

LAWDESK

CONSUMER PRIVACY

TRAINING

Consumer Privacy Training

Introduction

This course will provide with an overview of the key consumer privacy related provisions under the *Fair Credit Reporting Act* ("FCRA"), *Electronic Fund Transfer Act* ("EFTA") and *Right to Financial Privacy Act* ("RFPA") and how these provisions relate to the *Gramm-Leach-Bliley Act* ("GLBA") Privacy rule. Upon completion of this course, you will gain knowledge of:

- FCRA purpose
- Key highlights of FCRA provisions
- Users of consumer reports
- Furnishers of consumer information
- Pre-screening requirements
- Affiliate sharing & opt-out notice
- Enforcement provisions
- Relationship to GLBA privacy regulation
- EFTA and RFPA provisions

Purpose of the FCRA

The purpose of the FCRA is:

- To regulate aspects of the consumer reporting industry
- To place disclosure obligations on users of consumer reports
- To establish requirements applicable to the furnishing of information to consumer reporting agencies
- To require timely responses to consumer inquiries regarding information maintained by consumer reporting agencies

Key Highlights of FCRA Provisions

The FCRA establishes standards for the **collection, communication and use of information** bearing on a consumer's:

- creditworthiness,
- credit standing,
- credit capacity,
- character,
- general reputation,
- personal characteristics; or
- mode of living.

The FCRA imposes substantial requirements on consumer reporting agencies (i.e. credit bureaus). A financial institution will not be subject to the FCRA's substantial requirements that apply to consumer reporting agencies, if it communicates **only transaction or experience** information to third parties or among its affiliates.

Additionally, a financial institution will not be considered a consumer reporting agency, if it shares with affiliates non-transaction or non-experience information, and if it does so pursuant to a clear and conspicuous disclosure and opt-out notice to the consumer.

The **FCRA protects the privacy of consumer information** by:

- (1) restricting the use of consumer reports only for specific permissible purposes (such as determining eligibility for employment or credit prescreening),
- (2) establishing accuracy requirements when furnishing information to consumer reporting agencies; and
- (3) limiting the sharing among affiliates subject to a clear and conspicuous disclosure and opt-out notice.

As a general rule, the **FCRA preempts state law and regulations** to the extent that they are **inconsistent with the FCRA**.

Users of Consumer Reports

Adverse Action

"Adverse action" occurs when a financial institution, based upon a consumer report, determines to:

- deny or revoke credit
- make unfavorable changes to terms or conditions of credit
- deny requested transactions or services
- deny employment
- deny, cancel, or increase charges for insurance
- deny, cancel, or increase charges for any license or benefit

Notification

The FCRA requires that a consumer be notified by a financial institution when any "adverse action" is based in **whole or in part on any information contained in a consumer report**.

The **notification** must:

- Include name, address and telephone number (toll free if nationwide agency) of the consumer reporting agency that supplied the information
- Include a statement to the consumer stating the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reason why the adverse action was taken.
- Inform consumer of their **right to obtain a free copy** of the consumer report within **60 days** of receiving the notice of adverse action
- Inform consumers of their right to dispute the accuracy or completeness of any information in the consumer report

If the financial institution used a **credit score** in taking adverse action, the notification must also disclose:

- A numerical credit score used in making the credit decision
- The range of possible scores under the credit scoring model used
- Up to four key factors that adversely affected the credit score; or up to five factors if the number of inquiries made on the consumer report is a key factor (i.e. it almost always is)
- The date on which the credit score was created
- The name of the person or entity that provided the credit score

Furnishers of Consumer Information

Requirements for institutions furnishing information to consumer reporting agencies:

- The information must be **accurate**
- Must promptly correct or update any information previously provided [**Watch-out** as training module says no to change of address but that is not correct in real life].
- If a consumer disputes information, information may not be reported unless the agency is informed that the information is being disputed
- If the consumer voluntarily closes a reported account, the agency must be notified of such closure
- If a delinquent account is placed for collection or charged off, the agency must be notified of the month and year the account became delinquent
- Must investigate consumer disputes received from a consumer reporting agency and report results to the consumer and the agency within 30 days after the consumer contacts the agency, or within 45 days of receiving new information from the consumer
- If a properly submitted **direct dispute** is received from a consumer, investigate the dispute, review information provided by the consumer, and report results to the consumer within 30 days

Pre-Screening Requirements

Pre-screening:

"Pre-screening" is the practice of using consumer reports for the purpose of selecting pools of individuals for solicitation of financial or other products. Institutions receiving a pre-screened list from a consumer reporting agency must then make a **firm offer of credit** or insurance to those individuals.

Users of such reports must provide a **statement with the solicitation** notifying individuals that:

- Information contained in a consumer report was used in connection with the offer
- The consumer received the offer because he or she satisfied the criteria for creditworthiness or insurability used to screen for the offer
- If applicable, the credit or insurance may not be extended if it is determined that the consumer does not meet the criteria used for screening
- Consumers have the right to prohibit use of information in their consumer file in connection with future pre-screened offers by contacting a notification system established by the consumer reporting agency. The address and toll-free telephone number of the appropriate notification system must be provided

Affiliate-Sharing and Opt-Out

FCRA establishes the rules under which entities within a **holding company corporate family** may share consumer information. Under FCRA, **affiliated companies** (i.e. entities affiliated by common ownership or common corporate control) may share with another affiliate in the same corporate family any information that consists of the **transactions or experiences** between one of the affiliates and the consumer. This information can be shared directly between two affiliates or through a central database maintained by a designated entity within the corporate family.

The FCRA also **allows affiliates** to share either directly or indirectly through a central database **non-transaction or non-experience information** (e.g. any application information, credit reports obtained on consumers, etc.) if:

- A "**clear and conspicuous**" **disclosure** is provided to the consumer that information may be shared between or among the affiliates
- An **opt-out opportunity and notice** is provided

Affiliated entities also must **notify consumers** when based on certain information from an affiliate, adverse action is taken in connection with credit, insurance or employment. The **notice** must inform the consumer that they may obtain the information that led to the adverse action by requesting such in **writing within 60 days.**

Enforcement Provisions

Penalties:

The **regulatory agencies** or the **FTC** may commence a civil action for non-compliance with FCRA and assess a civil money penalty up to **\$2,500 per violation**. Additionally, a **state attorney general** may bring an action under FCRA to enjoin violations, in addition to whatever actions and remedies may be available under state law.

Under FCRA, any person that **negligently** violates any provision of FCRA is liable to the affected consumer equal to actual damages sustained by the consumer. **Willful non-compliance** results in liability equal to actual damages sustained or statutory damages ranging from **\$100 to \$1,000**. Criminal penalties involving **fines or imprisonment for up to two years** or both apply to any person that knowingly and willfully obtains information on a consumer under false pretenses.

Relationship to GLBA Privacy Regulations

The **GLBA** and **FCRA** both govern the disclosure of consumer information by financial institutions and other entities, subject to certain restrictions and notices to consumers. However, what may be **permitted under one statute may be prohibited or restricted under the other statute.**

The **GLBA** prohibits a financial institution from disclosing "**nonpublic personal information**," which is defined broadly as any information provided by a consumer to obtain a financial product or service, to nonaffiliated third parties unless it has provided consumers with a **Privacy Policy Notice** and an **opportunity to opt out** of such information sharing. Thus, under GLBA disclosure of "nonpublic personal information" is **explicitly prohibited without a notice and opt-out opportunity.**

The **FCRA** on the other hand provides that if a financial institution discloses "consumer report" information, defined as any information on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living, **to nonaffiliated third parties** it would be **deemed a consumer reporting agency.** With regard to nonaffiliated third parties, the financial institution does not have the option of providing an opt-out opportunity to the consumer and escape from becoming a consumer reporting agency.

However, the FCRA permits disclosure and sharing of "consumer report" information **with affiliates** if the financial institution provides the consumer with a notice and opportunity to opt out. Otherwise the financial institution **would be deemed a consumer reporting agency and become subject to a myriad of substantive requirements.**

Thus, under FCRA, disclosure of "consumer report" information is not prohibited but triggers classification as a **consumer reporting agency.** With nonaffiliated third parties, the mere disclosure **triggers such a classification,** while with affiliates disclosure without notice and opportunity to opt out triggers classification as a consumer reporting agency. **In contrast, under GLBA any disclosure of "nonpublic personal information" to nonaffiliated third parties is explicitly prohibited without a notice and opt-out opportunity.**

Electronic Fund Transfer Act

The *Electronic Fund Transfer Act* ("EFTA") and Regulation E apply to demand deposit, savings deposit and other consumer asset accounts and electronic fund transfer services relating to those accounts. They require financial institutions to **provide consumers with a disclosure** about whether the financial institution may disclose any information concerning the account to third parties regardless of whether they are affiliated or not. This **disclosure** must be **made at the time a consumer contracts for the electronic service or before the first electronic fund transfer is made**. A **Privacy Policy Notice** that **satisfies the GLBA regulation** requirements will be **deemed sufficient** for compliance with the EFTA and Regulation E.

Right to Financial Privacy Act

The *Right to Financial Privacy Act* ("RFPA") prohibits financial institutions from disclosing any information relating to a consumer's financial records to a **federal government authority** except in **limited circumstances**, such as:

- subject to the consumer's authorization,
- an administrative subpoena or summons,
- a search warrant,
- a judicial subpoena,
- or a formal written request in connection with a legitimate law enforcement inquiry; or
- to a regulatory agency in connection with its supervisory or regulatory functions.

The GLBA does not modify or affect the RFPA provisions. In fact, the GLBA provides for an exception from the GLBA nonaffiliated third party opt-out disclosure and notice requirements for disclosure of consumer's financial records if conducted in compliance with RFPA provisions.