

# ComplianceAction

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YOUR SOURCE FOR REGULATORY COMPLIANCE

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## ComplianceAction

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## Untangling the FCRA Web

by Patti Blenden

For a long time, the Fair Credit Reporting Act sat quietly at the Federal Trade Commission, making the lives of consumer reporting agencies miserable but not causing a great deal of difficulty to creditors. This changed in the 21st century with the FACT Act's amendments to FCRA imposing significant new responsibilities, followed by more changes wrought by the Dodd-Frank Act. Now the FCRA is a compliance nightmare. To make matters even more complex, the consumer privacy concerns and sales practice protections of FCRA are front and center in the wake of the Wells Fargo sales practices debacle.

There are several challenges to understanding and managing FCRA. It starts with definitions and coverage. The FCRA applies to many different business functions and to several different business types. There are the credit reporting agencies (CRA), information furnishers (Furnishers), and credit report users (Users). Each function is subject to its own rules and,

unfortunately for us, the rules are intertwined like a spider's web. In this issue, we take apart the key elements of FCRA affecting creditors and information users and show you where some traps are waiting.

### Permissible or Impermissible Purpose?

Recently, permissible purpose has become increasingly significant in FCRA enforcement. Are you ready for the latest examination target, sales practices and any incentive-based compensation programs? In testimony before the Senate Banking Committee, OCC Comptroller Thomas Curry warned that banks should expect closer examiner scrutiny of sales practices. He told the Committee he has directed examiners to review the sales practices of all the large and midsize banks the OCC supervises and assess the sufficiency of applicable controls. It is obvious that financial institutions of all sizes must take this opportunity to

*(continued on next page)*

## ActionSteps

- ✓ Carefully identify any and all cross-selling taking place across your enterprise. Dig deep to make sure you don't miss anything because of terminology (e.g., marketing, full service offering to existing customers, add-ons).
- ✓ Update a comprehensive listing of all incentive-based programs throughout your organization. Turn over every rock to make sure you find everything, big or small!
- ✓ Review policies and procedures and thoroughly confirm actual practices via detailed transaction testing.

review all sales practices enterprise-wide to mitigate the risk of compliance violations and civil money penalties. Reference our chart on page 4 for a quick overview of some key compliance laws and regulations impacting your sales practices and incentive-based compensation programs.

A great starting point is to review your compliance with Fair Credit Reporting Act's (FCRA) restrictions on using a consumer report to determine a consumer's eligibility for other products and services not requested by the consumer in conjunction with an application for a specific product or service (product). There are many practices swirling around the industry regarding use of consumer reports to market additional products to current and former customers, and not all compliant!

### FCRA Players

FCRA applies to those who compile and sell information about consumers (consumer reporting agencies), those who purchase and use the information (Users), and those who provide information about consumers to the credit reporters (Furnishers). Each party must protect the confidentiality of the consumer information to which it has access and use it appropriately.

Most creditors are Furnishers and Users. They are not consumer reporting agencies (CRA) – unless they slip up and violate a rule or two. Central to the FCRA coverage is whether actions by covered parties and uses of consumer information is permissible or impermissible. Understanding the definitions of coverage and permissible use is key to staying within the role of credit report user and information furnisher. Slip-ups can make you a credit reporting agency and you don't want that!

### Consumer Report

Let's start with the definition of "consumer report." FCRA defines a consumer report as any written, oral, or other communication of any information by a CRA that bears on the individual's seven consumer characteristics (creditworthiness, credit

standing, credit capacity, character, general reputation, personal characteristics, or mode of living) used or expected to be used or collected, in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for:

- Credit or insurance to be used primarily for personal, family, or household purposes;
- Employment purposes; or
- Any other purpose authorized under FCRA §604 (15 USC §1681b).

There are two basic elements of a qualifying "consumer report" in the context of FCRA. First, the report data must have a "bearing on" one or more specified consumer characteristics. Second, the report must be "used or expected to be used for establishing the consumer's eligibility" for credit, employment, insurance, or other FCRA permissible purposes. Both elements of the definition must be satisfied for a report to be a consumer report under FCRA.

Information that is not "used or expected to be used" to determine eligibility for a permissible purpose is not a consumer report, even if the information bears on one of the seven specified consumer characteristics.

Consumer reports and credit reports are a bit different. A credit report is a type of consumer report containing information about an individual's credit such as loan paying history and the status of credit accounts. This information includes how often the consumer's payments are made on time, how much credit is outstanding or is available for use, and whether a debt or bill collector is collecting unpaid debts. A report of information about a consumer from a fraud loss database is a "consumer report" if it is intended for use by creditors to evaluate consumers' credit applications. A report containing information on insufficient checks (volume, dates, amounts, circumstances) is a special purpose "consumer report" if used in connection with closing, restricting or otherwise altering the terms of deposit or other accounts used primarily for personal, family or household purposes.

### FCRA Permissible Purpose

Credit reports include a lot of personal information about consumers, invaluable information to assess a consumer's eligibility for a variety of financial institution products and services. FCRA restricts access to this highly confidential information to ensure that it is only obtained for permissible purposes and not used, re-used or exploited for impermissible purposes.

FCRA §604 (15 USC §1681b) defines permissible purposes under which a CRA may furnish a consumer report to a financial institution. Except for prescreening offers, a CRA may furnish a consumer report under the following circumstances and no other:

1. In response to a court order or Federal Grand Jury subpoena.
2. In accordance with the consumer's written instructions.
3. To a person it has reason to believe intends to use the report or information in connection with:
  - a. A credit transaction involving the consumer (includes extending, reviewing, and collecting credit);
  - b. Employment purposes;
  - c. Underwriting the consumer's insurance;
  - d. Determining the consumer's eligibility for a governmental license or other benefit required by law to consider an applicant's financial responsibility;
  - e. A valuation or an assessment of the credit or prepayment risks associated with an existing credit obligation as a potential investor, servicer, or current insurer; or
  - f. Otherwise has a legitimate business need for the information:
    - i. In connection with a business transaction initiated by the consumer; or
    - ii. To review an account to determine if consumer continues to meet the account terms.

In addition, FCRA §604(f) prohibits any person from obtaining a consumer report from a CRA

(continued on next page)

unless the person has certified to the CRA the permissible purpose(s) for which the report is being obtained and certifies that the report will not be used for any other purpose. So step one is having a permissible purpose. Step two is certifying to the CRA that the report will be used for a permissible purpose. Note that the FCRA prohibits the CRA from providing a report without this certification and at the same time prohibits the User from obtaining the report for other than a permissible purpose.

Generally, for permissible purposes other than employment, CRAs may furnish consumer reports without a consumer's specific permission or authorization. For example, where a consumer applies for credit (by phone, mail, in person, or electronically), the creditor has a permissible purpose to obtain a consumer report. Consumer permission is also not needed for entities to voluntarily furnish information concerning their transactions with consumers to CRAs, or for CRAs to gather information.

### Permissible Purpose and Eligibility

Eligibility information is information used to evaluate the applicant's creditworthiness or fitness for employment or insurance. Using information to decide whether an applicant qualifies for your product, an eligibility determination, is the key factor in concluding whether you have permissible or impermissible purpose for any scenario other than prescreening. Eligibility information is the combination of transaction and experience information and other information, the type of information found in third party sources (e.g. credit reports) or personal financial statements submitted by the consumer. The consumer report User (the creditor) may analyze any and all of the eligibility information provided by the consumer and obtained from third parties to evaluate the consumer's application.

In a credit application, or a marketing strategy, it is absolutely critical to know the difference between information that results from the consumer's transactions

with you, the consumer's transactions with affiliates, and information about the consumer's experience with others – such as creditors, landlords, or employers.

The FTC and other federal banking agencies have long struggled since the enactment of FCRA with scenarios involving a creditor that shares an applicant's consumer report with another party, and whether the creditor sharing the report becomes a CRA by doing so. The official interpretation that allows sharing a credit report between certain third parties is based on the fact that the report is shared merely to complete a particular transaction the consumer initiated. A common example of this is when a bank originates a consumer mortgage loan through an investor and only one party pulls credit on the individual. This would also be the case when an applicant applies for two loans, such as a mortgage and a HELOC, that are handled in different departments or affiliates using one report.

### Marketing & Cross-Selling

Every consumer report request must have permissible purpose. It does not matter whether it is a "hard pull" that is reflected on the consumer's report as an "inquiry" or a "soft pull" or updated report that is not reported as an "inquiry." All are "pulls" and trigger FCRA coverage because the credit report User is still accessing the confidential information of the individual protected by the FCRA.

Three of the permissible purposes provided by the statute and listed above are frequently used by banks in justification of pulling credit reports or other versions of consumer reports:

- Consumer' written instructions (request for modification or other change in terms),
- In connection with a credit transaction (including extending, review and collecting), and
- Other legitimate business needs, specifically a transaction initiated by a customer, or review of an account to determine if it still meet the account terms (deposit

account application, review of existing open-end credit, etc.).

Permissible purpose clearly exists for the bank to pull a credit report or other type of consumer report to determine the individual's eligibility for the product for which the consumer applied. Many organizations promote cross-selling all enterprise products and services to all of its customers without compliance problems.

The compliant sales practice supports marketing to all customers without making eligibility determinations as defined above, a simple "would you like to know more about the products and services we offer" would suffice. No screening using the report to determine to which applicant to cross-sell other products is allowed. Simply offer your portfolio of valuable products to all customers through something as simple as a checklist of other available products along with your application. Make it distinctly clear and conspicuous, don't bury it in the application material. Give the customers a choice and if they want to hear more, give them further details if there are not contractual problems with your credit bureau contract preventing re-use of that credit report, feel free to share it within your bank for products the consumer selected. Sharing outside of your legal entity could require privacy opt-outs in accordance with FCRA and GLBA privacy.

### Permissible Review

FCRA §604(a)(3)(A) states obtaining a consumer report "in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the ... review or collection of an account of the consumer." is a permissible purpose. At issue is when a creditor has a permissible "review" purpose and, when it does, whether the "review" report may also be used to market its other products or services.

In the 1999 "Gowen Letter (Advisory Opinion to Gowen (04-29-99))," FTC staff interpreted this issue in the context of closed-end

(continued on page 8)

## Key Retail Sales Practices and Compensation

by Patti Blenden

**T**o help organize a review of your sales practices and incentive-based compensation practices, we have assembled a list of

some of the existing laws and regulations impacting most financial institutions. Search high and low enterprise-wide to identify each and

every opportunity to access or share confidential consumer information to facilitate the sale of products and services.

| Statutory & Regulatory Citations   | Coverage   | Restrictions & Prohibitions  |
|--|--|--|
| Anti-Tying Disclosures<br>§106 of the Bank Holding Company Act<br>12 CFR 343.40  | Consumer credit applications when the regulated financial institution or its affiliates offers insurance or annuity products with that application.  | The anti-tying rules prohibit extending credit, leasing or selling property, or furnishing services or varying prices on products and services on the condition the customer obtain additional product or service from the same bank or its affiliates, or NOT obtain certain products or services from competitors.   |
| Consumer Protection in Sales of Insurance Sales<br>12 CFR 343  | Applies to retail sales, solicitation, advertising, or offers of any insurance product or annuity to a consumer by a bank or person on behalf of the bank, excluding the bank's trust or fiduciary activities.                                     | Insurance products are not FDIC-insured and therefore contain inherent risks. Some requirements overlap with 12 CFR 343, particularly with respect to disclosures and when sales and recommendations may be made. To the extent they overlap, Part 343 governs. A bank that offers annuities should establish policies and procedures for its sales program and offer variable annuities only when suitable for customers.   |
| FCRA Affiliated Business Marketing Practices<br>12 CFR 1022.21   | Consumer eligibility information used for marketing and other purposes by affiliated entities  | Eligibility information, transaction and experience information plus other application data supplied by the applicant or a third party, may not be shared with bank affiliates for any purpose unless the consumer has not executed the required opt-out offered by the bank.  |
| FCRA Permissible Purpose<br>15 USC §1681 b   | Consumer reporting agencies (CRA) maintain a significant amount of information about an individual in a consumer report and limits access to permissible purposes only.  | Access to consumer reports to determine eligibility is limited to extending, reviewing or collecting credit; per consumer's written instructions; or other legitimate need (e.g. in connection with a business transaction initiated by consumer; or account review to determine if consumer still meets account terms). Do not use for cross-sell without consumer's permission!  |
| GLBA Nonpublic Personal Information (NPI) Sharing Practices<br>12 CFR 1016.13 - 15   | Consumer NPI retained by the institution to be used for any purposes   | Subject to certain exceptions, financial institutions are prohibited from disclosing consumer NPI to nonaffiliated third parties for marketing or other purposes, unless institution satisfies various notice and opt-out requirements, and consumer has not elected to opt out of disclosure.   |
| Nondeposit Investment Products (NDIP) Referrals Reg R<br>12 CFR 218<br><br>Gramm Leach Bliley Act (GLBA) Required NDIP Disclosures | Regulation R prescribes how sales of NDIP securities to consumer customers must be conducted by retail banking institutions without a broker license.  | Permissible broker exceptions include a networking exception for third-party arrangements to sell NDIPs. GLBA requires certain disclosures when selling NDIP to consumers: not a bank product, not guaranteed by bank or any government agency, may go down in value, and not bank insured. Paying a referral fee to an unlicensed person is prohibited unless a one-time, nominal, fixed sum not contingent upon NDIP sale.   |
| RESPA Reg X Affiliated Business Arrangements (AfBA)<br>12 CFR 1024.15  | RESPA-covered federally related mortgage loans where the LO has either an affiliate relationship or a direct or beneficial > 1% ownership interest in a settlement service provider and LO directly or indirectly refers business to the provider. | An AfBA is not a violation of RESPA §8 if prior to the referral, the person making each referral has disclosed the nature of the relationship (explaining ownership and financial interest) to the affiliate and the provider's estimated charge or range of charges. This disclosure must be provided on a separate piece of paper either at application with the GFE or Loan Estimate, or at the time of the referral. The only AfBAs that can be required are appraisers, attorneys and credit bureaus. |
| RESPA Section 8 Reg X Prohibition of Referral Fees<br>12 CFR 1024.14   | Federally related mortgage loans, consumer closed-end or open-end first or subordinate lien dwelling secured transactions  | Any person who gives or accepts a fee, kickback, or thing of value (payments, commissions, gifts, tangible item or special privileges) for the referral of settlement business is in violation of Section 8(a) of RESPA, other than for services actually performed.   |
| SAFE Act Mortgage Loan Originator (MLO) Compensation<br>12 USC §5101-5116  | Closed-end or open-end consumer credit transactions secured by a dwelling, excluding loans secured by a timeshare interest.  | Prohibits individuals from engaging in residential mortgage loan origination without first obtaining and maintaining annually either registration as an MLO employed by a covered financial institution or a state license and registration for all other individuals.   |
| TILA Reg Z Loan Originator Compensation (LO Comp)<br>12 CFR 1026.36  | Closed-end consumer credit transactions secured by a dwelling, excluding loans secured by a timeshare interest.  | Only individuals with appropriate expertise may coordinate and negotiate consumer mortgage loans. With limited exceptions, LOs cannot receive (and no person pay directly or indirectly), loan term-based compensation to mitigate risk of incenting an LO to ignore consumer's best interest for personal benefit. Direct or indirect dual compensation is also prohibited.   |
| TILA Reg Z TRID Service Provider & Fee Identification<br>12 CFR 1026.37  | Consumer closed-end mortgages secured by any real estate excluding reverse mortgages.  | Creditor is required to disclose charges required to be paid at or before closing pursuant to the property contract for sale, if any, are disclosed to the extent the Creditor has knowledge of those charges, consistent with the good faith standard under §1026.19(e).  |

## FinCEN Advisory on Email Schemes

FIN-2016-A003 was issued in September to help financial institutions guard against a growing number of e-mail fraud schemes where criminals misappropriate funds by deceiving banks and their customers into conducting wire transfers. FinCEN provides useful red flags developed in cooperation with the FBI and the US Secret Service to help detect and prevent similar e-mail fraud. Business E-Mail Compromise (BEC) and E-Mail Account Compromise (EAC) schemes are among the growing trend of cyber-enabled crime adversely affecting financial institutions and their customers. Include the advisory in enterprise-wide training as soon as possible!

## National Cyber Security Awareness Month

The Department of Homeland Security administers a campaign every October to promote informed awareness regarding the growing number and type of cyber security threats. The Internet touches almost all aspects of everyone's daily life, whether we realize it or not. NCSAM is designed to engage and educate public and private sector partners through events and initiatives to raise awareness about cyber security, provide tools and resources to stay safe online, and increase our Nation's resiliency in the event of a cyber incident.

## OFAC Sanctions Update

President Obama issued an executive order (EO) terminating the national emergency with regard to Africa's Ivory Coast (Côte d'Ivoire) effective September 14, 2016. Due to the recent presidential election in Ivory Coast and the increased political stability, the U.N. Security Council and the U.S. Department of State terminated their arms embargoes earlier this year. Separately, on the same day, President Obama announced he intended to remove all economic sanctions against Burma. The Burma sanctions program remains in effect until the President issues a similar EO. Be sure to update your OFAC Compliance Programs and watch for more changes soon.

## October, 2016

- \* The Military Lending Act amendments significantly expands specific protections provided to service members and their families. The rules were effective October 3, 2016, excluding credit cards, which are effective October 3, 2017. Confirm that your consumer updated lending procedures are working to comply with the new requirements.
- \* The FFIEC is seeking comment on proposed Guidance for Third-Party Lending to establish safety and soundness and consumer compliance measures institutions should follow when lending through any third party business relationship. The proposal defines third-party lending as an arrangement that relies on a third party to perform a significant aspect of the lending process. Covered relationship examples include institutions originating loans for third parties; institutions originating loans through or jointly with third parties; and institutions originating loans using platforms developed by third parties. Comments are due on October 27th.

## December, 2016

- \* Update the trigger numbers for Truth in Lending including the CARD Act, HOEPA, and ATR/QM rules. Check the coverage triggers for CRA and HMDA.

## January, 2017

- \* Effective January 1, 2017, the HMDA Rule narrows the scope of depository institutions subject to Regulation C in 2017. A bank, savings association, or credit union will not be subject to Reg C in 2017 unless it meets the asset-size, location, federally related, and loan activity tests under current HMDA Reg C and it originates at least 25 home purchase loans, including refinancings of home purchase loans (as defined in current Reg C) in both 2015 and 2016.

## October, 2017

- \* The CFPB's final Prepaid Account Rule creating comprehensive consumer prepaid financial product protections is effective October 1, 2017. The Rule introduces two new terms: "prepaid accounts" and "hybrid prepaid-credit cards." Most of the provisions that regulate prepaid accounts amend Reg E, and the provisions applicable to hybrid prepaid-credit cards (cards offering credit features in conjunction with the prepaid accounts) will be in Reg Z.

## In the editor's *Opinion*

### UDAP/UDAAP: Consumer or Commercial Customers?

**M**any of you have often heard me say compliance is a living history lesson. Understanding when and why the political, economic or social pressures climaxed in a new law or rule will dramatically improve our performance as risk managers, not just checkbox checking fools. With renewed focus on ethical sales practices, it's a great time to review the reign of UDAP and UDAAP as protector of consumer and business customers. Surprised that I included business customers?

In addition to many FTC enforcement actions identifying individuals and businesses as consumer victims of UDAP violations, refer to a direct quote from the FDIC Compliance Examination Manual. In the UDAP chapter, it states "Section 5 of the FTC Act also applies to commercial transactions and businesses. In applying these statutory factors, the FDIC will identify and take action whenever it finds conduct that is unfair, as such conduct that falls well below the high standards of business practice expected of banks and the parties affiliated with them. In summarizing UDAP standards, the FDIC states Unfair acts or practices injure both consumers and competitors because consumers who would otherwise have selected a competitors product are wrongly diverted by the unfair act or practice."

UDAP has dramatically evolved since its 1914 origins as an anti-trust law into the enforcement law of choice. Its vague and broad language provides an incredible, interpretative luxury for the courts and regulators. The 1914 Federal Trade Commission (FTC) Act created the FTC and focused on protecting the public from the competition-stifling impact of monopolies. In 1938, Wheeler-Lea amendments shifted the focus to protecting consumers from deceptive advertising practices and fraud. Section 5 of the FTC Act was amended to cover not only unfair competition, but also unfair or deceptive acts or practices. The 1937 House Report No. 1613 stated new Section 5 empowered the FTC to prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment made the consumer, who may be injured by an unfair trade practice, of equal concern before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor. Amendments in 1975 required bank regulators to address complaints against financial institutions. Since 2011, we've seen the CFPB rule with an obvious parental slant, protecting the consumer from his or her own choices.

Would anybody question UDAP/UDAAPs position as one of the industry's riskiest areas of compliance? And if the penalties and restitution of recent enforcement actions are any indication, the risk continues to skyrocket. It is as if the stroke of an absolute monarchy's pen can singlehandedly drop an organization's market value and public reputation with an unprecedented penalty, effectively deciding who will or will not survive. It borders on an unchecked, potentially malicious opportunity to manipulate the marketplace. Undeniably, there are cases where ill-gotten gains should be clawed back. Each of us are accountable for our actions. But dangerously handing out justice without due process, or imposing significantly different interpretations retroactively swings the pendulum too far. Looks like the courts are beginning to agree.

UDAP/UDAAP isn't going away and must be woven into your compliance culture's infrastructure. Banking laws and rules are robust, regulating everything except which type of toilet paper to buy, strong or soft. As comprehensive as they are, gaps still exist. That's where UDAP and UDAAP step in to fill the cracks, judging whether entities are doing the right thing, in all things for all customers. Be careful out there.

## Compliance *Notes*

### OCC Bank Supervision Plan

In preparing your institution's 2017 action plan, be sure to include the priorities identified by the OCC in its recent bank supervision operating plan for fiscal year (FY) 2017. The plan provides the foundation for policy initiatives and for supervisory strategies as applied to individual banks. OCC staff members use this plan to guide their supervisory priorities, planning, and resource allocations. Supervisory strategies for FY 2017 focus on:

- Commercial and retail loan underwriting;
- Business model sustainability and viability;
- Operational resiliency;
- BSA/AML compliance management; and
- Change management to address new regulatory requirements.

### FDIC's Community Bank Mortgage Resource

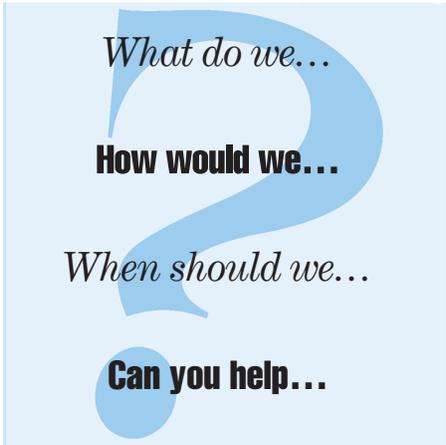
Community banks offer mortgage products and services designed to meet the unique needs of their communities, including rural areas and low- and moderate-income (LMI) borrowers. We have long understood that offering affordable mortgage loans to a wide range of customers deepens bank-customer relationships and provides an important pathway for borrowers to own their own homes and build wealth. The FDIC's Affordable Mortgage Lending Guide is a useful reference tool including practical, instructive examples to assist in comparing available federal mortgage programs. Banks will be empowered to evaluate programs to find the right fit for its business plans and strategies to improve lending options available for their communities. In addition, the experience of other lenders that have found ways to use limited resources to harness federal and other resources could provide practical examples that may be instructive to institutions considering these opportunities. Check out the FDIC's resource center at [www.fdic.gov/consumers/community/mortgagelending/guide.html](http://www.fdic.gov/consumers/community/mortgagelending/guide.html).

**Question:** I am looking for some clarification concerning the requirements of emailing the Closing Disclosure (CD) that I hope you would be willing to provide. A colleague of mine remembers attending a training session recently where she thought it was mentioned it was acceptable to email the CD to a borrower without following E-Sign as long as we do not require a signature and we do not rely on a “return receipt” as proof of delivery. Instead we would require the borrower to respond back when they have received and read the document. Their email response would remain in the loan file as proof of delivery 3 days before the loan closing.

My question is whether a borrower stating in an email response that they have received and read the CD is sufficient to prove receipt of the document without following E-sign requirements?

**Answer:** There are several important parts to your great question. It is not acceptable to email the CD (or any other required consumer disclosure) to an applicant/borrower without following E-Sign. There are a few specified initial “at application” disclosures that may be provided electronically before a consumer has completed the full E-Sign process, and only if the consumer accessed the application portal electronically (i.e. online application, etc.), evidencing their ability to initiate and communicate electronically. But that does NOT authorize any other electronic delivery until the customer completes the required E-Sign protocol. Whether or not you require a signature or rely on a “return receipt” as proof of delivery does not impact the fact that electronically delivered disclosures have essentially NOT been provided to the consumer without E-sign.

To DELIVER a required disclosure to a consumer electronically (*the bank sending to the customer*), you MUST follow E-Sign requirements other than the very few initial exceptions noted above. However, a



*What do we...*  
**How would we...**  
*When should we...*  
**Can you help...**

consumer can COMMUNICATE with the bank via email anything they want electronically (*the customer sending to the bank*) without regard to E-Sign. For example, the bank could accept a consumer’s email to the bank acknowledging the consumer’s receipt of the CD, the consumer’s answers to questions an underwriter left in a voice mail, or even the individual’s execution of his or her right to rescind. The distinction is the consumer is the SENDER, therefore not requiring E-Sign compliance to communicate to the bank.

**Question:** We hope to offer Health Savings Accounts (HSA) in the very near future and are questioning whether or not we need to provide a Reg E EFT Disclosure. From the research we have done, it looks like some banks do and some might not. Also, we don’t plan on allowing any ATM withdrawals or cash back on HSA transactions and that probably would need to be disclosed. We also don’t plan to allow HSA card activity above our normal daily debit card limits for other consumer accounts which I’m assuming also needs to be disclosed.

**Answer:** The HSA product is very similar to the Individual Retirement Plan product at financial institutions. The IRS provides tax benefits on contributions, interest and qualified medical expense distributions from the account. Banks serve as the custodian or trustee of the

tax-exempt HSA trust deposit account. It must be an individually owned account and your customer must be covered by or have been covered by a high-deductible health plan. Since it is a consumer deposit account at your bank, you must provide all consumer disclosures appropriate for the deposit account related to the HSA you are offering in addition to the HSA-specific disclosure. Provide the consumer with TISA Reg DD disclosures, GLBA/FCRA privacy disclosures, and EFTA Reg E disclosures if allowing electronic transactions. If you are going to allow the customers to conduct ACH or debit card transactions, you must disclose the available Reg E transactions and any applicable restrictions (e.g. daily dollar withdrawal limit).

**Question:** Can a consumer loan be covered by both Servicemember Civil Relief Act (SCRA) and Military Lending Act (MLA) at the same time?

**Answer:** Generally, no, the two should be exclusive. SCRA protections apply to consumer or commercial loans that the covered servicemember entered into BEFORE active duty service. MLA protections apply to covered consumer loans entered into by a covered borrower DURING active duty.

**Question:** Does the new Military Lending Act (MLA) apply to payment arrangements made for overdraft customers unable to bring negative balance deposit accounts to positive?

**Answer:** If a workout option meets Reg Z’s “more than four installments” criteria, both Reg Z and MLA apply. You must comply with the covered borrower determination rules, provide MLA disclosures and calculate the Military Annual Percentage Rate (MAPR) if a covered borrower, and other compliance procedures.

## Updated TRID Tools

The CFPB has updated its small entity compliance guide and its guide to the LE and CD forms booklet. They are available for download from the CFPB at: <http://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/tila-respa-disclosure-rule/>

# ComplianceAction

## PURPOSE:

**To** keep your compliance, audit, and legal officers and staff up-to-date on regulatory and compliance issues and industry related techniques;

**To** provide guidance for implementing and managing your compliance program;

**To** increase your awareness and understanding of compliance developments;

**To** provide you with information that will be useful in communicating compliance information to bank staff; and,

**To** assemble all of the above in a readable, understandable, usable format that can be photocopied and distributed in-house by each subscriber.

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credit transactions. Because the terms of closed-end credit transactions are generally predetermined and may not be changed unilaterally by the creditor, the staff opined the creditor did not have a permissible "review" purpose. Relevant legislative history explains that the account review purpose is designed for the purpose of deciding whether to retain or modify current account terms, an option that clearly exists for open-end credit. FTC interpretations adopted by the CFPB make clear the analysis is not based on whether the account is open- or closed-end. The key is the permissible "review" purpose applies only where the creditor has an existing account relationship and uses the report solely to decide whether to modify account terms. Even when a User may conduct a permissible "review" based on a consumer report, cross-selling or marketing products others than the one being reviewed is not allowed without consumer permission.

## Impermissible Purpose

The problems begin when your policy, or worse yet, your everyday practice outside of policy, is to review the credit report or other eligibility information and determine whether you think the customer will be eligible before the customer responds affirmatively to exploring other products or services! That is not permissible purpose and violates FCRA's privacy protections for sensitive consumer report access and use.

If financial institutions wish to offer products not requested by the individual if the account officer thinks the customer may qualify, in other words market or cross-sell products for which the individual did not apply and might be eligible, they must comply with FCRA and GLBA privacy protections limiting access to a consumer's confidential credit report. Since the customer did not request the other products, the bank does not have permissible purpose to use the credit report pulled for any other purpose.

## Business-Related Credit

No discourse about permissible purpose would be complete without discussing permission to pull a consumer report for business purpose credit. In July 2001, the FDIC issued FIL-61-2001 to clarify the interpretation of consumer reports used for business credit by the banking agencies and the FTC. It is still a very useful document. The consensus opinion is that where an individual is personally liable for repayment of a business credit extension, the business transaction involves a consumer, thereby providing permissible purpose to obtain a consumer report. Based on the interpretation that personal liability provides a permissible purpose to obtain a consumer report under FCRA §604(a)(3)(A), the creditor may obtain a consumer report on an individual in connection with a business credit transaction, IF and ONLY if, the individual is an individual proprietor, co-signer or guarantor on the loan. Conservative best practice in these FCRA litigious times is to get an individual's written authorization BEFORE you request the credit report.

Note that there would not be a permissible purpose to obtain a consumer report on an individual for an extension of credit for a business purpose when the person would not be personally liable for repayment. This would include situations where the individual is merely a shareholder, director or officer of a corporation, but neither guarantees or co-signs the loan, nor is an individual proprietor liable for the loan.

## Permissible or Impermissible

As we say so many times, compliance is all about the timing! Do you have the customer's implied or written authorization BEFORE you pull a consumer report or not? Which products are you offering, ones requested by the individual applicant, or ones your bank wants to cross-sell to meet a strategic quota? Anytime you color outside the lines drawn by the customer's request for a specific product or service, you must pause and determine how and when to proceed in a compliant manner.