

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 would 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.