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Informational Sheet

Equal Credit Opportunity Act

Disclaimer: The following material should not be considered legal advice. When you have a legal question, contact competent legal counsel. Comments are based on a few decades of experience and specialized training provided by NACM and various attorneys relating to ECOA and relevant practices.

The Equal Credit Opportunity Act (ECOA) (1974; 1990), Title VII of the Consumer Credit Protection Act (CCPA), was designed to prohibit discrimination in credit transactions. ECOA was the only Title of the CCPA applying to all credit transactions, consumer and commercial.

The Consumer Credit Protection Act (CCPA) also includes Truth in Lending Act (TILA, Title I, 1968); Fair Credit Reporting Act (FCRA, Title VI, 1971, amended by Fair and Accurate Credit Transactions Act, FACTA, 2003); ECOA; Fair Debt Collection Practices Act (FDCPA, Title VIII, 1977); and other statutes meant to protect the consumer in credit transactions.

In general, ECOA requires all creditors to adopt practices that avoid discrimination based on race, color, religion, national origin, sex/gender, marital status, and age. In addition, the Act prohibits discrimination based on two unique situations, the receipt of income from a public assistance program and the good faith exercise of rights under the CCPA. Broadly interpreted, this means every aspect of managing the applicant's or customer's relationship, including obtaining information from the applicant/customer, verifying information with other creditors and third parties, managing any subsequent receivables, providing a reference, and collection practices, must be conducted in a nondiscriminatory, impartial manner.

Historically, the ECOA has been very broadly interpreted to cover all credit transactions and any third-party actions that may affect credit transactions. Regulation B, the Federal Reserve Board implementing regulation, and subsequent enforcement have clearly established this principle.

The Act does not require willful or intentional discrimination. The effects of a creditor's actions are sufficient to create a violation. The Federal Trade Commission enforces the ECOA. Fines may be substantial (up to $500,000) and may include punitive damages and legal expenses.

Three processes familiar to all business/trade creditors are addressed by the Act:

- Providing notice of credit decisions;
- Providing reasons for adverse actions; and
- Retaining records for a specific time period.

Providing notice of credit decisions

Best practices include the provision of a prompt written notice (within 30 days) of any matters affecting a customer's credit relationship with your company, including a new customer welcome letter, recognition of any tenure achievements, notice of deductions and/or disputes, and any changes of any sort in credit accommodations. These practices meet the requirements of ECOA.

"Adverse Action" in ECOA involves a credit decision that

- Declines an applicant a credit line or provides a credit line which is less than requested;
- Changes the credit status of an existing customer, e.g., when a credit line is reduced, or when a customer is changed from open account status to COD or CIA; or,
- Changes terms of sale (credit), e.g., when terms are reduced from Net 30 to Net 10.

Business/trade creditors must provide notice within 30 days of any adverse action affecting a business applicant. The notice may be provided orally or in writing and must contain:

- A statement of the action taken;
- The reason for the action;
- The name and address of the creditor; and
- The ECOA Notice 701(a)*.

If the applicant requests specific reason(s) for denial, orally or in writing, within 60 days of the adverse action notice, the creditor must provide the reason(s) within 30 days of receiving the request**.** Best practices include consistently providing written notice when the decision is made, including the reason(s).

Business/trade creditors also may choose to place the 701(a) notice on all customer credit-related forms, including the credit application, credit line confirmations, and other communications. While this is not legally required by the Act or Regulation B, a creditor may determine it wishes to communicate its policy of compliance with the ECOA.

Providing reasons for adverse action

When a business/trade creditor takes one of the three common adverse actions (declines a credit line, changes status, or changes terms), as noted above, best practices include providing written notice to the applicant or customer. Business/trade creditors should use a standard declination letter which includes the four pieces of information noted above and required by Regulation B: a declination statement; the reason(s) for adverse action; your company name, phone, and fax number; and the ECOA Notice 701(a).

The reasons for denial may not be too general, e.g., "you failed to achieve the necessary score," or "You don't meet requirements of our policy." At the same time, they need not be too specific; e.g., providing a credit agency's score or summary or quoting specifics from a derogatory public record filing.

Reasons for declination might include the following:

- *"Need for additional references."*
  This usually happens when a reference does not respond to a request for information.
- *"Inability to verify references."*
  This may involve an inability to reach the claimed reference or a lack of response.
- *"Unfavorable trade references."*
  This may involve a trade creditor reported delinquency, or a situation where the customer takes unearned cash discounts or refuses to pay late fees.

***ECOA Notice 701(a)**
The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex/gender, marital status, age (provided the applicant has the capacity to contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington, D.C., 20580.

- *"Delinquent credit obligations."*
  This involves subject's pattern of failure to observe payment expectations of creditors.
- *"Public record filings indicate judgments and liens to collect trade obligations/taxes."*
  As public record filings, these indicate a history of failure to pay as agreed.

Trade creditors may have other reasons, consistent with the principle of providing general reasons sufficient for the applicant to understand the basis of declination.

Trade creditors should carefully avoid providing names of specific creditors that may have provided a negative reference. Unless the creditor is subject to a valid legal order, this confidential information should not be divulged or discussed with the applicant/debtor.

If credit is denied in whole or in part as a result of information received from a consumer credit report (for example, in the case of a guarantor), refer the applicant directly to the consumer reporting agency.

Applicants should not be referred to a distributor of commercial credit reports. The distributor is unaware of the declination or the specific reason for a creditor's adverse action.

Records retention

If an applicant has revenues of more than $1mm, creditor records must be kept for 60 days after notification to the applicant of a credit decision. If an applicant has revenues of $1mm or less, creditor records must be kept for at least 12 months.

If the applicant requests in writing, within 60 days of creditor notification, the reasons for an adverse credit decision, the creditor must retain the applicant's records for at least 12 months.

Potential liability for violations of the ECOA

As noted above, a violation, which does not require showing of willful action, may include fines of up to $500,000, punitive damages, and attorney's fees and costs for noncompliance. The Federal Trade Commission enforces the Act and reports such activities to the Consumer Financial Protection Bureau.

Reducing your company's exposure

As noted by Thorne and Zorilla (see below), five practices will help limit your company's exposure to an ECOA violation:

1. Make sure your application does not ask for discriminatory information;
2. Make sure you utilize a consistent and well-documented credit review process;
3. Comply with applicant/customer notification requirements;
4. Comply with records retention requirements;
5. Train employees in nondiscriminatory policies and methods and make them aware of the company's expectations of compliance.

For more information about the ECOA, go to www.ftc.gov/credit; also, see "The Equal Credit Opportunity Act: Avoid the Pitfalls," Thorne and Zorilla, *Business Credit*, March 2008.

Provided courtesy of NACM Commercial Services