

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 text of the solicitation, 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 FR 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