental assessment of the applicant's record, the reasons disclosed must relate to the factors reviewed judgmentally, even if the factors were also considered in the credit scoring component. If the application is not approved or denied as a result of the credit scoring, but falls into a gray band, and the creditor performs a judgmental assessment and denies the credit after that assessment, the reasons disclosed must come from both components of the system. The same result applies where a judgmental assessment is the

first component of the combined system. As provided in comment 9(b)(2)-1, disclosure of more than a combined total of four reasons is not likely to be helpful to the applicant.

8. Automatic denial. Some credit decision methods contain features that call for automatic denial because of one or more negative factors in the applicant's record (such as the applicant's previous bad credit history with that creditor, the applicant's declaration of bankruptcy, or the fact that the applicant is a minor). When a creditor denies the credit request because of an automatic-denial factor, the creditor must disclose that specific factor.

9. Combined ECOA-FCRA disclosures. The ECOA requires disclosure of the principal reasons for denying or taking other adverse action on an application for an extension of credit. The Fair Credit Reporting Act (FCRA) requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or its own files. Disclosing that a credit report was obtained and used in the denial of the application, as the FCRA requires, does not satisfy the ECOA requirement to disclose specific reasons. For example, if the applicant's credit history reveals delinquent credit obligations and the application is denied for that reason, to satisfy § 202.9(b)(2) the creditor must disclose that the application was denied because of the applicant's delinquent credit obligations. To satisfy the FCRA requirement, the creditor must also disclose that a credit report was obtained and used in the denial of the application. Sample forms C-1 through C-5 of Appendix C of the regulation provide for the two disclosures.

9(c) Incomplete applications.

Paragraph 9(c)(1)

1. Exception for preapprovals. The requirement to provide a notice of incompleteness does not apply to preapprovals that constitute applications under § 202.2(f).

Paragraph 9(c)(2)

1. Reapplication. If information requested by a creditor is submitted by an applicant after the expiration of the time period designated by the creditor, the creditor may require the applicant to make a new application.

Paragraph 9(c)(3)

1. Oral inquiries for additional information. If an applicant fails to provide the information in response to an oral request, a creditor must send a written notice to the applicant within the 30-day period specified in § 202.9(c)(1) and (2). If the applicant provides the information, the creditor must take action on the application and notify the applicant in accordance with § 202.9(a).

9(g) Applications submitted through a third party.

1. Third parties. The notification of adverse action may be given by one of the creditors to whom an application was submitted, or by a noncreditor third party. If one notification is provided on behalf of multiple creditors, the notice must contain the name and address of each creditor. The notice must either disclose the applicant's right to a statement of specific reasons within 30 days, or give the primary reasons each creditor relied upon in taking the adverse action—clearly indicating which reasons relate to which creditor.

2. Third party notice—enforcement agency. If a single adverse action notice is being provided to an applicant on behalf of several creditors and they are under the jurisdiction of different federal enforcement agencies, the notice need not name each agency; disclosure of any one of them will suffice.

3. Third-party notice—liability. When a notice is to be provided through a third party, a creditor is not liable for an act or omission of the third party that constitutes a violation of the regulation if the creditor accurately and in a timely manner provided the third party with the information necessary for the notification and maintains reasonable procedures adapted to prevent such violations.

Section 202.10—Furnishing of Credit Information

1. Scope. The requirements of § 202.10 for designating and reporting credit information apply only to consumer credit transactions. Moreover, they apply only to creditors that opt to furnish credit information to credit bureaus or to other creditors; there is no requirement that a creditor furnish credit information on its accounts.

2. Reporting on all accounts. The requirements of § 202.10 apply only to accounts held or used by spouses. However, a creditor has the option to designate all joint accounts (or all accounts with an authorized user) to reflect the participation of both parties, whether or not the accounts are held by persons married to each other.

3. Designating accounts. In designating accounts and reporting credit information, a creditor need not distinguish between accounts on which the spouse is an authorized user and accounts on which the spouse is a contractually liable party.

4. File and index systems. The regulation does not require the creation or maintenance of separate files in the name of each participant on a joint or user account, or

require any other particular system of recordkeeping or indexing. It requires only that a creditor be able to report information in the name of each spouse on accounts covered by § 202.10. Thus, if a creditor receives a credit inquiry about the wife, it should be able to locate her credit file without asking the husband's name.

10(a) Designation of accounts.

1. New parties. When new parties who are spouses undertake a legal obligation on an account, as in the case of a mortgage loan assumption, the creditor must change the designation on the account to reflect the new parties and must furnish subsequent credit information on the account in the new names.

2. Request to change designation of account. A request to change the manner in which information concerning an account is furnished does not alter the legal liability of either spouse on the account and does not require a creditor to change the name in which the account is maintained.

Section 202.11—Relation to State Law

11(a) Inconsistent state laws.

1. Preemption determination—New York. The Board has determined that the following provisions in the state law of New York are preempted by the federal law, effective November 11, 1988:

i. Article 15, section 296a(1)(b)—Unlawful discriminatory practices in relation to credit on the basis of race, creed, color, national origin, age, sex, marital status, or disability. This provision is preempted to the extent that it bars taking a prohibited basis into account when establishing eligibility for certain special-purpose credit programs.

ii. Article 15, section 296a(1)(c)—Unlawful discriminatory practice to make any record or inquiry based on race, creed, color, national origin, age, sex, marital status, or disability. This provision is preempted to the extent that it bars a creditor from requesting and considering information regarding the particular characteristics (for example, race, national origin, or sex) required for eligibility for special-purpose credit programs.

2. Preemption determination—Ohio. The Board has determined that the following provision in the state law of Ohio is preempted by the federal law, effective July 23, 1990:

i. Section 4112.021(B)(1)—Unlawful discriminatory practices in credit transactions. This provision is preempted to the extent that it bars asking or favorably considering the age of an elderly applicant; prohibits the consideration of age in a credit scoring system; permits without limitation the consideration of age in real estate transactions; and limits the consideration of age in special-purpose credit programs to certain government-sponsored programs identified in the state law.

Section 202.12—Record Retention

12(a) Retention of prohibited information.

1. Receipt of prohibited information. Unless the creditor specifically requested such information, a creditor does not violate this section when it receives prohibited information from a consumer reporting agency.

2. Use of retained information. Although a creditor may keep in its files prohibited information as provided in § 202.12(a), the creditor may use the information in evaluating credit applications only if permitted to do so by § 202.6.

12(b) Preservation of records.

1. Copies. Copies of the original record include carbon copies, photocopies, microfilm or microfiche copies, or copies produced by any other accurate retrieval system, such as documents stored and reproduced by computer. A creditor that uses a computerized or mechanized system need not keep a paper copy of a document (for example, of an adverse action notice) if it can regenerate all pertinent information in a timely manner for examination or other purposes.

2. Computerized decisions. A creditor that enters information items from a written application into a computerized or mechanized system and makes the credit decision mechanically, based only on the items of information entered into the system, may comply with § 202.12(b) by retaining the information actually entered. It is not required to store the complete written application, nor is it required to enter the remaining items of information into the system. If the transaction is subject to § 202.13, however, the creditor is required to enter and retain the data on personal characteristics in order to comply with the requirements of that section.

Paragraph 12(b)(3)

1. Withdrawn and brokered applications. In most cases, the 25-month retention period for applications runs from the date a notification is sent to the applicant granting or denying the credit requested. In certain transactions, a creditor is not obligated to provide a notice of the action taken. (See, for example, comment 9-2.) In such cases, the 25-month requirement runs from the date of application, as when:

i. An application is withdrawn by the applicant.

ii. An application is submitted to more than one creditor on behalf of the applicant, and the application is approved by one of the other creditors.

12(b)(6) Self-tests

1. The rule requires all written or recorded information about a self-test to be retained for 25 months after a self-test has been completed. For this purpose, a self-test is completed after the creditor has obtained the results and made a determination about what corrective action, if any, is appropriate. Creditors are required to retain information about the scope of the self-test, the methodology used and time period covered by the self-test, the report or results of the self-test including any analysis or conclusions, and any corrective action taken in response to the self-test.

12(b)(7) Preapplication marketing information.

1. Prescreened credit solicitations. The rule requires creditors to retain copies of prescreened credit solicitations. For purposes of this regulation, a prescreened solicitation is an "offer of credit" as described in 15 U.S.C. 1681a(1) of the Fair Credit Reporting Act. A creditor complies with this rule if it retains a copy of each solicitation mailing that contains different terms, such as the amount of credit offered, annual percentage rate, annual fee, etc.

2. List of criteria. A creditor must retain the list of criteria used to select potential recipients. This includes the criteria used by the creditor both to determine the potential recipients of the particular solicitation and to determine who will actually be offered credit.

3. Correspondence. A creditor may retain correspondence relating to consumers' complaints about prescreened solicitations in any manner that is reasonably

accessible and is understandable to examiners. There is no requirement to establish a separate database or set of files for such correspondence, or to match consumer complaints with specific solicitation programs.

Section 202.13—Information for Monitoring Purposes

13(a) Information to be requested.

1. Natural person. Section 202.13 applies only to applications from natural persons.

2. Principal residence. The requirements of § 202.13 apply only if an application relates to a dwelling that is or will be occupied by the applicant as the principal residence. A credit application related to a vacation home or a rental unit is not covered. In the case of a two- to four-unit dwelling, the application is covered if the applicant intends to occupy one of the units as a principal residence.

3. Temporary financing. An application for temporary financing to construct a dwelling is not subject to § 202.13. But an application for both a temporary loan to finance construction of a dwelling and a permanent mortgage loan to take effect upon the completion of construction is subject to § 202.13.

4. New principal residence. A person can have only one principal residence at a time. However, if a person buys or builds a new dwelling that will become that person's principal residence within a year or upon completion of construction, the new dwelling is considered the principal residence for purposes of § 202.13.

5. Transactions not covered. The information-collection requirements of this section apply to applications for credit primarily for the purchase or refinancing of a dwelling that is or will become the applicant's principal residence. Therefore,

applications for credit secured by the applicant's principal residence but made primarily for a purpose other than the purchase or refinancing of the principal residence (such as loans for home improvement and debt consolidation) are not subject to the information-collection requirements. An application for an open-end home equity line of credit is not subject to this section unless it is readily apparent to the creditor when the application is taken that the primary purpose of the line is for the purchase or refinancing of a principal dwelling.

6. Refinancings. A refinancing occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same borrower. A creditor that receives an application to refinance an existing extension of credit made by that creditor for the purchase of the applicant's dwelling may request the monitoring information again but is not required to do so if it was obtained in the earlier transaction.

7. Data collection under Regulation C. See comment 5(a)(2)-2.

13(b) Obtaining of information.

1. Forms for collecting data. A creditor may collect the information specified in § 202.13(a) either on an application form or on a separate form referring to the application. The applicant must be offered the option to select more than one racial designation.

2. Written applications. The regulation requires written applications for the types of credit covered by § 202.13. A creditor can satisfy this requirement by recording on paper or by means of computer the information that the applicant provides orally and that the creditor normally considers in a credit decision.

3. Telephone, mail applications.

i. A creditor that accepts an application by telephone must request the monitoring information.

ii. A creditor that accepts an application by mail need not make a special request for the monitoring information if the applicant has failed to provide it on the application form returned to the creditor.

iii. If it is not evident on the face of an application that it was received by mail, telephone, or via an electronic medium, the creditor should indicate on the form or other application record how the application was received.

4. Video capability.

i. If a creditor takes an application through a medium that allows the creditor to see the applicant, the creditor must treat the application as taken in person. The creditor must note the monitoring information on the basis of visual observation or surname, if the applicant chooses not to provide the information.

ii. If an applicant applies through an electronic medium without video capability, the creditor may treat the application as if it were received by mail.

5. Applications through loan-shopping services. When a creditor receives an application through an unaffiliated loan-shopping service, it does not have to request the monitoring information for purposes of the ECOA or Regulation B. Creditors subject to the Home Mortgage Disclosure Act should be aware, however, that data collection may be called for under Regulation C (12 CFR part 203), which generally requires creditors to report, among other things, the sex and race of an applicant on brokered applications or applications received through a correspondent.

6. Inadvertent notation. If a creditor inadvertently obtains the monitoring information in a dwelling-related transaction not covered by § 202.13, the creditor may process and retain the application without violating the regulation.

13(c) Disclosure to applicants.

1. Procedures for providing disclosures. The disclosure to an applicant regarding the monitoring information may be provided in writing. Appendix B contains a sample disclosure. A creditor may devise its own disclosure so long as it is substantially similar. The creditor need not orally request the monitoring information if it is requested in writing.

13(d) Substitute monitoring program.

1. Substitute program. An enforcement agency may adopt, under its established rulemaking or enforcement procedures, a program requiring creditors under its jurisdiction to collect information in addition to information required by this section.

Section 202.14—Rules on Providing Appraisal Reports

14(a) Providing appraisals.

1. Coverage. This section covers applications for credit to be secured by a lien on a dwelling, as that term is defined in § 202.14(c), whether the credit is for a business purpose (for example, a loan to start a business) or a consumer purpose (for example, a loan to finance a child's education).

2. Renewals. This section applies when an applicant requests the renewal of an existing extension of credit and the creditor obtains a new appraisal report. This section does not apply when a creditor uses the appraisal report previously obtained to evaluate the renewal request.

14(a)(2)(i) Notice.

1. Multiple applicants. When an application that is subject to this section involves more than one applicant, the notice about the appraisal report need only be given to one applicant, but it must be given to the primary applicant where one is readily apparent.

14(a)(2)(ii) Delivery.

1. Reimbursement. Creditors may charge for photocopy and postage costs incurred in providing a copy of the appraisal report, unless prohibited by state or other law. If the consumer has already paid for the report—for example, as part of an application fee—the creditor may not require additional fees for the appraisal (other than photocopy and postage costs).

14(c) Definitions.

1. Appraisal reports. Examples of appraisal reports are:

i. A report prepared by an appraiser (whether or not licensed or certified), including written comments and other documents submitted to the creditor in support of the appraiser's estimate or opinion of the property's value.

ii. A document prepared by the creditor's staff that assigns value to the property, if a third-party appraisal report has not been used.

iii. An internal review document reflecting that the creditor's valuation is different from a valuation in a third party's appraisal report (or different from valuations that are publicly available or valuations such as manufacturers' invoices for mobile homes).

2. Other reports. The term "appraisal report" does not cover all documents relating to the value of the applicant's property. Examples of reports not covered are:

i. Internal documents, if a third-party appraisal report was used to establish the value of the property.

ii. Governmental agency statements of appraised value.

iii. Valuations lists that are publicly available (such as published sales prices or mortgage amounts, tax assessments, and retail price ranges) and valuations such as manufacturers' invoices for mobile homes.

Section 202.15—Incentives for Self-Testing and Correction

15(a) General rules

15(a)(1) Voluntary self-testing and correction

1. Activities required by any governmental authority are not voluntary self-tests. A governmental authority includes both administrative and judicial authorities for federal, state, and local governments.

15(a)(2) Corrective action required

1. To qualify for the privilege, appropriate corrective action is required when the results of a self-test show that it is more likely than not that there has been a violation of the ECOA or this regulation. A self-test is also privileged when it identifies no violations.

2. In some cases, the issue of whether certain information is privileged may arise before the self-test is complete or corrective actions are fully under way. This would not necessarily prevent a creditor from asserting the privilege. In situations where the self-test is not complete, for the privilege to apply the lender must satisfy the regulation's

requirements within a reasonable period of time. To assert the privilege where the self-test shows a likely violation, the rule requires, at a minimum, that the creditor establish a plan for corrective action and a method to demonstrate progress in implementing the plan. Creditors must take appropriate corrective action on a timely basis after the results of the self-test are known.

3. A creditor's determination about the type of corrective action needed, or a finding that no corrective action is required, is not conclusive in determining whether the requirements of this paragraph have been satisfied. If a creditor's claim of privilege is challenged, an assessment of the need for corrective action or the type of corrective action that is appropriate must be based on a review of the self-testing results, which may require an in camera inspection of the privileged documents.

15(a)(3) Other privileges

1. A creditor may assert the privilege established under this section in addition to asserting any other privilege that may apply, such as the attorney-client privilege or the work-product privilege. Self-testing data may be privileged under this section whether or not the creditor's assertion of another privilege is upheld.

15(b) Self-test defined

15(b)(1) Definition

Paragraph 15(b)(1)(i)

1. To qualify for the privilege, a self-test must be sufficient to constitute a determination of the extent or effectiveness of the creditor's compliance with the Act and Regulation B. Accordingly, a self-test is only privileged if it was designed and used for that purpose. A self-test that is designed or used to determine compliance with other laws

or regulations or for other purposes is not privileged under this rule. For example, a self-test designed to evaluate employee efficiency or customers' satisfaction with the level of service provided by the creditor is not privileged even if evidence of discrimination is uncovered incidentally. If a self-test is designed for multiple purposes, only the portion designed to determine compliance with the ECOA is eligible for the privilege.

Paragraph 15(b)(1)(ii)

1. The principal attribute of self-testing is that it constitutes a voluntary undertaking by the creditor to produce new data or factual information that otherwise would not be available and could not be derived from loan or application files or other records related to credit transactions. Self-testing includes, but is not limited to, the practice of using fictitious applicants for credit (testers), either with or without the use of matched pairs. A creditor may elect to test a defined segment of its business, for example, loan applications processed by a specific branch or loan officer, or applications made for a particular type of credit or loan program. A creditor also may use other methods of generating information that is not available in loan and application files, such as surveying mortgage loan applicants. To the extent permitted by law, creditors might also develop new methods that go beyond traditional pre-application testing, such as hiring testers to submit fictitious loan applications for processing.

2. The privilege does not protect a creditor's analysis performed as part of processing or underwriting a credit application. A creditor's evaluation or analysis of its loan files, Home Mortgage Disclosure Act data, or similar types of records (such as broker or loan officer compensation records) does not produce new information about a

creditor's compliance and is not a self-test for purposes of this section. Similarly, a statistical analysis of data derived from existing loan files is not privileged.

15(b)(3) Types of information not privileged

Paragraph 15(b)(3)(i)

1. The information listed in this paragraph is not privileged and may be used to determine whether the prerequisites for the privilege have been satisfied. Accordingly, a creditor might be asked to identify the self-testing method, for example, whether preapplication testers were used or data were compiled by surveying loan applicants. Information about the scope of the self-test (such as the types of credit transactions examined, or the geographic area covered by the test) also is not privileged.

Paragraph 15(b)(3)(ii)

1. Property appraisal reports, minutes of loan committee meetings or other documents reflecting the basis for a decision to approve or deny an application, loan policies or procedures, underwriting standards, and broker compensation records are examples of the types of records that are not privileged. If a creditor arranges for testers to submit loan applications for processing, the records are not related to actual credit transactions for purposes of this paragraph and may be privileged self-testing records.

15(c) Appropriate corrective action

1. The rule only addresses the corrective actions required for a creditor to take advantage of the privilege in this section. A creditor may be required to take other actions or provide additional relief if a formal finding of discrimination is made.

15(c)(1) General requirement

1. Appropriate corrective action is required even though no violation has been formally adjudicated or admitted by the creditor. In determining whether it is more likely than not that a violation occurred, a creditor must treat testers as if they are actual applicants for credit. A creditor may not refuse to take appropriate corrective action under this section because the self-test used fictitious loan applicants. The fact that a tester's agreement with the creditor waives the tester's legal right to assert a violation does not eliminate the requirement for the creditor to take corrective action, although no remedial relief for the tester is required under paragraph 15(c)(3).

15(c)(2) Determining the scope of appropriate corrective action

1. Whether a creditor has taken or is taking corrective action that is appropriate will be determined on a case-by-case basis. Generally, the scope of the corrective action that is needed to preserve the privilege is governed by the scope of the self-test. For example, a creditor that self-tests mortgage loans and discovers evidence of discrimination may focus its corrective actions on mortgage loans, and is not required to expand its testing to other types of loans.

2. In identifying the policies or practices that are a likely cause of the violation, a creditor might identify inadequate or improper lending policies, failure to implement established policies, employee conduct, or other causes. The extent and scope of a likely violation may be assessed by determining which areas of operations are likely to be affected by those policies and practices, for example, by determining the types of loans and stages of the application process involved and the branches or offices where the violations may have occurred.

3. Depending on the method and scope of the self-test and the results of the test, appropriate corrective action may include one or more of the following:

i. If the self-test identifies individuals whose applications were inappropriately processed, offering to extend credit if the application was improperly denied and compensating such persons for out-of-pocket costs and other compensatory damages;

ii. Correcting institutional policies or procedures that may have contributed to the likely violation, and adopting new policies as appropriate;

iii. Identifying and then training and/or disciplining the employees involved;

iv. Developing outreach programs, marketing strategies, or loan products to serve more effectively segments of the lender's markets that may have been affected by the likely discrimination; and

v. Improving audit and oversight systems to avoid a recurrence of the likely violations.

15(c)(3) Types of relief

Paragraph 15(c)(3)(ii)

1. The use of pre-application testers to identify policies and practices that illegally discriminate does not require creditors to review existing loan files for the purpose of identifying and compensating applicants who might have been adversely affected.

2. If a self-test identifies a specific applicant who was discriminated against on a prohibited basis, to qualify for the privilege in this section the creditor must provide appropriate remedial relief to that applicant; the creditor is not required to identify other applicants who might also have been adversely affected.

Paragraph 15(c)(3)(iii)

1. A creditor is not required to provide remedial relief to an applicant that would not be available by law. An applicant might also be ineligible for certain types of relief due to changed circumstances. For example, a creditor is not required to offer credit to a denied applicant if the applicant no longer qualifies for the credit due to a change in financial circumstances, although some other type of relief might be appropriate.

15(d)(1) Scope of privilege

1. The privilege applies with respect to any examination, investigation or proceeding by federal, state, or local government agencies relating to compliance with the Act or this regulation. Accordingly, in a case brought under the ECOA, the privilege established under this section preempts any inconsistent laws or court rules to the extent they might require disclosure of privileged self-testing data. The privilege does not apply in other cases (such as in litigation filed solely under a state's fair lending statute). In such cases, if a court orders a creditor to disclose self-test results, the disclosure is not a voluntary disclosure or waiver of the privilege for purposes of paragraph 15(d)(2); a creditor may protect the information by seeking a protective order to limit availability and use of the self-testing data and prevent dissemination beyond what is necessary in that case. Paragraph 15(d)(1) precludes a party who has obtained privileged information from using it in a case brought under the ECOA, provided the creditor has not lost the privilege through voluntary disclosure under paragraph 15(d)(2).

15(d)(2) Loss of privilege

Paragraph 15(d)(2)(i)

1. A creditor's corrective action, by itself, is not considered a voluntary disclosure of the self-test report or results. For example, a creditor does not disclose the results of a self-test merely by offering to extend credit to a denied applicant or by inviting the applicant to reapply for credit. Voluntary disclosure could occur under this paragraph, however, if the creditor disclosed the self-test results in connection with a new offer of credit.

2. The disclosure of self-testing results to an independent contractor acting as an auditor or consultant for the creditor on compliance matters does not result in loss of the privilege.

Paragraph 15(d)(2)(ii)

1. The privilege is lost if the creditor discloses privileged information, such as the results of the self-test. The privilege is not lost if the creditor merely reveals or refers to the existence of the self-test.

Paragraph 15(d)(2)(iii)

1. A creditor's claim of privilege may be challenged in a court or administrative law proceeding with appropriate jurisdiction. In resolving the issue, the presiding officer may require the creditor to produce privileged information about the self-test.

Paragraph 15(d)(3) Limited use of privileged information

1. A creditor may be required to produce privileged documents for the purpose of determining a penalty or remedy after a violation of the ECOA or Regulation B has

been formally adjudicated or admitted. A creditor's compliance with such a requirement does not evidence the creditor's intent to forfeit the privilege.

Section 202.16—Electronic Communication

16(b) General Rule

1. Relationship to the E-Sign Act. The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under this part other than a provision that requires disclosures to be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing, and retainability rules and the clear and conspicuous standard. For example, to satisfy the clear and conspicuous standard for disclosures, electronic disclosures must use visual text. The clear and conspicuous standard and retainability requirements apply to all disclosures provided electronically—those expressly required by the Act and regulation to be in writing, and those provided in writing where the creditor has the option to give the disclosure orally or in writing.

2. Clear and conspicuous standard. A creditor must provide electronic disclosures using a clear and conspicuous format. Also, in accordance with the E-Sign Act:

i. The creditor must disclose the requirements for accessing and retaining disclosures in that format;

ii. The applicant must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and

iii. The creditor must provide the disclosures in accordance with the specified requirements.

3. Timing and effective delivery. i. When an applicant applies for credit on-line. When a creditor permits an applicant to apply for credit on-line, the applicant must be required to access the disclosures required at application before submitting the application. A link to the disclosures satisfies the timing rule if the applicant cannot bypass the disclosures before submitting the application. Or the disclosures must automatically appear on the screen, even if multiple screens are required to view all of the information. The creditor is not required to confirm that the applicant has read the disclosures.

ii. Appraisals and adverse action. Disclosures provided by e-mail are timely based on when the disclosures are sent. Disclosures posted at an Internet web site, such as adverse action notices or copies of appraisals, are timely when the creditor has both made the disclosures available and sent a notice alerting the applicant that the disclosures have been posted. For example, under § 202.9, a creditor must provide a notice of action taken within 30 days of receiving a completed application. For an adverse action notice posted on the Internet, a creditor must post the notice and notify the applicant of its availability within 30 days of receiving the applicant's completed application.

4. Retainability of disclosures. Creditors satisfy the requirement that disclosures be in a form that the applicant may keep if electronic disclosures are delivered in a format that is capable of being retained (such as by printing or storing electronically). The format must also be consistent with the information required to be provided under section 101(c)(1)(C)(i) of the E-Sign Act (15 U.S.C. 7001(c)(1)(C)(i) about the hardware and software requirements for accessing and retaining electronic disclosures.

5. Disclosures provided on creditor's equipment. A creditor that controls the equipment providing electronic disclosures to applicants (for example, a computer terminal in a creditor's lobby or an automated loan machine at a public kiosk) must ensure that the equipment satisfies the regulation's requirements to provide timely disclosures in a clear and conspicuous format and in a form that the applicant may keep. For example, if disclosures are required at the time of an on-line application, the disclosures must be sent to the applicant's e-mail address or must be made available at another location such as the creditor's Internet web site, unless the creditor provides a printer that automatically prints the disclosures.

16(d) Address or Location to Receive Electronic Communication

Paragraph 16(d)(1)

1. Electronic address. An applicant's electronic address is an e-mail address that is not limited to receiving communication transmitted solely by the creditor.

Paragraph 16(d)(2)

1. Identifying account involved. A creditor may identify a specific account in a variety of ways and is not required to identify an account by reference to the account number. For example, where the applicant has only one credit card account, and no confusion would result, the creditor may refer to "your credit card account." If the applicant has two credit card accounts, the creditor may, for example, differentiate accounts based on the card program or by using a truncated account number.

2. 90-day rule. The actual disclosures provided to an applicant must be available for at least 90 days, but the creditor has discretion to determine whether they should be available at the same location for the entire period.

16(e) Redelivery

1. E-mail returned as undeliverable. If an e-mail to the applicant (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if, for example, the creditor sends the disclosure to a different e-mail address or postal address that the creditor has on file for the applicant. Sending the disclosures a second time to the same electronic address is not sufficient if the creditor has a different address for the applicant on file.

16(f) Electronic Signatures

1. Relationship to the E-Sign Act. The E-Sign Act provides that electronic signatures have the same validity as handwritten signatures. Section 106 of the E-Sign Act (15 U.S.C. 7006) defines an electronic signature. To comply with the E-Sign Act, an electronic signature must be executed or adopted by an applicant with the intent to sign the record. Accordingly, regardless of the technology used to meet this requirement, the process must evidence the applicant's identity.

Section 202.17—Enforcement, Penalties, and Liabilities

17(c) Failure of compliance.

1. Inadvertent errors. Inadvertent errors include, but are not limited to, clerical mistake, calculation error, computer malfunction, and printing error. An error of legal judgment is not an inadvertent error under the regulation.

2. Correction of error. For inadvertent errors that occur under §§ 202.12 and 202.13, this section requires that they be corrected prospectively.

APPENDIX B—MODEL APPLICATION FORMS

1. Freddie Mac/Fannie Mae form—residential loan application. The uniform residential loan application form (Freddie Mac 65/Fannie Mae 1003), including supplemental form (Freddie Mac 65A/Fannie Mae 1003A), prepared by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association and dated October 1992 may be used by creditors without violating this regulation. Creditors that are governed by the monitoring requirements of this regulation (which limits collection to applications primarily for the purchase or refinancing of the applicant's principal residence) should delete, strike, or modify the data-collection section on the form when using it for transactions not covered by § 202.13(a) to ensure that they do not collect the information. Creditors that are subject to more extensive collection requirements by a substitute monitoring program under § 202.13(d) or by the Home Mortgage Disclosure Act (HMDA) may use the form as issued, in compliance with the substitute program or HMDA.

2. FHLMC/FNMA form—home improvement loan application. The home-improvement and energy loan application form (FHLMC 703/FNMA 1012), prepared by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association and dated October 1986, complies with the requirements of the regulation for some creditors but not others because of the form's section "Information for Government Monitoring Purposes." Creditors that are governed by § 202.13(a) of the regulation (which limits collection to applications primarily for the purchase or refinancing of the applicant's principal residence) should delete, strike, or modify the data-collection section on the form when using it for transactions not covered by § 202.13(a) to ensure

that they do not collect the information. Creditors that are subject to more extensive collection requirements by a substitute monitoring program under § 202.13(d) may use the form as issued, in compliance with that substitute program.

APPENDIX C—SAMPLE NOTIFICATION FORMS

1. Form C-9. Creditors may design their own form, add to, or modify the model form to reflect their individual policies and procedures. For example, a creditor may want to add:

i. A telephone number that applicants may call to leave their name and the address to which an appraisal report should be sent.

ii. A notice of the cost the applicant will be required to pay the creditor for the appraisal or a copy of the report.

By order of the Board of Governors of the Federal Reserve System, February **, 2003.

Jennifer J. Johnson
Secretary of the Board