

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—Requirements for 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;