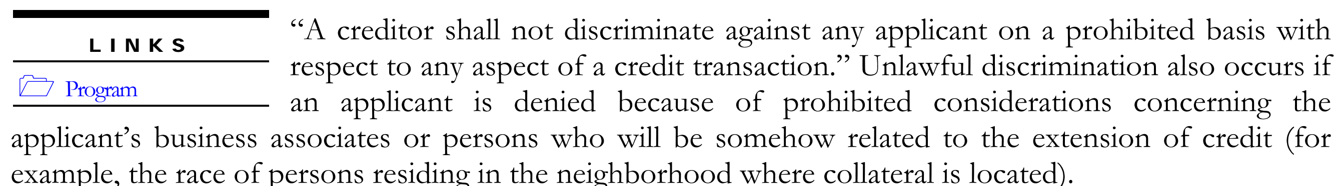
Equal Credit Opportunity Act

The Equal Credit Opportunity Act (the Act) as implemented by Regulation B prohibits discrimination with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has capacity to contract), receipt of income from public assistance programs, and good faith exercise of any rights under the Consumer Credit Protection Act. According to § 202.2(l), the regulation applies to all persons who, in the ordinary course of business, regularly participate in the credit decision, including setting the terms of the credit.

The Federal Reserve Board structured the regulation to cover the requirements imposed on a financial institution before, during, and following the application and evaluation process of granting credit. Both the Act and Regulation B set out a basic rule for credit grantors in § 202.4:



"A creditor shall not discriminate against any applicant on a prohibited basis with respect to any aspect of a credit transaction." Unlawful discrimination also occurs if an applicant is denied because of prohibited considerations concerning the applicant's business associates or persons who will be somehow related to the extension of credit (for example, the race of persons residing in the neighborhood where collateral is located).

To prevent discrimination in the credit-granting process, Regulation B imposes a delicate balance on the credit system, recognizing both the financial institution's need to know as much as possible about a prospective borrower and the borrower's right not to disclose information that is irrelevant to the transaction. The regulation deals with taking the application, evaluating the application, acting on the application, and furnishing and maintaining credit information. One should note that Regulation B does not prevent a creditor from determining any pertinent information necessary to evaluate the creditworthiness of an applicant.

ADMINISTRATION AND ENFORCEMENT

The Act gives the Federal Reserve Board the responsibility for writing Regulation B. The Board is also responsible for administering the rules through amendments and the official staff commentary under section 706(e) of the Act.

General Enforcement

Administrative enforcement of the Act is distributed among twelve supervisory Federal agencies and the Department of Justice. For the most part, the Federal agencies with general supervisory authority over a

particular group of creditors are given Equal Credit Opportunity enforcement responsibility over those creditors.

OTS Enforcement – Examiner Responsibility

The Office of Thrift Supervision is responsible for enforcing savings associations' compliance with ECOA and Regulation B. This responsibility is carried out by the regional offices primarily through the examination program. The adequacy of each institution's compliance with Regulation B is normally determined during regularly scheduled comprehensive examinations. Violations are noted and agreements with management for prompt correction of violations are obtained.

TAKING THE APPLICATION

Prescreening and Advertising – § 202.4(b)

Regulation B applies to the application process before the institution accepts the application. Lending officers and employees must be careful to take no action that would, on a prohibited basis, discourage anyone from applying for a loan. A financial institution may not, therefore, advertise in ways that would tend to encourage some types of borrowers and discourage others, on a prohibited basis. The portion of this handbook covering the Fair Housing Act contains a discussion of this issue.

Regulation B's applies to the application process before the institution accepts the application.

Prescreening tactics that tend to discourage potential applicants are also prohibited. For instance, instructions to loan brokers to use scripts or other means to discourage minority applicants from applying for credit would constitute a violation.

The prohibition against discouraging applicants applies to written applications and oral or telephone inquiries. Therefore, in the pre-interview, and when taking a written application, lending officers must refrain from asking for prohibited information. Questions must be neutral in nature, of a type applicable to and asked of every applicant desiring the same kind and amount of credit.

Written Application – § 202.4(c)

The regulation requires financial institutions to take an application in writing for some dwelling related loans. A financial institution is required to write down the information they normally consider when making such loans. For loans to purchase or refinance a dwelling, a financial institution is also required to ask the applicants their ethnicity, race, sex, marital status, and age. This information is used by enforcement agencies to make certain that the financial institution is not discriminating on a prohibited basis in making these loans. Written applications are not required for other types of credit. However, OTS regulations require institutions to inform inquirers of the right to file a written loan application (§ 528.3(b)) for any type of credit request.

Form of Disclosures - § 202.4(d)(1) & (2)

Regulation B requires financial institutions that provide written disclosures associated with this regulation to provide the disclosures in a clear and conspicuous manner and, except for the disclosures required by § 202.5 and § 202.13, in a form the applicant may retain.

Disclosures in Electronic Form – Disclosures required to be given in writing may be provided to the applicant in electronic form subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign) (15 USC 7001 et seq.).

Under certain circumstances institutions must provide disclosures in electronic format. This requirement depends upon the following:

- If an applicant accesses a credit application electronically such as online at a home computer, the creditor must provide the disclosure in electronic form (such as with the application form on its website) in order to meet the requirement to provide disclosures in a timely manner on, or with the application. If the creditor instead mailed paper disclosures to the applicant, this requirement would not be met.

- In contrast, if an applicant is physically present in the creditor's office, and accesses a credit application electronically, such as via a terminal or kiosk (or if the applicant uses a terminal or kiosk located on the premises of an affiliate or third party that has arranged with the creditor to provide applications to consumers), the creditor may provide disclosures in either electronic or paper form, provided the creditor complies with the timing, delivery, and retainability requirements of the regulation.

Requesting Information - § 202.5(a) and (b)

Regulation B prohibits financial institutions from requesting and collecting specific information about an applicant that has no bearing on the applicant's ability or willingness to repay credit requested and that could be used to discriminate against the applicant.

With the exception of information required to be collected for extension of credit secured by a dwelling (see Information for Monitoring Purposes – § 202.13), financial institutions may not request or collect information about an applicant's race, color, religion, national origin, or sex. Exceptions to this rule generally involve situations in which the information is necessary to test for compliance with fair lending rules or is required by a state or federal regulatory agency or other government entity for a particular purpose, such as to determine eligibility for a particular program. For example, a creditor may request prohibited information for the following purposes:

- Conducting a self-test that meets the requirements of § 202.15.

- Determining eligibility for a special purpose credit program, as provided in § 202.8(b), (c) and (d).

Information Concerning a Spouse or Former Spouse – § 202.5(c)

Regulation B requires that certain conditions be met before lenders can seek information about an applicant's spouse. As a general rule, the financial institution may not request information about an applicant's spouse. However, the financial institution may request information about the spouse or former spouse in any of the following cases:

- The nonapplicant spouse will be a user of or joint obligor on the account. (*Note:* the term "user" applies only to open-end accounts.)
- The nonapplicant spouse will be contractually liable on the account.
- The applicant is relying on the spouse's income, at least in part, as a source of repayment.
- The applicant resides in a community property state or the property upon which the applicant is relying as a basis for repayment of the credit requested is located in such a state.
- The applicant is relying on alimony, child support, or separate maintenance income as a basis for obtaining the credit.

Section 202.5(c)(3) allows a financial institution to request a list of all accounts upon which the applicant is liable, the name and address in which the accounts are carried, and any other names used previously to obtain credit.

Unless the need is apparent from an affirmative indication regarding one of the above criteria, no financial institution may request information on an applicant's spouse.

Inquiries Concerning Marital Status – § 202.5(d)(1)

Individual credit. When an applicant applies for individual credit, the financial institution may not ask the applicant's marital status. There are two exceptions to this rule:

1. If the credit transaction is to be secured, the financial institution may ask the applicant's marital status. (This information may be necessary to determine what would be required to gain access to the collateral in the event of default.)
2. If the applicant either lists assets to support the debt that are located in a community property state or resides in such a state, the financial institution may ask the applicant's marital status. (In community property states assets owned by a married individual may also be owned by the spouse, thus complicating the accessibility of the collateral and repayment of the credit requested in the event of default.)

Joint credit. Whenever a request for credit is joint (made by two or more individuals who will be primarily liable) the financial institution may always ask the applicant's marital status regardless of whether the credit is to be secured or unsecured.

Terminology. In instances in which the financial institution is permitted to inquire about marital status, only the terms "married," "unmarried," and "separated" may be used. This applies to oral as well as written requests for marital status information. "Unmarried" may be defined to include divorced, widowed, or never married, but the application must not be structured in such a way as to encourage the applicant to distinguish among these.

The financial institution may always ask questions concerning the applicant's income or assets that support the credit request. However, any such question must not be structured so as to encourage the applicant to indicate marital status. The financial institution may also ask questions to obtain relevant information that indirectly discloses marital status. For example, the financial institution, when asking about the customer's current payment obligations, may always inquire whether the applicant is obligated to pay alimony, child support, or separate maintenance payments. In addition, questions may be asked concerning the source of income or ownership of assets supporting the debt, and whether the debt obligations of the applicant have a co-obligor.

On the written application all terms must be neutral as to sex. "Husband" and "wife" and any other terms indicating sex must not be used. Courtesy titles indicating sex such as Mr., Mrs., Ms., and Miss may be used, but only if accompanied by a conspicuous statement that the designation of any such title is optional.

Alimony, Child Support, or Separate Maintenance Income – § 202.5(d)(2)

A financial institution may ask if the applicant is receiving alimony, child support, or separate maintenance payments only if the financial institution first discloses to the applicant that such income does not need to be revealed unless the applicant wishes to rely on that source of income for determining creditworthiness. An appropriate notice to the effect that such income does not have to be revealed unless the applicant chooses to rely on it must be given whenever the financial institution makes any general request concerning income and the source of that income. Therefore, a financial institution must either ask questions designed to solicit only information about specific income (for example, salary, wages, employment income) or must state that disclosure of alimony, child support, or separate maintenance payments is not required.

Other Limitations on Information Requests

Under no circumstance may a financial institution request or use information about an applicant's birth control practices or childbearing intentions or capability. However, as a general rule, a creditor may request and consider any information regarding the applicant's continued ability to repay, such as the probability of continuing employment, so long as this inquiry is made of all applicants who are similarly qualified. The number, ages, and expenses of present dependents may also be requested. Making the assumption, however, that childbearing, or the potential for it, is always associated with a discontinuity in ability to repay is prohibited in an evaluation of creditworthiness by § 202.5(d)(3).

The financial institution may inquire about the applicant's permanent residence and immigration status in order to determine creditworthiness as defined in § 202.5(e). However, the financial institution may not arbitrarily deny credit to some aliens and not others, merely on the grounds that the ones denied are not

citizens. (Although the practice of denying credit to all noncitizens may not be prohibited under Regulation B, an institution may face elevated legal risk under other Federal Statutes, particularly the Civil Rights Act of 1870 (42 USC § 1981).)

EVALUATING THE APPLICATION

Rule Governing the Evaluation of Applications – § 202.6(a)

In evaluating the application, the financial institution may not consider any information it obtains to discriminate on a basis prohibited under Regulation B.

Prohibited Considerations – § 202.6(b)(2) - (7)

- A financial institution may not consider the applicant's age (provided the applicant is old enough, under State law, to have the capacity to contract) unless it is used for the purpose of determining a pertinent element of creditworthiness or in an appropriate credit scoring system. The age of an elderly applicant (62 years or older) may always be considered when used in the applicant's favor (For example, reverse mortgage program that requires the borrower to be age 62 or older is permissible under § 202.6(b)(2)(iv)).

  — In a judgmental credit evaluation system, age is considered legitimately pertinent when considered in connection with occupation, to determine the amount of employment or retirement income which will support the debt until maturity; to determine whether the security is adequate to cover the debt if the maturity of the extension exceeds the life expectancy of the applicant, or to assess the significance of the applicant's length of employment or residence.

  — In an empirically derived, demonstrably and statistically sound credit scoring system, a financial institution may use an applicant's age as a predictive factor, provided that the age of an elderly applicant is not assigned a negative factor or value.

- A financial institution may not consider whether the applicant receives income from a public assistance program. A creditor cannot deny credit, or grant credit on more onerous terms, because some or all of the applicant's income is derived from public assistance. However, a creditor may consider probable continuity of such income. Unemployment compensation, social security, and aid to families with dependent children are examples of the types of programs covered by the prohibition.

- A financial institution may neither refuse to consider nor discount the income of an applicant or spouse on a prohibited basis or because it is part time. The income of a spouse used in an application for credit must be considered equally with that of the applicant. In addition, income derived from annuity, pension, or retirement benefits must not be discounted. The financial institution may, however, consider the amount and probable continuity of any income in

evaluating the application. A financial institution must consider alimony, child support, or separate maintenance income voluntarily listed by the applicant in support of the debt to the extent that payments will be likely to continue. Methods for determining the likelihood of the continuity of payments may include, but are not limited to, the following:

- whether the payments are provided for by oral or written agreement, or by court decree;
- the length of time payments have been made;
- whether the receipt of payments has been recent and regular;
- the ability to compel payment; and
- the creditworthiness and credit history of the payor, where available to the financial institution in accordance with the Fair Credit Reporting Act or other law.

- Regulation B forbids asking about an applicant's plans or expectations to have children or an applicant's physical capability for childbearing. Furthermore, a creditor is prohibited from considering statistics or making assumptions concerning the probability that a person like the applicant or the applicant's spouse will have a certain number of children, or will cease employment to bear or raise children.
- To the extent a financial institution uses credit history in evaluating applications, it must consider in evaluating creditworthiness any account reported in the name of both spouses and, on the applicant's request, any account reported in the name of the applicant's spouse which the applicant can demonstrate reflects the applicant's willingness or ability to repay. If the applicant requests, the financial institution must also consider any information that the applicant may present tending to indicate that the credit history of an account reported in both names does not accurately reflect the applicant's ability or willingness to repay. To facilitate this inquiry, Regulation B allows a financial institution to request the name in which an account is carried if the applicant discloses the account in applying for credit.
- The financial institution may consider whether an applicant is a permanent resident of the United States and the applicant's U.S. immigration status to the extent that this information is necessary to ascertain the financial institution's rights and remedies with respect to repayment.

A financial institution may not use marital status as a basis for determining the applicant's creditworthiness.

Prohibited Considerations – § 202.6(b)(8)

A financial institution may not use marital status as a basis for determining the applicant's creditworthiness. However, an institution may consider marital status for the purpose of ascertaining whether state law gives the applicant's spouse an interest in the property being offered as collateral.

Credit Scoring System

Regulation B neither requires nor endorses any particular method of credit analysis. Creditors may use traditional methods that rely on a credit officer's subjective evaluation of an applicant's creditworthiness, or they may use more objective' statistically developed techniques such as credit scoring. For purposes of certain regulatory provisions, however, Regulation B divides the field of creditor analysis in two categories:

1. Credit scoring systems that qualify as "empirically derived, demonstrably and statistically sound."

2. Judgmental systems.

All forms of credit analysis fall into one category or the other. The regulation (§ 202.2(p)) prescribes the standards that a credit scoring system must meet in order to qualify as an "empirically derived, demonstrably and statistically sound, credit system." All forms of credit analysis that do not meet these standards are automatically classified as "judgmental" systems. The division of credit analysis systems into these two categories is important because creditors that use a "demonstrably and statistically sound" system may take the age of an applicant directly into account as a predictive variable. Judgmental systems may not do this.

The ECOA's prohibition against age discrimination specifically provides that it does not constitute discrimination for a financial institution:

"To use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value . . . ."

Several conditions are built into this statutory provision:

- The credit system should be empirically derived (that is, based on credit experience).

- The system should be "demonstrably and statistically sound" in accordance with regulations prescribed by the Federal Reserve Board.

- The age of an elderly applicant should not be assigned a negative factor or value.

Regulation B implements this provision by first defining empirically derived credit systems, in general terms-that is, as systems that evaluate creditworthiness by assigning points to various attributes of the applicant (and, perhaps also, to attributes of the credit requested). The points assigned are derived from a statistical analysis of recent creditworthy and noncreditworthy applicants of the financial institution.

The second part of the definition prescribes the standards that an empirically derived credit system must meet in order to qualify as an "empirically derived, demonstrably and statistically sound, credit system."

These standards include the following requirements:

- The data used to develop the system derive either from an empirical comparison of sample groups or the population of creditworthy and noncreditworthy applicants who applied for credit within a reasonable period of time.

- That the system be developed for the purpose of evaluating the creditworthiness of applicants with respect to the legitimate business interests of the creditor utilizing the system.

- That the system must be developed and validated using statistical principles and methodology.

- That the creditor periodically reevaluates the predictive ability of the system by the use of statistical principles and methodology and adjusts it as necessary.

Credit scoring systems that meet these criteria may take the applicant's age directly into account and assign points to age (subject to the limitation on assigning a negative factor or value to the age of an elderly person).

Judgmental Systems

As noted above, any system other than an empirically derived, demonstrably and statistically sound, credit system is a judgmental system (including any credit scoring system that does not meet the prescribed technical standards). Such a system cannot take the applicant's age directly into account in evaluating creditworthiness. The Act and the Regulation do, however, permit a creditor to consider the applicant's age for the purpose of evaluating other information about the applicant that had a demonstrable relationship to creditworthiness.

- A creditor may consider, for example, the occupation and length of time to retirement of an applicant to ascertain whether the applicant's income will support the extension of credit until its maturity.

- The financial institution may consider the adequacy of any security offered if the duration of the credit extension will exceed the life expectancy of the applicant. An elderly applicant might not qualify for a 30-year mortgage loan because the duration of the loan exceeds the applicant's life expectancy and the cost of realizing on the collateral might exceed the applicant's equity. The same applicant might qualify with a larger downpayment and a shorter loan maturity.

- A creditor could also consider an applicant's age, for example, to assess the significance of the applicant's length of employment or residence (a young applicant may have just entered the job market; an elderly applicant may recently have retired and moved from a longtime residence).

In none of these examples, however, is age being directly considered in a decision to evaluate creditworthiness. A system, for instance, that only permits an applicant over the age of 70 to have a repayment term of one year whereas a younger applicant is permitted to repay the credit over a three year period is not lawful.

RULES CONCERNING EXTENDING OR DENYING CREDIT

Separate Account – § 202.7(a)

No financial institution may refuse, on the grounds of sex, marital status, or any other prohibited basis, to grant a separate account to a creditworthy applicant. If a creditor offers separate accounts to unmarried applicants, it must offer separate accounts to creditworthy married applicants, and vice versa regardless of sex. Laws preventing the separate extensions of consumer credit to each spouse are preempted if the spouse voluntarily applies for separate credit. If the spouses apply for separate extensions of credit, the accounts must be aggregated to determine finance charges or loan ceilings under state law or laws of the United States.

Name on the Account – § 202.7(b)

No financial institution may refuse to allow an applicant to open or maintain an account in a birth-given first name and surname, the spouse's surname or birth-given first name, or a combined surname. However, the financial institution may require that the applicant use one name consistently in doing business with the financial institution. In addition, the financial institution may inquire whether the applicant has obtained credit in another name or is liable for accounts listed in another name in order to determine the entire credit history of the applicant.

Change in Name or Marital Status – § 202.7(c)

A financial institution may not take the following actions, with respect to any person who is contractually liable on an existing open end account on the basis of age, retirement or a change in the applicant's marital status:

- Require a reapplication (except in limited circumstances).
- Change the terms of the account.
- Terminate the account.

If the financial institution does learn of a change in the marital status of any contractually liable person on an existing account, it may require a reapplication under the following conditions:

- If the account was granted to a person who is contractually liable and the decision was to grant the credit based in part on the income of that person's spouse, and if the income of that person, by themself, does not now support the current line of credit the financial institution may require a reapplication. The financial institution, however, may not deprive the person of the use of the credit line while the reapplication is being evaluated. The financial institution may evaluate the application based on its current credit standards. It must meet the regular requirements of Regulation B for evaluating and notifying the applicant of the action taken by the financial institution.

Signature Requirement – § 202.7(d)

Among the key sections of Regulation B as it relates to sex and marital status discrimination are the ones regarding the signatures a financial institution may require when granting a loan. The purpose of these sections is to permit people (and particularly women) who are creditworthy in their own right to obtain credit on their own by removing, to the greatest possible extent, any dependence on a spouse *(including guarantors, sureties, endorsers, and other similar parties).*

There are two general rules which apply throughout the sections on signature requirements:

A financial institution shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

First, a financial institution may not require a signature of an applicant's spouse, or other person other than a joint applicant on any credit instrument if the applicant qualifies under the financial institution's standards of creditworthiness for the amount and terms of the credit requested. A financial institution shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

Second, a financial institution has much more latitude in seeking signatures for instruments necessary to reach property used as security, or in support of the customer's creditworthiness than it does obtaining signatures by persons other than the applicant on documents that establish the contractual obligation to repay.

To understand the second general principle it is necessary to keep in mind that there is an important distinction between debt instruments, such as the note itself, and instruments, such as a mortgage, Deed of Trust, or other security device, which are necessary to secure the credit and to reach and obtain property in the event of default. The former type of instrument, the note, is a legal admission that a debt exists. A person who signs a note accepts a personal obligation to repay the debt in full - even though there may be other signatories or someone else may have received the actual proceeds of the loan. A mortgage, or security agreement, on the other hand, creates a far more limited obligation-one which only allows the financial institution to reach the signer's interest in the property described, in the event of default. If, after default and the sale of the pledged property, an amount remains due to the financial institution, someone who has signed only a mortgage or other security agreement is not obligated to pay that amount.

Joint applicants. A financial institution may obtain the signature of all joint applicants, on both the note and the security instrument. It is irrelevant whether the applicants are married so long as the application is intended by the applicants to be joint, that is with the assets of both borrowers supporting the debt and with joint liability. The only difficult aspect of this rule is in determining who are joint applicants. If two people come in to the financial institution and voluntarily make joint application there is no problem, of course, and the financial institution need not try to discourage this. However, if two people come in together but only one applies, the financial institution may not attempt to persuade the other to join, or require a joint application, if the individual applicant is creditworthy.

The term "joint applicant" refers to someone who applies contemporaneously with the applicant for shared or joint credit. It does not refer to someone whose signature is required by the creditor as a condition for granting the credit requested.

Evidence of joint application. A person's intent to be a joint applicant must be evidenced at the time of application. Signatures on a promissory note may not be used to show intent to apply for joint credit. On the other hand, signatures or initials on a credit application affirming applicants' intent to apply for joint credit may be used to establish intent to apply for joint credit (see Appendix B of the regulation). The method used to establish intent must be distinct from the means used by individuals to affirm the accuracy of information. For example, signatures on a joint financial statement affirming the veracity of information are not sufficient to establish intent to apply for joint credit. If there is any doubt as to the applicants' intent, the loan officer should ask for clarification.

Cosigners – § 202.7(d)(5). If it is determined that an applicant for individual credit cannot support the credit in that person's own right, according to the financial institution's objective, nondiscriminatory standards, it may then request that the applicant obtain a cosigner, guarantor, or the like. In all such cases, however:

- The financial institution must require a cosigner or guarantor in all circumstances where the applicants are similarly situated. In other words, it cannot require cosigners only for unmarried applicants, or only for married applicants, or only for women, or men, or on any other prohibited basis.

- The financial institution may not require that the applicant's spouse be the cosigner, although the applicant may so choose.

- The financial institution may not impose requirements on the cosigner or guarantor that it is prohibited from imposing on the applicant.

Signature of the Applicant's Spouse – § 202.7(d). In certain circumstances a financial institution may request the spouse's signature, even where a married applicant applies for individual credit:

- Secured credit – § 202.7(d)(4). If an applicant requests secured credit, a financial institution may require any person, including the applicant's spouse, who owns an interest in the property to sign any instrument which the financial institution reasonably believes to be necessary under state law to make the property being offered as security available to satisfy the debt in the event of default. In a noncommunity property state, this will normally not include the note itself.

  Integrated instruments. A financial institution may not require the spouse to sign an "integrated instrument" that combines the note, security agreement, and other disclosures, where the nonapplicant spouse's signature would not be required on the note under the rules stated above. Where a spouse's signature is necessary to reach the property relied on, and the financial institution habitually uses an integrated form, the financial institution should have the spouse sign a separate security agreement.

- Unsecured credit – § 202.7(d)(2). When the applicant requests unsecured credit but relies in part on property that the applicant owns jointly with another person to satisfy the financial institution's standards of creditworthiness, the financial institution may require the signature of the other person only on any instrument necessary, or reasonably believed to be necessary, under State law to make the property relied on available to satisfy the debt in the event of death or default of the applicant.

In deciding what is reasonably necessary, a financial institution may look not only at state law, but also the form of ownership of the property, its susceptibility to attachment, execution, severance, and partition, and any other factors that may affect the value of the applicant's interest in the property to the creditor. But the fact that the spouse may use property being relied on (such as a car) does not necessarily mean that each person's signature is "necessary" for the financial institution's legal protection. Some stronger ownership interest other than mere use is generally required. Also, if one spouse has authority under State law to commit enough of the jointly held property to establish creditworthiness without the other spouse's signature' such a signature is not "necessary" to reach the property and the financial institution may not require it.

- Community property states - § 202.7(d)(3). Consistent with the general principles addressed previously, a separate set of rules applies if a married applicant requests individual unsecured credit and resides in a community property state, or if the property upon which the applicant is relying is located in a community property state. In such circumstances, a financial institution may require the signature of the spouse on any instrument including the note necessary under the law of the state in which the applicant resides, or in which the property is located, to make the community property available to satisfy the debt in the event of default, only if:

  - The applicable state law denies the applicant power to manage or control enough community property to qualify for the credit requested; and
  - The applicant does not have sufficient separate property to qualify, without regard to the community property.

  Of course, even in a community property state a financial institution may always require the spouse's signature on any instrument necessary to reach the collateral for a secured loan, but a financial institution may not automatically require a spouse's signature on the note, except in conformance with the above rules. OTS Regional Counsel can provide information on which states are considered community property states.

Establishment of a credit history. A financial institution may permit a nonapplicant spouse to sign a note, and thereby become obligated to repay the loan, if the spouse volunteers to do so. Some spouses may wish to use this option to help create a credit history which would operate in their own favor.

Business credit. The business exemptions of Regulation B (§ 202.3(d)(2)) *do not* apply to the signature requirements. Accordingly, a spouse's signature may be required in a business setting only in the same circumstances that it could in other loans.

Insurance – § 202.7(e)

When the financial institution offers casualty, credit life, health, accident, disability or other credit insurance, differences in cost, terms, or availability of the insurance will not constitute violations of the regulation. However, the financial institution may not deny or terminate credit merely because the insurance is unavailable on account of the applicant's age. When insurance is desired by the applicant, information regarding the applicant's age, sex, or marital status may be requested for the purpose of offering insurance.

As noted in the discussion of insurance in the FHA portion of this handbook, the treatment of insurance under the FHA rules may not be the same when dealing with housing credit.

Special Purpose Credit Programs – § 202.8

The following types of credit programs meet the definition of special purpose credit programs:

- Any credit assistance program authorized by federal or state law for the benefit of economically disadvantaged class of persons as defined in § 202.8(a).
- Any credit assistance program offered by a nonprofit organization for the benefit of its members or for the benefit of an economically disadvantaged class of persons.
- Any special purpose credit program offered to meet special social needs by a profit making organization. Such a program must meet the following requirements:
  - — A written plan must be developed which designates those classes of applicants who are eligible and the procedures and standards for the extension of credit.
  - — The program will extend credit to those applicants who probably would not be able to obtain such credit on substantially similar terms as other applicants.

Any denial of credit to an applicant who did not qualify under a special purpose credit program is not a violation of the regulation.

If applicants in special purpose credit programs are required to have one or more common characteristics, such as race, national origin, sex, marital status, age, or receipt of income from a public assistance program, the financial institution may request and consider these characteristics in determining the eligibility of applicants for such a program without violating the regulation. If financial need is to be used as a determining factor under a special purpose credit program, information concerning the applicant's marital status, income from alimony, child support, or separate maintenance payments, or financial information on the spouse may be requested and considered to determine the applicant's eligibility for such a program. In addition, the signature of a spouse or other person on the application or credit instrument may be obtained, if required for eligibility under federal or state law. Considering this information and requiring a signature will not be a violation of the regulation if used to determine eligibility for the program.

Notification – § 202.9

Notification of action taken. The financial institution is required to give notice of both favorable and adverse action. Notice of approval can be implied, such as by providing the requested credit card.

The financial institution must notify the applicant of action taken within 30 days after receipt of a completed written or oral application. (A completed application is one for which a creditor has received all the information it regularly obtains and considers in evaluating applications.) There are two exceptions: (1) the financial institution must notify an applicant to whom it has made a counteroffer, of the adverse action, within 90 days unless the applicant accepts or uses the credit during that time; and (2) when the financial institution and the applicant agree that the applicant will inquire about what action was taken and the applicant fails to do so within 30 days of application the financial institution need not provide the required notification of approval.

The financial institution must notify an applicant of adverse action taken on an incomplete application or with respect to an existing account within 30 days.

Adverse Action – § 202.2(c)

Adverse action means any of the following:

- A refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer and the applicant uses or expressly accepts the credit offered.
- A termination of an existing account or an unfavorable change in terms on an existing account if the same action is not taken on all or substantially all of a similar account type.
- A termination of an account due to past delinquency or default when such delinquency or default was cured prior to the creditor's action.
- A denial of an increase in the credit available to the applicant when requested in accordance with appropriate financial institution procedures.

Adverse action does not include any of the following:

- Any change in the terms of an account which is expressly agreed to by the applicant.
- Any action or forbearance taken in connection with inactivity, current delinquency, or current default on an account.
- A denial of credit at the point of sale or loan (for example, when a customer unsuccessfully attempts to use a credit card) unless (a) the denial is a termination or unfavorable change in terms that does not affect all or a substantial portion of a classification of the creditor's accounts, or (b) the denial is a reapplication to increase the amount of credit available for the account.

- A denial of credit because extending the credit requested is prohibited by laws affecting the financial institution.
- A denial of credit because the financial institution does not offer the type of credit requested.

Contents of Adverse Action Notice – § 202.9(a)(2). Whenever the institution takes adverse action, it must supply the applicant with the following, in writing:

- The ECOA notice as described in the regulation; and
- A statement of specific reasons for the action taken, or a disclosure of the applicant's right to request such a statement and to receive it within 30 days after the financial institution receives the request. The applicant must make the request within 60 days of the notice of action taken.

The financial institution's disclosure of the right to receive a statement of the reasons for denial must include the name, address, and telephone number of the individual or office where the reasons may be obtained. When the financial institution chooses to disclose the reasons for denial orally, it must inform the applicant of the right to receive written confirmation of the reasons within 30 days from written request.

If the financial institution chooses to disclose the specific reasons for adverse action, the financial institution has two options:

- The financial institution may formulate its own checklist or letter which provides the specific principal reasons for adverse action, or
- The financial institution may use the sample forms in Appendix C of Regulation B.

Statement of Specific Reason. Statements that the adverse action was based on the creditor's internal standards or policies or that the applicant, joint applicant, or similar party failed to achieve a qualifying score on the creditor's credit scoring system are insufficient.

Incomplete Application – § 202.9(c)(1). When an incomplete application is received, the financial institution shall notify the applicant within 30 days either:

- Of action taken using procedures in § 202.9 (a); or
- Request the additional information needed from the applicant.

If additional information is needed and if the applicant fails to respond, within a reasonable period of time, the financial institution has no further obligation. If the applicant supplies the requested information within the requested time period, the financial institution shall take action on the application and notify the applicant.

Multiple applicants. If two or more persons make a joint application, the notification has to only be given to one of the primarily liable applicants.

Multiple creditors. When more than one creditor is involved in the transaction, and the credit is denied or a counteroffer is not accepted by the applicant, each creditor who takes such adverse action must make the required notification. This notification may be provided by a creditor or indirectly through a third party (for example by agreement, through a retailer who offers the credit transaction to the financial institution for discounting) if the identity of all creditors taking the action is given.

A financial institution is not liable for a failure to comply with the notification requirements if the failure was caused by an "inadvertent error" as defined *and,* after discovering the error (1) the financial institution corrects the error as soon as possible and (2) begins to comply with the regulation.

Applications submitted through a third party - § 202.9(g). When a financial institution purchases indirect paper from a dealer in the regular course of business, it is the responsibility of the financial institution to maintain procedures to determine whether the dealer is complying with the ECOA in all aspects of the credit transaction.

If the applicant within 30 days accepts a credit offer from the financial institution, no other notification is required from either the financial institution or the dealer. If credit is not extended by the financial institution or the applicant does not accept the financial institution's offer of alternate terms, each creditor taking adverse action must make notification to the applicant. For example, if a dealer attempts to obtain financing at several financial institutions and none of the financial institutions agree to extend credit or the applicant does not accept any alternative terms offered, all the financial institutions and any dealer acting as a creditor involved in the transaction must give the notices required for adverse action. Financial institutions may enter into contractual arrangements with dealers to provide all appropriate notices. When the dealer provides a joint notification, the financial institution will not be liable for actions or omissions resulting in violations, if the financial institution provided the dealer with the information necessary to comply with the notification requirements and the financial institution was maintaining procedures to avoid any such violation. Any joint notification must identify each creditor.

All creditors involved in an indirect credit transaction must retain all written or recorded information in their possession for 25 months after notice of action, on any application (including any notice of adverse action taken) or incomplete application.

OTHER RULES

Furnishing Credit Information – § 202.10

One of the primary methods used by financial institutions to determine creditworthiness is to examine the customer's credit history compiled and maintained by credit reporting agencies. Prior to the enactment of ECOA many women found it difficult to obtain credit because of the way in which these credit histories were developed, maintained, and operated by the credit reporting agencies. Frequently, accounts were

reported only in the husband's name, even when the wife was jointly liable or was the person primarily responsible for seeing to it that the debt was properly repaid.

Additionally, women were sometimes denied credit because of their husbands' bad credit histories for which the wives were not responsible. The result was that women did not benefit from the good credit histories they participated in developing and were penalized for bad ones that were not of their doing.

Regulation B takes steps to rectify this situation. Since the credit histories in credit reporting agencies are developed primarily from information supplied by creditors themselves, the regulation sets forth requirements aimed at the method by which creditors must maintain and report the information. These requirements are designed to enable customers, primarily women, to (1) develop their own credit histories; (2) have their joint accounts reflected in such a way that either joint or individual retrieval of information is possible; and (3) be assured that only the information pertinent to their own credit histories is reported and considered when they individually apply for credit.

It should be emphasized that financial institutions are not required to report credit information. The regulation only requires that if they do, they report it in accordance with the regulation's requirements.

Designation of accounts – § 202.10(a), (b), (c). A creditor that furnishes credit information shall designate:

- Any new account to reflect participation of both spouses if the applicant's spouse is permitted to use or is contractually liable on the account; and
- Any existing account to reflect participation within 90 days after receiving a written request to do so from one of the spouses.

If a creditor furnishes credit information to a consumer reporting agency, the creditor shall furnish the information in the name of the spouse about whom the information was requested.

Accounts held or used by spouses as defined in the official commentary to Regulation B apply only to creditors that furnish credit information to credit bureaus or to other creditors. A financial institution that furnishes credit information has the option to designate on all joint accounts the participation of both parties, whether or not the accounts are held by persons married to each other. A financial institution need not distinguish between accounts on which the spouse is an authorized user and a contractually liable party. A financial institution is not required to create or maintain separate files in the name of each participant on a joint account, but it must be able to report information in the name of each spouse on the account.

Inadvertent errors within the meaning of the regulation, resulting in failure to comply with requirements regarding furnishing credit information will not be considered violations of the regulation if the financial institution takes corrective action and begins complying immediately upon discovering the error. (See § 202.17(c)).

Relation to State Law – § 202.11

Regulation B alters, affects, or preempts only those state laws that are inconsistent with the Act or Regulation B, and then only to the extent of the inconsistency. A determination as to whether a state law is inconsistent will be made if a formal Board interpretation is requested.

Any person may apply for such an interpretation. The regulation does not alter any provision of state property laws or federal or state banking regulations which deal with the solvency of such institutions, or laws relating to the disposition of a decedent's property.

Retention of Records – § 202.12

Retention of Prohibited Information – § 202.12(a). A creditor may retain in its files under certain circumstances, information that is generally prohibited, if the information was obtained:

- From any source prior to March 23, 1977.
- From consumer reporting agencies, an applicant, or others without the specific request of the creditor.
- As required to monitor compliance with the Act and this regulation or other federal or state statutes or regulations.

While the financial institution may retain such information in its files, care must be taken to ensure that it will not be considered in evaluating creditworthiness.

Applications – § 202.12(b)(1). The financial institution must retain the original or a legible copy of the following information for 25 months after the date the financial institution informs the applicant of notice of action taken on the application or incompleted application:

- Any application, any information required to monitor compliance with the Act, and all written or recorded information used in evaluating the application which has not been returned pursuant to the applicant's request.
- Copies of written documents and any recorded notation or memorandum of oral communication of the notification of action taken on the application, the statement of specific reasons for adverse action, and any written statement from the applicant alleging a violation of the regulation or the Act.

Existing Accounts. The financial institution must also retain the original or copy of the following information for 25 months after the financial institution informs the applicant of adverse action regarding existing accounts:

- Any written or recorded information concerning such adverse action.

- Any written statement from the applicant alleging a violation of the regulation or the Act.

Incomplete Applications. The financial institution must retain all written or recorded information concerning the applicant, including any notation of action taken, for 25 months after the date that the financial institution receives any application for which the financial institution is not required to comply with the notification requirements of § 202.9. The 25-month requirement runs from the date of application when the application is withdrawn by the applicant or when the application is submitted to more than one creditor on behalf of the applicant, and the application is approved by one of the other creditors.

Enforcement Proceedings or Investigations - § 202.12(b)(4). If the financial institution has received notice that it is under investigation for violation of the regulation, the financial institution must retain all the above information relating to the account or application under investigation until there has been a final disposition of the matter.

Self-tests – § 202.12(b)(6). The financial institution must retain all written or recorded information about the self-test for 25 months after the self-test has been completed.

Prescreened Solicitations - § 202.12(b)(7). The financial institution must retain an offer of credit to potential customers for 25 months following the date of solicitation. The institution must retain the original form or a copy of the following:

The financial institution must retain an offer of credit to potential customers for 25 months following the date of solicitation.

- The text of any prescreened solicitation.
- The list of criteria the creditor used both to select potential recipients of the solicitation and to determine who will ultimately be offered credit.
- Any correspondence related to complaints (formal or informal) about the solicitation.

Information for Monitoring Purposes – § 202.13 (see also Section 1215: Home Mortgage Disclosure Act)

In order to monitor compliance with the regulation, financial institutions must request and maintain the following information regarding written applications for the purchase or the refinancing of a dwelling occupied or to be occupied, by the applicant as a principal residence, where the extension of credit will be secured by the dwelling (dwelling means a residential structure that contains 1-4 family units, individual condominium or cooperative unit, and a mobile or other manufactured home). An application for an extension of credit secured by a dwelling must request the following information regarding any applicants:

- Ethnicity, using the categories Hispanic or Latino, and *not* Hispanic or Latino.
- Race, using the categories American Indian or Alaskan Native; Asian; Black or African-American; Native Hawaiian or Other Pacific Islander and White.

- Sex.
- Marital status, using the categories "married," "unmarried," and "separated."
- Age.

The information may be requested on the application form or on a separate sheet of paper that refers to the application. The applicant and joint applicant must be informed that the disclosure of such information is optional and that the information is requested by the Federal government for monitoring compliance with Federal laws that prohibit discrimination. If the applicant chooses not to supply the requested information, the creditor is required to note on the form, to the extent possible, the ethnicity, race, and sex of the applicants on the basis of visual observation or surname. Some forms may not ask marital status and age if the information was requested as part of the application process (see model residential application form in Appendix B of the regulation).

Telephone and Mail Applications. A financial institution that accepts an application by telephone or mail must request the monitoring information. However, the financial institution does not have to make a special request for the monitoring information if the applicant has failed to provide the information on the returned application form.

Video and other Electronic-application processes. If the financial institution takes an application through an electronic medium that allows the institution to see the applicant, the institution must treat the application as taken in person. If the applicant applies through an electronic medium without video capability, the institution should treat the application as if it were received by mail.

A financial institution that fails to request monitoring information or discourages applicants from supplying it is violating the regulation. Consequently, low response rates should be examined closely to determine the cause.

Providing Appraisal Reports – § 202.14

The regulation provides credit applicants with a right to receive copies of appraisal reports. This section applies to applications for credit to be secured by a consumer's dwelling, whether it is extended for a business purpose (for example, to start a business) or a consumer purpose (for example, a loan to finance a child's education).

There are two ways a financial institution can provide the appraisal report:

- By routinely providing a copy to an applicant, whether credit is granted or denied or the application is withdrawn.
- Upon an applicant's written request. If the financial institution only provides an appraisal report upon written request, then the applicant must be notified in writing of the right to receive a copy of the report. If there is more than one applicant, notice can be given to one applicant only, but it must be given to the primary applicant. The notice can be given at any time during the application

process but not later than when the financial institution provides notice of action taken under § 202.9. The notice should specify that the applicant's request must be in writing, give the financial institution's mailing address, and state the time for making the request.

Section 202.14(a) applies if an applicant requests a renewal of an existing extension of credit and the financial institution obtains a new appraisal report to evaluate the request, but it does not apply to a renewal request if the previous appraisal report is used to determine whether to grant credit.

A financial institution is required to mail or deliver a copy of the appraisal report promptly, generally within 30 days, after acquiring the appraisal report, receiving a request from the applicant, or receiving reimbursement from the applicant for the report, whichever is the last to occur. Financial institutions do not have to provide a copy of the appraisal report when the applicant's request is more than 90 days after the financial institution provided notice of action taken on the application under § 202.9 or 90 days after the application is withdrawn.

A financial institution may be reimbursed for photocopy and postage costs incurred in providing the appraisal report, unless prohibited by state or other law. If the applicant has already paid for the appraisal report, as part of the application fee, the financial institution may not seek additional fees, other than photocopy and postage stamps. Also, if the financial institution does not otherwise charge for the appraisal report, it may not require a payment solely from applicants who request a copy of the report.

For the purpose of paragraph (a) of this section, the term dwelling means a residential structure that contains one to four units whether or not that structure is attached to real property. The term includes, but is not limited to, an individual condominium or cooperative unit, and a mobile or other manufactured home. The term appraisal report means the document(s) relied upon by a creditor in evaluating the value of the dwelling.

Self-testing and Self-correction – § 202.15

A self-test must meet two criteria. *First*, it must be a program, practice, or study that a lender designs and uses specifically to determine the extent or effectiveness of its compliance with the regulation. *Second*, the results of the self-test must create data of factual information that is otherwise not available and cannot be derived from loan or application files or other records related to credit transactions.

A financial institution may conduct a voluntary self-test to determine the level of its compliance with the ECOA. The results of the voluntary self-test are privileged and are solely for the use of the financial institution. This privilege applies to the data created and any analysis, opinions and conclusions pertaining to the self-test results. It covers work papers or draft documents as well as final documents. It does not apply to whether a self-test was conducted, the methodology used or the scope of the self-test, time period or the dates it was conducted. Also, it does not apply to the loan and application files, or other business records; and information derived from such files and records, even if aggregated, summarized or reorganized.

For the privilege of self-testing to apply, appropriate corrective action is required when the self-test shows that it is more likely than not a violation occurred, even though no violation has been formally determined.

Enforcement, Penalties and Liabilities – § 202.16

In addition to actual damages, Regulation B provides for punitive damages of up to $10,000 in individual lawsuits and up to the lesser of $500,000 or one percent of the financial institution's net worth in class action suits. Successful complainants are also entitled to an award of court costs and attorney's fees.

"Inadvertent errors" is defined by § 202.2(s) as errors of a mechanical, electronic, or clerical nature that the financial institution can show that (1) were not intentional and (2) occurred despite the fact that the financial institution maintains procedures reasonably adapted to avoid such errors. A financial institution is not liable for a failure to comply with the notification requirements of § 202.9 if the failure was caused by an inadvertent error and after discovering the error, the financial institution (1) corrects the error as soon as possible and (2) begins compliance with the requirements of the regulation. Similarly a financial institution's failure to comply with §§ 202.6(b)(6), 202.10, 202.12 and 202.13 will not be considered a violation if it results from an inadvertent error and the financial institution takes the corrective action noted above. Errors involving § 202.12 and § 202.13 may be corrected prospectively by the financial institution.

If the OTS is unable to obtain compliance with the Act or regulation, or the OTS has reason to believe that a financial institution has engaged in a pattern or practice of discouraging or denying applications in violation of the Act or regulation, the OTS must refer the matter to the Department of Justice.

Self-testing and Self-correction – § 202.15

A financial institution may conduct a voluntary self-test to determine the level of its compliance with the ECOA. The self-test can be in the form of a program, practice or study to collect such information. The results of the self-test are privileged and are solely for the use of the financial institution.

This privilege applies to the data created and any analysis, opinions and conclusions pertaining to the self-test results. It covers work papers or draft documents as well as final documents. It does not apply to whether a self-test was conducted, the methodology used or the scope of the self-test or the dates it was conducted. Also, it does not apply to the loan and application files in which the study derived its conclusions.

For the privilege of self-testing to apply, appropriate corrective action is required when the self-test shows that it is more likely than not a violation occurred, even though no violation has been formally determined.

Business Credit

All business credit, that is, credit extended for business, commercial or agricultural purposes, is subject to the general rule under Regulation B that a creditor shall not discriminate against any applicant on any

prohibited basis with respect to any aspect of a credit transaction. Financial institutions are also subject to many of the other more specific requirements of Regulation B in connection with business credit. The following is a list of the provisions of the regulation that affect business credit:

- Information regarding marital status may always be requested in business credit, but information relating to sex may not.
- The provisions requiring a financial institution to determine whether accounts are shared with spouses in order to furnish credit information are not applicable to business credit.
- The financial institution must notify the applicant, orally or in writing, of action taken or of the incompleteness of the application. The financial institution must provide the written notifications relating to adverse action in business credit only when the applicant requests, in writing, the reasons for any adverse action. The customer's request must come within 30 days after the financial institution's notification to the customer of the adverse action.
- Any records relating to an application for business credit must be retained for 25 months after notice of action taken or of incompleteness only when the applicant requests, in writing, that such records be retained, within 90 days after adverse action is taken.
- The provisions regarding a spouse's signature are applicable to business credit. Specifically, financial institutions generally may not require that spouses of principals become liable for or guarantee the debt (unless the spouse is also a principal in the business).

Rules Based on Applicant's Revenue Size

To ensure that ECOA rights were available to the owners of small business entities, the Board's regulations implement the law and set these two basic requirements when the business earns $1 million or less in annual revenues (and different rules, described below, for larger entities):

- The lender must give a notice disclosing the applicant's right to a written statement of reasons if credit is denied.
- The lender must keep records on loan applications whether the loan was granted or denied for one year (counting the date that the applicant was notified of the lender's credit decision).

Compliance Procedures for Lenders

The first step toward compliance is to decide on the approach that best fits in with the institution's business lending operations, taking such matters as business volume into account.

I. Adopt consumer rules for all transactions

The rules for business credit are very close to the rules for consumer credit transactions. An institution could apply the consumer rules and be in full compliance with the Act and regulation:

- The institution would inform the applicant orally when a loan is granted, but would have to put it in writing when the credit is denied.
- When credit is denied, the institution would have the choice of automatically giving the reasons for denial in writing or giving notice of the applicant's right to a written statement of reasons, also in writing, and giving the actual statement only when asked.
- The institution would retain records for 25 months, as in consumer credit. Or, the institution could opt to follow the consumer rules on notices and the business credit rule of 12 months on recordkeeping.

II. Use one set of rules for all business transactions

The institution could apply the same rules across the board - that is, those that govern when a business applicant's revenues are $1 million or under - in all business transactions regardless of revenue size, as follows:

- The institution would tell the applicant of the credit decision orally, whether an application is granted or denied.
- It would have two options for giving notice of the applicant's right to a written statement of reasons. Option 1 would involve giving the applicant who is denied credit either the reasons in writing or notice of the right to a written statement of reasons (also in writing). In either case, this action must be taken within 30 days of receiving a completed application, the same as in consumer transactions. Option 2 involves giving a notice to all applicants of the right to a written statement of reasons in the event of a denial. It can be given during the application state, rather than after credit is denied, but must be in a form the applicant can keep (such as on a document given to the applicant, or on a separate sheet).
- Records from business applications must be retained for one year; the institution could segregate loan files based on the revenue size of the business, keeping records for one year if revenues were $1 million or less.

III. Follow two sets of rules for business credit

The institution could adopt the rules above, as applicable, and use the following procedures when revenues exceed $1 million:

- Inform the applicant of the credit decision, orally or in writing, within a reasonable time of receiving a complete application. (The Board has said that 30 days is always reasonable). There is

no required disclosure of the applicant's right to a written statement, although the applicant is in fact entitled to such a statement on request.

- The institution must keep records of an application for at least 60 days after notifying the applicant of the credit decision. After that, records may be discarded unless the applicant asks for a written statement of the reasons for denial, or asks that records be kept for the one-year period.

REFERENCES

Laws

15 USC 1691 et seq.	Equal Credit Opportunity Act

Regulations

Federal Reserve Board Regulations (12 CFR)

Part 202	Regulation B

Office of Thrift Supervision Regulations (12 CFR)

Part 528	Nondiscrimination Requirements