

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 CFR 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's 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 CFR 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 CFR 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 CFR 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 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