California Western Law Review

Volume 46 | Number 1 Article 2

2009

Credit Reporting, Prescreened Lists, and Adverse Action: The Impact of the Fair Credit Reporting Act and the Equal Credit Opportunity Act

Elwin J. Griffith
Florida State University

CALIFORNIA WESTERN LAW REVIEW

VOLUME 46 FALL 2009 NUMBER 1

CREDIT REPORTING, PRESCREENED LISTS, AND ADVERSE ACTION: THE IMPACT OF THE FAIR CREDIT REPORTING ACT AND THE EQUAL CREDIT OPPORTUNITY ACT

ELWIN J. GRIFFITH*

I. INTRODUCTION

Over the years, consumers have had their fair share of challenges in the credit arena. There was a time when a creditor could make loan disclosures in a format of its choosing, and as a result a consumer might not be fully aware of all the essential terms of a transaction.[1] It became increasingly clear that something had to be done about making the disclosure of the cost of credit a priority, so that a consumer could make an informed choice among the credit terms available to him.[2] The introduction of standard disclosures in the

* Tallahassee Alumni Professor of Law, Florida State University.

1. House report made the following point about the effect of not regulating disclosure in the credit arena:

> Today the consumer is faced with a number of credit disclosure practices, most of which are not directly comparable to one another. With respect to rate, some creditors employ an "add on" rate, which is based on the original balance of the obligation as opposed to the declining balance. This has the effect of understating the simple annual rate by approximately fifty percent.

H.R. REP NO. 90-1040, at 13 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970.

2. Senator Paul Douglas, who first introduced Truth in Lending legislation in 1960, made the point that a consumer had "the right to be informed . . . and to be

marketplace meant that a consumer would be able to make a meaningful comparison of competing lenders that would eventually inure to his benefit.[3] With this in mind, Congress introduced the Truth in Lending Act in 1968,[4] so that creditors would thereafter have to make certain prescribed disclosures to their customers.

This was just the beginning. It was not too long before Congress added two more pieces of consumer legislation,[5] which will be the subject of this article. Having dealt with the disclosure requirements for consumer credit, Congress then turned its attention to fair and accurate credit reporting. It was not surprising that Congress followed the natural trail from truth in lending to accuracy in reporting, for credit reporting agencies had assumed a significant role in assembling information on consumers for the benefit of lenders, and the agencies' failure to strive for maximum possible accuracy in their reports had a profound effect in the marketplace.[6] It was not unusual for a consumer

---

given the facts he needs to make an informed choice." 109 CONG. REC. 2029 (1963) (remarks of Sen. Douglas). A House report on the Truth in Lending Act stated the purpose of the legislation:

> The committee believes that by requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit.

H.R. REP. NO. 90-1040, at 13 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970.

3. Congress found that "economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit." 15 U.S.C. § 1601 (2006).

4. Act of May 29, 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601-1667f (2006)).

5. *See* Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681x (2006); Equal Credit Opportunity Act, Pub. L. No. 93-495. 58 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691-1691f (2006)).

6. A Senate Committee report gave some idea of the problems caused by the reporting system:

> Most credit bureaus systematically compile public record information such as records of suits, tax liens, arrests, indictments, convictions, bankruptcies, judgments and the like. This information is then included on a person's report when he applies for credit, or in some cases when he applies for employment. Unfortunately, the information cannot always be

reporting agency to emphasize to its customers that it would not guarantee the accuracy of any information that it provided to them.[7] Despite this, lenders still relied on the information in making their decisions and a consumer was therefore at a lender's mercy when he challenged the denial of any loan application.[8] Even when a consumer found out that a lender's decision was based on an inaccurate consumer report, the consumer still had a hard time getting his file corrected.[9] To make matters worse, lenders were often bound by agreement with their reporting agencies not to disclose information about any agency that provided a negative report about a consumer.[10]

> kept up to date either because it is costly or because the correct information is simply not available. Thus, it is possible for a credit bureau to report a record of a suit or arrest without indicating that the suit was dismissed or the arrest charges dropped.

S. REP. NO. 91-517, at 4 (1969).

7. *See Retail Credit Co. of Atlanta, Ga.: Hearing Before a Subcomm. of the H. Comm. on Government Operations*, 90th Cong. 47 (1968) [hereinafter *Retail Credit Hearings*].

8. Senator Proxmire pointed out the hazards of inaccurate and misleading information:

> Perhaps the most serious problem in the credit reporting industry is the problem of inaccurate or misleading information. There have been no definitive studies made of just how accurate is the information in the files of credit reporting agencies. But even if it is 99 percent accurate—and I doubt that it is that good—the 1 percent inaccuracy represents over a million people. While the credit industry might be satisfied with a 1-percent error, this is small comfort to the 1 million citizens whose reputations are unjustly maligned. Moreover, the composition of the 1 million persons is constantly shifting. Everyone is a potential victim of an inaccurate credit report. If not today, then perhaps tomorrow.

115 CONG. REC. 2411 (1969) (remarks of Sen. Proxmire).

9. *See Commercial Credit Bureaus: Hearings Before a Subcomm. of the H. Comm. On Government Operations*, 90th Cong. 10-11 (1968).

10. One witness at a congressional hearing admitted as much when he made the following comment:

> Our contractual relationship is set up so that an underwriting department of an insurance company or a credit grantor is not supposed to divulge that the Retail Credit Co. made an investigation. But that is so they will not indiscriminately send people to us when we may not be involved in an investigation.

Retail Credit Hearings, *supra* note 7 (testimony of W. Lee Burge, President, Retail Credit Co. Atlanta, Ga.). Representative Gallagher responded to Mr. Burge's statement by observing that a consumer would never know that Retail Credit Co.

This article will first discuss a consumer reporting agency's obligation to provide accurate reports within the context of the Fair Credit Reporting Act (FCRA)[11] and will review some of the challenges a consumer reporting agency faces in meeting its responsibilities thereunder. After all, an agency's report can have a lasting impact on a consumer's credit record, and there is frequent conflict between a consumer and the agency about the information in the consumer's file. An agency will sometimes argue that a consumer report is not misleading because it is technically accurate and thus the consumer has no legitimate complaint.[12] From the consumer's perspective, an agency should strive for more than technical accuracy. Many an agency has failed to convince a court with this "technical accuracy" defense, and as a result consumer reporting agencies have had to dig deeper for a more realistic portrayal of the consumer's record.[13]

Lenders have also had their share of challenges under the FCRA. They have the opportunity to entice consumers from prescreened lists with offers of credit.[14] There is frequent disagreement about whether a lender had made a firm offer of credit to consumers from the prescreened lists.[15] The courts have been keen to prevent creditors

---

was the source of negative information because the contract between the user and Retail Credit Co. prevented that disclosure. *Id.* (statement of Rep. Gallagher).

11. 15 U.S.C. §§ 1681-1681x (2006).

12. *Compare* Todd v. Associated Credit Bureau Servs., Inc., 451 F. Supp. 447 (E.D. Pa. 1977) *aff'd mem.*, 578 F.2d 1376 (3d Cir. 1978), *with* Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984).

13. *See* Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 415 (4th Cir. 2001) (finding that a report is inaccurate when it is so misleading as to have an adverse effect on the consumer); Sepulvado v. CSC Credit Servs., 158 F.3d 890, 895 (5th Cir. 1998) (same); Swoager v. Credit Bureau of Greater St. Petersburg, Fla., 608 F. Supp. 972, 977 (M.D. Fla. 1985) (finding that "a technical truth, in essence, can be as misleading as an outright truth where it paints an incomplete picture").

14. *See* 15 U.S.C. §§ 1681b (c)(1)(B), 1681m(d).

15. The statute defines the term "firm offer of credit or insurance" as "any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer," but the offer may be further conditioned on one or more of the criteria covered in the statute. 15 U.S.C. § 1681a(l).

from misusing prescreened lists.[16] Although some courts have been quite liberal in deciding on the firmness of a lender's offer,[17] some have also been concerned about whether an offer of credit must have value for the consumer.[18] This article will review the requirements for a firm offer of credit in light of the approaches the courts have taken.

On another front, a consumer is always curious to know why a creditor has turned down his application for credit. The Equal Credit Opportunity Act (ECOA) requires a creditor to give its reasons for taking adverse action on a consumer's application.[19] Sometimes the reasons are not clear and a creditor may find itself having to explain what it meant, because the evidence shows that the creditor was decidedly vague in communicating its rejection.[20] The courts have been eager to hold creditors accountable for their ambiguity, without requiring them to craft some long, detailed statement that might further confuse the consumer.[21] After all, the objective is to provide

16. *See* Cole v. U.S. Capital, 389 F.3d 719, 728 (7th Cir. 2004) (holding a prescreened offer of credit was really a solicitation to sell cars); McDonald v. NextStudent, Inc., 542 F. Supp. 2d 956, 962 (E.D. Mo. 2008) (denying summary judgment to defendant where its mailer did not show it was an offer of credit).

17. *See* Cavin v. Home Loan Ctr., Inc., 531 F.3d 526, 531 (7th Cir. 2008) (holding that lender made firm offer of credit despite absence of some material terms); Poehl v. Countrywide Home Loans, Inc., 528 F.3d 1093, 1099 (8th Cir. 2008) (holding that lender did not violate FCRA by accessing consumers' credit reports because test for offer of credit is whether it is firm according to the statute and not whether it is valuable); Sullivan v. Greenwood Credit Union, 520 F.3d 70, 76 (1st Cir. 2008) (holding the phrase "firm offer of credit" did not require lender to include terms other than prescreened criteria).

18. *See Poehl*, 528 F.3d at 1099; Murray v. New Cingular Wireless Servs., Inc., 523 F.3d 719, 721 (7th Cir. 2008); Dixon v. Shamrock Fin. Corp., 522 F.3d 76, 82 (1st Cir. 2008); *Cole*, 389 F.3d at 726.

19. *See* 15 U.S.C. § 1691(d)(2)-(3) (2006); 12 C.F.R. § 202.9(a)(2), (b)(2) (2009).

20. *See* Stoyanovich v. Fine Art Capital L.L.C., No. 06 Civ. 13158(SHS), 2007 U.S. Dist. LEXIS 60793, at *15-17 (S.D.N.Y. Aug. 17, 2007); Higgins v. J.C. Penney, Inc., 630 F. Supp. 722 (E.D. Mo. 1986)

21. *See* Fischl v. Gen. Motors Acceptance Corp., 708 F.2d 143, 147 (5th Cir. 1983) (holding that language "credit references are insufficient" did not satisfy requirement for creditor to give specific reasons); Carroll v. Exxon Co., U.S.A., 434 F. Supp. 557, 562 (E.D. La. 1977) (holding that creditor failed to satisfy requirement of specific reasons for denial where it listed only one of more than five factors). *But cf.* Williams v. MBNA Am. Bank, N.A., 538 F. Supp. 2d 1015, 1020 (E.D. Mich. 2008) (holding that the reasons given that the consumer had sufficient balances on

the consumer with enough information so that he may, if he wants, take the necessary steps to repair his credit record, and not be left in the dark about his deficiencies.[22] It is also important to determine whether an organization that is not the actual lender in a transaction, a dealer, may still be a creditor for purposes of the statute, so that it has an obligation to give notice of any adverse action. The cases will show that it depends on the extent of the dealer's involvement in the transaction.[23] With respect to adverse action, it involves more than a rejection for a loan.[24] It even includes the decision of an insurance company to charge a consumer a higher premium on the basis of a consumer report.[25] The higher premium may be regarded as an increase even if the premium is for initial coverage, and not for a policy renewal.[26] It is relevant, therefore, to review how an increase in an insurance premium can result in an adverse action, when a consumer is paying his premium for the first time.

---

her line of credit and that she had sufficient credit available in light of her income were specific enough to satisfy requirement).

A Senate Report noted, however, that Congress did not intend to require "statements of reasons be given in the form of long, detailed personal letters" but that a short checklist statement will be sufficient so long as it reasonably indicates the reasons for adverse action." S. REP. No. 94-589, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 410. In *Williams v. MBNA America Bank, N.A.*, the plaintiff found the creditor's reasons for rejecting her application "incoherent" and "illogical," arguing that they were not clearly and conspicuously explained. 538 F. Supp. at 1020-21. The court noted that there was no such requirement in the statute or the regulation relating to the content of an adverse action notice. *Id.* at 1021. The "clear and conspicuous" requirement in the regulation relates to the format of disclosures. *See* 12 C.F.R. § 202.4(d) (2009).

22. *See* Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971, 977 (7th Cir. 2004); Aikens v. Nw. Dodge, Inc., No. 03C7956, 2006 WL 59408, at *2 (N.D. Ill. Jan.5, 2006); *Fischl,* 708 F.2d at 146.

23. *See Treadway*, 362 F.3d at 979 (7th Cir. 2004); Henry v. Westchester Foreign Auto, Inc., 522 F. Supp. 2d 610, 614 (S.D.N.Y. 2007); Barnette v. Brook Road Inc., 457 F. Supp. 2d 647, 654 (E.D. Va. 2006); Kivel v. Wealthspring Mortgage Corp., 398 F. Supp. 2d 1049, 1053-54 (D. Minn. 2005)

24. *See* 15 U.S.C § 1681a(k)(1) (2006). The FCRA requires that a person give notice to a consumer about any adverse action "based in whole or in part on any information contained in a consumer report." *Id.* § 1681m(a).

25. *See* Safeco Ins. Co. of Am. v. Geico Gen. Ins. Co., 551 U.S. 47, 62-63 (2007).

26. *See id.* at 63.

II. ACCURACY IN CREDIT REPORTING

A. The Proper Standard

A consumer reporting agency does not have strict liability under the FCRA for preparing inaccurate reports.[27] It must "follow reasonable procedures to assure maximum possible accuracy" in reporting information about a consumer.[28] At first blush, the "accuracy" requirement does not seem problematic, but a technically accurate report may turn out to be misleading.[29] In that event, there may be some doubt whether the agency has fulfilled its obligation, inasmuch as its report may not tell the whole story about the consumer.[30] If an agency's report is inaccurate under this standard, the consumer may at least challenge the reasonableness of the agency's procedures, even if the report meets the test of technical accuracy. The statute requires a consumer reporting agency to aim for "maximum possible accuracy;" therefore, the agency's report should be measured against this standard.[31] If the agency has done all that it could

27. *See* Spence v. TRW, Inc., 92 F.3d 380, 383 (6th Cir. 1996); Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994); Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1156 (11th Cir. 1991); Thompson v. San Antonio Retail Merchants Assoc., 682 F.2d 509, 513 (5th Cir. 1982); Schmitt v. Chase Manhattan Bank, N.A. No. 03-3295 ADM/AJB, 2005 U.S. Dist. LEXIS 18029, at *9 (D. Minn. August 23, 2005); Anderson v. Trans Union L.L.C., 345 F. Supp. 2d 963, 970 (W.D. Wis. 2004).

28. 15 U.S.C. § 1681e(b) (2006).

29. *See* Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 415 (4th Cir. 2001) (stating that "[a] report is inaccurate when it is 'patently incorrect' or when it is 'misleading in such a way and to such an extent that it can be expected to [have an] adverse []' effect") (quoting Supulvado v. CSC Credit Servs., 158 F.3d 890, 895 (5th Cir. 1998); Pinner v. Schmidt, 805 F.2d 1258, 1262-63 (5th Cir. 1986) (finding a consumer report inaccurate when it described an account as "litigation pending," when it was the consumer that brought the suit).

30. *See Dalton,* 257 F.3d at 416 (finding that jury could reasonably conclude from the report that individual was guilty of a felony although he had pleaded guilty to misdemeanor); *Pinner,* 805 F.2d at 1262 (finding liability where consumer report that indicated "litigation pending" could be interpreted as a consumer being sued instead of bringing suit); Alexander v. Moore & Assocs., Inc., 553 F. Supp. 948, 952 (D. Haw. 1982) (finding liability where consumer report indicated failure to pay cleaning costs to landlord as a bad credit experience).

31. Section 1681e(b) provides that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum

reasonably do to meet that standard, then it has a legitimate defense against the consumer for any resulting inaccuracy.[32]

It is not enough for an agency simply to act as a conduit by passing on information provided by its customers.[33] Under some circumstances, an agency may find itself in trouble when it continues to report information that a consumer has disputed. When information is disputed, it is no defense for the agency to say it has reported what the creditor had in its records.[34] The creditor's information may be accurate in the sense that the creditor is accurately reporting the content of the consumer's record. But the information that a creditor has in its database about a consumer may be inaccurate, and when the agency is aware of the data's unreliability, it must exercise caution in reporting the information to its subscribers.[35]

An agency's report that is technically true can be as damaging as a false report if it paints a misleading picture.[36] The FCRA encourages an agency to present a full picture of a consumer's record, and not merely report the bare essentials in order to be technically accurate. If it were otherwise, the statute would not require a consumer reporting agency to strive for "maximum possible accuracy" in its consumer

---

possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

32. *See* DeAndrade v. Trans Union L.L.C., 523 F.3d 61, 67 (1st Cir. 2008); Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 105 (2d Cir. 1997); Philbin v. Trans Union Corp., 101 F.3d 957, 963-64 (3rd Cir. 1996); Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994); *Cahlin*, 936 F.2d at 1156; Bryant v. TRW, Inc., 689 F.2d 72, 78 (6th Cir. 1982).

33. Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997); *Bryant*, 689 F.2d at 77; Crane v. Trans Union, L.L.C., 282 F. Supp. 2d 311, 317 (E.D. Pa. 2003).

34. *See Dalton*, 257 F.3d at 417; *Bryant*, 689 F.2d at 78; Poore v. Sterling Testing Sys., Inc., 410 F. Supp. 2d 557, 571 (E.D. Ky. 2006).

35. *See* Graham v. CSC Credit Servs., Inc., 306 F. Supp. 2d 873, 878 (D. Minn. 2004); Thomas v. Gulf Coast Credit Serv. Inc., 214 F. Supp. 2d 1228, 1234 (M.D. Ala. 2002); NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 4.4.6.3 (6th ed. 2006) [hereinafter FAIR CREDIT REPORTING].

36. *See* Gorman v. Wolpoff & Abramson, L.L.P., 552 F.3d 1008, 1023 (9th Cir. 2009); Saunders v. Branch Banking & Trust Co. of Va., 526 F.3d 142. 148 (4th Cir. 2008); Sepulvado v. CSC Credit Servs. 158 F.3d 890, 895 (5th Cir. 1998); Swoager v. Credit Bureau of Greater St. Petersburg, 608 F. Supp. 972, 977 (M.D. Fla. 1985).

reports.[37] This language suggests the drafters were not willing to settle for a narrow definition of accuracy.[38] Instead, it suggests that an agency should do everything within its control to achieve the statutory objective, and not leave out information that would lead to a different conclusion about the report. The statute's legislative history supports this approach, for Senator Proxmire's exchange with Senator Bennett during congressional deliberations drove home the point that a report that a consumer had been charged with assault could hardly be accurate in the statutory sense when the report failed to mention that the charge was dismissed because the consumer went to the defense of an elderly person who was being attacked.[39] The "technical accuracy" approach would sustain that kind of reporting because the attacker had indeed sued the consumer for assault. Nevertheless, if the report stopped there, one would hardly know that instead of being a villain, the consumer had become a hero in coming to the aid of an elderly victim.[40]

The failings of the "technical accuracy" defense also appear when an agency reports a consumer's joint account as "included in bankruptcy" simply because the other joint owner had filed for bankruptcy. A creditor could not be faulted for rejecting a credit application on the basis of that information, since it would be relying on the agency's message that the consumer was somehow involved in a bankruptcy proceeding.[41] It is plain that a report of this kind cries out for some explanation, because the bare reference to a bankruptcy leads the reader to believe that the subject of the report has been involved in some way with a proceeding that has a negative impact on his credit.

---

37. *See* 15 U.S.C. § 1681e(b) (2006).

38. *See Dalton*, 257 F.3d at 415; Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994); Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir. 1984); Alexander v. Moore & Assocs., Inc., 553 F. Supp. 948 (D. Haw. 1982).

39. *Fair Credit Reporting: Hearings on S.823 Before the Subcomm. on Fin. Institutions of the S. Banking and Currency Comm.*, 91st Cong. 34 (1969) [hereinafter *Senate Hearings on Fair Credit Reporting*].

40. *See* FAIR CREDIT REPORTING, *supra* note 35, § 4.2.3.

41. *See* Dickens v. Trans Union Corp., 18 F. App'x 315 (6th Cir. 2001); Johnson v. Equifax. Inc., 510 F. Supp. 2d 638 (S.D. Ala. 2007); Heupel v. Trans Union, 193 F. Supp. 2d 1234 (N.D. Ala. 2002).

In the same vein, it is certainly more desirable from a consumer's point of view for an agency to report that a consumer has subsequently satisfied his debt even after the creditor has charged off the account. A consumer reporting agency should have every incentive to report information that may correct any misleading impressions conveyed by the correct identification of a charged-off account. In this situation no one can dispute the fact that the creditor has charged off the debt, but it would also be desirable, in the interest of completeness, for an agency to report that the consumer subsequently satisfied the debt.[42] By the same token, it is disconcerting that a reporting agency would report that a consumer had also declared bankruptcy, but fail to add that the consumer had withdrawn his bankruptcy petition and repaid his outstanding debt.[43] These cases raise the problem of having incomplete information in a report and suggest that incompleteness is a component of inaccuracy.[44]

Although the word "completeness" does not appear in § 1681e(b), it is included in § 1681i dealing with an agency's obligation to reinvestigate when a consumer raises questions about the completeness or accuracy of any item in his file.[45] The missing term in § 1681e(b) leaves doubts about congressional intent, since it is arguable that Congress did not intend to recognize completeness as an

42. *See Henson*, 29 F.3d 280; *Koropoulos*, 734 F.2d 37; Evantash v. G.E. Mortgage Servs., Inc., No. 02-CV-1188, 2003 U.S. Dist. LEXIS 12131 (E.D. Pa. Nov. 25, 2003).

43. *See* McPhee v. Chilton Corp. 468 F. Supp. 494 (D. Conn. 1978); Todd v. Associated Credit Bureau Servs., Inc., 451 F. Supp. 447 (E.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1376 (3d Cir. 1978).

44. Senator Proxmire observed that if a consumer report indicated that a consumer was delinquent, but also failed to report that the creditor had agreed to the consumer's slow payments because of extenuating circumstances, that would be incomplete information. 115 CONG. REC. 2411 (1969) (remarks of Sen. Proxmire). During the congressional hearings, some congressmen seemed to regard "accuracy" and "completeness" as synonyms. *See* 116 CONG. REC. 36569-73 (remarks of Rep. Sullivan); *Senate Hearings on Fair Credit Reporting*, *supra* note 39, at 34 (remarks of Sen. Bennett).

45. *Compare* 15 U.S.C. § 1681e(b) (2006) (requiring a consumer reporting agency to use reasonable procedures to achieve "maximum possible accuracy"), *with id.* § 1681i (requiring a consumer reporting agency to reinvestigate if a consumer disputes the "completeness or accuracy" of any item of information).

essential element of accuracy.[46] Congress must have intended to create some role for completeness when it drafted § 1681i. The statute requires an agency to delete inaccurate information from the consumer's file.[47] That is understandable, given the damage that inaccurate information can cause to a consumer's credit. There may, however, be information that is missing from the consumer's file and deletion would not be the proper remedy for that problem.[48] In that event, the agency should make amends by completing the file with the missing information. This would not be inconsistent with recognizing the "completeness" element in § 1681e(b).[49] The reference in § 1681i simply clarifies that in addition to deleting misleading information, a

46. The court in *Koropoulos v. Credit Bureau, Inc.* suggested that a reference to "completeness" may have been omitted in § 1681e(b) because the section was added late in the legislative process and there was no time to reconcile it with earlier versions. 734 F.2d 37, 44 (D.C. Cir. 1984). Section 1681e(b) was added late in the process during conference deliberations at the insistence of the House conferees. *See* 116 CONG. REC. 36,570 (1970) (statement of Rep. Sullivan).

47. The reinvestigation provision requires a consumer reporting agency to "promptly delete that item of information" which the agency finds to be inaccurate. 15 U.S.C § 1681i(a)(5)(A)(i) (2006).

48. The statute recognizes that a reinvestigation could show that the information in the consumer's file is "inaccurate or incomplete." *Id.* § 1681i(5)(A). The agency can delete an inaccuracy, but dealing with incompleteness requires something else. This is why the drafters went to the trouble of covering explicitly both inaccuracy and incompleteness in the reinvestigation provision. *See id.*; *Koropoulos*, 734 F.2d at 44.

49. In introducing the legislation, Senator Proxmire specifically dealt with the problem of incomplete information as an element of inaccuracy. He observed that "because of the increased computerization and standardization of credit bureau files, all of the relevant information is not always reflected in a person's files." 115 CONG. REC. 2411 (1969) (remarks of Sen. Proxmire). The House Conference Report also gave an idea that § 1681e(b) covered both incomplete and misleading reports through the following explanation:

> The House conferees intend that this requirement [to follow reasonable procedures to assure maximum possible accuracy] shall include the duty to differentiate between types of individual bankruptcies (e.g. between straight bankruptcies and chapter XIII wage earner plans), and that disposition of a wage earner plan where the consumer conscientiously carries out his responsibilities under it should be duly noted.

H.R. CONF. REP. NO. 91-1587, at 29 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4411, 4415.

reporting agency must also include missing information that will contribute to a fuller understanding of the consumer's record.

This is not to say that an agency should be chastised for rendering an incomplete report that is not misleading. It is entirely reasonable to accept completeness as a component of accuracy without demanding completeness itself as a requirement, if the agency has provided a report that satisfies the criterion of maximum possible accuracy. After all, the statute strives for a full picture of the record that tells the whole story about the consumer. Nevertheless, the information must be relevant to that objective, and so it is not necessary to demand completeness from the reporting agency if there is no compromise on accuracy.[50]

III. DUTY TO REINVESTIGATE

A. The Agency's Obligation

If a consumer disputes the accuracy or completeness of a report, the reporting agency must conduct a reasonable reinvestigation to determine whether there is a problem.[51] A consumer has a basis for a claim under § 1681i only if the information in the consumer's file is in fact inaccurate.[52] When the consumer in *DeAndrade v. Trans Union L.L.C.*[53] challenged the agency's report about an outstanding mortgage, the consumer's allegation of fraud with respect to the mortgage did not change the fact that the mortgage documents of record were what informed the agency's report.[54] A reinvestigation would not have changed the result. The consumer reporting agency saw a recorded mortgage and reported that information.[55] It was not within its portfolio to delve into the transaction in order to determine

50. In *Sepulvado v. Credit Servs., Inc.* the Fifth Circuit declined "to construe § 1681e(b) in a way that would require completeness without regard to whether the disputed entry was misleading." 158 F.3d 890, 896 (5th Cir. 1998).

51. 15 U.S.C. § 1681i(a)(1)(A) (2006).

52. DeAndre v. Trans Union L.L.C., 523 F.3d 61, 67 (1st Cir. 2008); Dennis v. BEH-1, L.L.C., 520 F.3d 1066, 1069 (9th Cir. 2008); Williams v. Colonial Bank, 826 F. Supp. 415, 418 (M.D. Ala. 1993).

53. 523 F.3d 61 (1st Cir. 2008).

54. *See id.* at 68.

55. *See id.*

the arrangement between the parties. This would have opened the way for a collateral attack on the mortgage itself, an assignment that the FCRA does not contemplate for the reporting agency.

The important question is whether the consumer reporting agency could have uncovered any inaccuracy if it had reinvestigated the matter.[56] Nevertheless, when a consumer informs a consumer reporting agency of some inaccuracy in a report, the agency should not merely confirm the accuracy of the information with the original source.[57] The statute's recognition of an agency's "grave responsibilities" for reporting accurate information[58] suggests that an agency cannot simply repeat the disputed information in a report after a creditor's perfunctory confirmation. When a consumer notifies the reporting agency that a source may be unreliable, or if the agency should be aware of that possibility, the agency has a duty to go beyond the original source in order to resolve the dispute.[59] It is also important to weigh the cost of reinvestigating the matter against the possible harm that may fall to the consumer as a result of any inaccurately reported information.[60]

---

56. *See id.* at 68; Cushman v. Trans Union Corp., 115 F.3d 220, 226 (3d Cir. 1997).

57. *See Cushman*, 115 F.3d 220; Henson v. CSC Credit Servs., 29 F.3d 280, 286-87 (7th Cir. 1994); Stevenson v. TRW Inc., 987 F2d 288, 293 (5th Cir. 1993).

58. Congress found a "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4) (2006).

59. *See Stevenson*, 987 F.2d at 293 (explaining that in reinvestigating the accuracy of a credit report, a credit reporting agency "must bear some responsibility for evaluating the accuracy of information obtained from subscribers"); Lambert v. Beneficial Mortgage Corp., No. 3:05-cv-05 468-RBL, 2007 WL 1309542, at *5 (W.D. Wash. May 4, 2007) (stating that an agency's use of a customer dispute verification form does not relieve a consumer reporting agency from the obligation of verifying the accuracy of its initial source of information); Cairns v. GMAC Mortgage Corp., No. CIV 04-1840-PHX-SMM, 2007 WL 735564, at *6 (D. Ariz. Mar. 5, 2007) (stating that statutory obligation to reinvestigate "must necessarily consist of something more than parroting information received from the original sources"); White v. Trans Union, 462 F. Supp. 2d 1079, 1083 (C.D. Cal. 2006) (rejecting the theory that as a matter of law a reasonable reinvestigation requires only confirmation of the accuracy of information from an original source).

60. *See Cushman*, 115 F.3d at 225; *Henson*, 29 F.3d at 287.

In *Cushman v. Trans Union Corp.*,[61] the reporting agency did not discharge its responsibility. It simply confirmed whether the lender had issued some credit cards in the name of the consumer. The consumer was not questioning whether the cards had been issued in her name. She was concerned instead with the fraudulent use of the cards issued to an unknown person in her name, so it was not enough for the reporting agency merely to satisfy itself that the cards bore her name.[62] Having been informed of the consumer's misgivings, the agency then had a responsibility to dig deeper for an answer.[63] The agency's obligation was no different in *Henson v. CSC Credit Services*,[64] where the consumer disputed the existence of a judgment against him.[65] The reporting agency relied on the court's judgment docket that contained the erroneous information.[66] It is understandable that the agency had confidence in the judgment docket, but once the consumer raised doubts about its accuracy, the agency should then have reinvestigated the matter. It knew the extent of the consumer's query, so there was no question of unreasonable use of resources to respond to the consumer's dispute.[67]

Even if a reporting agency relies on another party to review a consumer's court file in order to determine whether the disputed information is accurate or not, in the final analysis the agency is responsible for any deficiencies in the search process. It all relates

61. *Cushman*, 115 F.3d 220.
62. *See id.* at 222.
63. *See id.* at 224.
64. 29 F.3d 280 (7th Cir. 1994).
65. *Id.* at 283.
66. *See id.* at 285.
67. The consumers survived the defendants' motion to dismiss their complaint under § 1681i because a consumer reporting agency may not rely exclusively on public court documents once it is informed that the consumer disputes the information in his credit report. *See id.* at 286. The notice to the agency gives the agency the opportunity to "target its resources in a more efficient manner and conduct a more thorough investigation." *Id.* at 286-87. To determine a credit reporting agency's duty, the court will balance the cost of verifying the accuracy of the source against the possible harm that the consumer may suffer because of the inaccurate reporting of the information. *Id.* at 287.

back to the requirement of a "reasonable reinvestigation."[68] There was nothing unusual in *Dennis v. BEH-1*[69] that caused the reporting agency to overlook the entry in the consumer's court file, that reflected dismissal of the action against the consumer. The agency's investigator either overlooked the document or did not understand its legal effect, for he confirmed the entry of a judgment against the consumer.[70] The reporting agency placed its confidence in the subcontractor that it had employed to review the matter, but in the final analysis it was up to the agency to determine the legal effect of the stipulation to which the parties had agreed.

B. The Reinvestigation Report

Once a consumer reporting agency has completed its reinvestigation, it must notify the consumer about the result in writing within five business days.[71] It must also provide a "consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation."[72] The ambiguity of the statutory language raises the question whether the reporting agency must provide the consumer's complete file or merely a report about the revisions to that file. The statute calls for a consumer report that is based on the revised file, so that the report covered in § 1681i(a)(6)(B)(ii) cannot be the same as the consumer's file. In *Nunnally v. Equifax Information Services, L.L.C.*,[73] the Eleventh Circuit explained that the consumer's revised file is the basis for the consumer report that is required after the reinvestigation, and that the phrase "as that file is revised" really

---

68. 15 U.S.C. § 1681i(a)(1)(A) (2006); *see also* Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1160 (11th Cir. 1991); FAIR CREDIT REPORTING, *supra* note 35, § 4.5.3.3.

69. Dennis v. BEH-1, L.L.C., 520 F.3d 1066 (9th Cir. 2008).

70. *See Dennis*, 520 F.3d at 1070. The agency misinterpreted the written stipulation between the parties as an entry of judgment. In fact the stipulation evidenced an agreement between the consumer and his landlord that no judgment would be entered against the consumer as long the consumer complied with the payment schedule. *See id.*

71. 15 U.S.C. § 1681i(a)(6)(A).

72. *Id.* § 1681i(a)(6)(B)(ii).

73. Nunnally v. Equifax Info. Servs., L.L.C., 451 F.3d 768 (11th Cir. 2006).

highlights the place from which the consumer report originated.[74] The revisions are the key to the consumer report.

One wonders, however, whether the drafters could have avoided the *Nunnally*-type problem by simplifying the post-reinvestigation obligation of a consumer reporting agency. Surely the drafters could have insisted on a single report of the results of the reinvestigation that would include the revisions that ensued therefrom. The choice of having the consumer report as "part of, or in addition to" the notice about the results of the reinvestigation leaves the inquiry open to speculation that the consumer may expect more than the statute requires.[75] The consumer's main interest is in ascertaining how his dispute has changed his record, and so the consumer should find it easier to understand what has happened if the consumer reporting agency produces a report that tells the whole story once the reinvestigation has concluded.[76] This does not mean, however, that the current language requires disclosure of the complete file.

There are other references to a consumer's file in other sections of the statute. For example, under § 1681g(a)(1) a consumer reporting agency must disclose "[a]ll information in the consumer's file" on the consumer's request.[77] The Federal Trade Commission must prepare a summary of consumer's rights under § 1681g(a)(1)(B) and that summary includes the consumer's right to obtain "a copy of a consumer report under subsection (a)."[78] The reference in subsection (c)(1)(B) that links a "consumer report" to "all information in the consumer's file" in subsection (a)(1) suggests that the drafters were referring to a consumer's complete file in both subsections.[79] The reinvestigation requirements in § 1681i(a)(6)(B)(ii) do not mention anything about § 1681i(a) dealing with a consumer's complete file, but instead employ different language that calls for a consumer report

---

74. *Id.* at 776.

75. *See* 15 U.S.C. § 1681i(a)(6)(B) (2006).

76. The consumer might find it easier to relate the results of the reinvestigation to the post-reinvestigation report if they are both contained in the same document. This would require, therefore, a deletion of the language "or in addition to" in § 1681i(a)(6)(B).

77. 15 U.S.C. § 1681g(a)(1) (2006).

78. *Id.* § 1681g(c)(1)(B)(i).

79. *Compare id.* § 1681g(a)(1) *with id.* § 1681(c)(1)(B)(i).

based on the consumer's file as revised.[80] This language is certainly not equivalent to "[a]ll information in the consumer's file," a phrase that is the hallmark of § 1681g(a)(1).[81]

Section 1681j is another provision that refers to a consumer's complete file. It gives a consumer the right to obtain a free copy of his file every year pursuant to § 1681g.[82] Section 1681j leaves no doubt that the free copy must be of all information in the consumer's file because it refers specifically to "all disclosures pursuant to section 1681g."[83] If the drafters had wanted something more for the consumer in § 1681i(a)(6)(B)(ii), they could easily have made the same linkage to § 1681g(a)(1) that they did when they dealt with § 1681j.[84] It looks like a deliberate attempt to make a distinction between a reporting agency's duties after reinvestigation and the consumer's right to demand his complete file in any event. The reinvestigation causes the parties to focus on the consumer's specific complaint, and it is understandable, therefore, that § 1681i(a)(6)(B)(ii) would not broaden the disclosures to include the consumer's complete file. The communication that follows an agency's reinvestigation should ideally highlight the changes to the consumer's file that ensue from the consumer's dispute.[85] Nevertheless, the drafters could have made it easier for consumers by merely requiring a single, post-reinvestigation communication that not only gives the results of the agency's efforts,

---

80. *See id.* § 1681(i)(a)(6)(B)(ii).

81. *See id.* § 1681g(a)(1).

82. *Id.* § 1681j(a)(1)(A).

83. *Id.* Among the disclosures covered by § 1681g is the information in the consumer's file.

84. Compare *id.* § 1681i(a)(6)(B)(ii) (requiring "a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation"), *with id.* § 1681j(a)(1)(A) (requiring disclosures pursuant to § 1681g once during any 12-month period without cost to the consumer).

85. In *Nunnally v. Equifax Information Services*, the Eleventh Circuit observed that an agency's revisions may not be apparent to the consumer if the agency sends him his complete file after a reinvestigation. 451 F.3d 768, 776 (11th Cir. 2006). The court believed that the summary letters that the consumer reporting agency sent to the consumers were more effective in highlighting the changes made. *See id.* One authority has indicated that two national consumer agencies, Equifax and Experian, only provide information about the specific matters that were investigated, instead of providing a consumer's complete file. *See* FAIR CREDIT REPORTING, *supra* note 35, § 4.6.1.

but also that highlights the changes. This procedure would avoid the consumer's expectation of a full-fledged consumer file which might be implied from the reference to a separate consumer report in subsection (6)(B)(ii).

This confusion over a consumer's file may arise in another context. A consumer reporting agency must disclose at the consumer's request "all information in the consumer's file."[86] When the consumers made their request in *Gillespie v. Trans Union Corporation*,[87] they did not get what they had hoped for, since the purge date was missing from the reporting agency's disclosure.[88] The question then became whether the term "file" mentioned in §1681g(a)(1) covered everything in the consumer file held by Trans Union, or whether it referred only to data in a consumer report that Trans Union issued to third parties.[89] If the former, then Trans Union had to include the purge date in the information that it provided to the consumer. The Seventh Circuit opted for the latter approach,[90] relying on the FTC Official Staff Commentary, which limits the term "file" to information "that might be furnished, or has been furnished, in a consumer report on [the] consumer."[91]

The court observed that if the file referred to in § 1681g(a)(1) covered everything that the consumer reporting agency held in the consumer's name, then it would not have been necessary to identify other categories of information in subsections (a)(2)-(6) that the consumer could request from the reporting agency.[92] By giving § 1681g(a)(1) a narrower focus, the court purported to accommodate the other subsections, fearing that it could not avoid their redundancy if it

86. 15 U.S.C. § 1681g(a)(1).

87. Gillespie v. Trans Union Corp., 482 F.3d 907, 908 (7th Cir. 2007).

88. *See id.* at 908. The purge date is the date when the consumer reporting agency removes from its reports any information about a consumer's delinquency. *Id.*

89. Section 1681g(a)(1)(A) refers to "[a]ll information in the consumer's file."

90. *See Gillespie*, 482 F.3d at 909.

91. Commentary on the Fair Credit Reporting Act, 16 C.F.R. pt. 600 app., § 603(g)-2 (2009). The Commentary contains interpretations of the FCRA by Federal Trade Commission. It does not have the effect of regulations, and the FTC updates the Commentary from time to time. *See* 16 C.F.R. pt. 600 app., Introduction 1.4.

92. See *Gillespie*, 482 F.3d at 909.

gave subsection (a)(1) an all-inclusive label.[93] There is nothing in the statute that restricts the material in a consumer's file to information relating only to a consumer report. A file comprises "all of the information on [the] consumer recorded and retained by a consumer reporting agency regardless of how the information is stored,"[94] and an agency must disclose "all information" in that file if the consumer requests it.[95] If the drafters intended to restrict the disclosure to matters in a consumer report, they could have limited the reporting agency's obligation to information of the kind covered in § 1681a(d)(1),[96] a category that lacks the comprehensive features of § 1681g(a)(1). There may be some concern that if the information demanded through § 1681g(a)(1) includes everything relating to the consumer, then the additional paragraphs of the section allowing for the disclosure of additional information becomes redundant.[97]

First of all, it is conceivable that a consumer may be interested only in a specific item instead of his complete file, and § 1681g therefore gives him the option to choose his area of inquiry. Furthermore, while subsection (a)(1) covers all information in the file *at the time of the [consumer's] request*, subsection (a)(4) allows the consumer to request information about checks relating to any adverse characterization of the consumer that are in the consumer's file *at the time of the disclosure*.[98] It is conceivable, therefore, that information about checks may not be in the file when the consumer makes his request for all information under subsection (a)(1), but it may be there when the reporting agency makes its disclosure pursuant to subsection (a)(4). The consumer's request under subsection (a)(1) would not, therefore, make subsection (a)(4) redundant in the scheme of things. The same thing may be said about subsection (a)(5) which requires a reporting agency to disclose on the consumer's request all information

---

93. *See id.*

94. 15 U.S.C. § 1681a(g) (2006).

95. *Id.* § 1681g(a)(1).

96. Section 1681a(d) defines "consumer report" by relating it to certain information about the consumer's reputation and credit standing that is used to establish the consumer's eligibility for purposes identified in the statute. 15 U.S.C. § 1681a(d)(1). The limiting language of this section must be contrasted with the broad language of § 1681g(a)(1) that covers all information in the consumer's file.

97. *See Gillespie*, 482 F.3d at 909.

98. *Compare* 15 U.S.C. § 1681g(a)(1) *with* 15 U.S.C. § 1681g(a)(4).

about third-party inquiries concerning the consumer that took place in the one-year period preceding the consumer's request for disclosure.[99] A consumer could request all information in his file, but yet not have access to all inquiries about him that preceded his request for information. The drafters left nothing to chance in ensuring that with respect to third-party inquiries about the consumer, the reporting agency would have to take a retrospective look to satisfy the demands of subsection (a)(5); that would satisfy the historical element of that subsection without affecting the vitality of subsection (a)(1).

IV. USE OF PRESCREENED LISTS FOR OFFERS OF CREDIT

A. The Strategy

Congress passed the FCRA "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy."[100] As a result of the role that credit reporting agencies play in reporting information about consumers, creditors are able to make intelligent decisions about consumer credit without fear of compromising the privacy concerns of their customers. When Congress amended the FCRA in 1996 to allow creditors to buy from credit reporting agencies prescreened lists of persons who met certain criteria for credit, it presented another challenge for creditors.[101]

---

99. *See id.* § 1681g(a)(5).

100. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52 (2007) (citing 15 U.S.C. § 1681). Senator Proxmire gave some idea of the rationale for enacting the FCRA:

> The aim of the Fair Credit Reporting Act is to see that the credit reporting system serves the consumer as well as it serves the industry. The consumer has a right to information which is accurate; he has a right to correct inaccurate or misleading information; he has a right to know when inaccurate information is entered into his file; he has a right to see that the information is kept confidential and is used for the purpose for which it is collected; and he has a right to be free from unwarranted invasions of his personal privacy. The Fair Credit Reporting Act seeks to secure these rights.

Senate Hearings on Fair Credit Reporting (statement of Sen. Proxmire), *supra* note 39.

101. *See* Consumer Credit Reporting Reform Act of 1996, sec. 2404 (a)(2) § 1681(c)(1), Pub. L. No. 104-208, 110 Stat. 3009-431.

Creditors could use these prescreened lists only if they planned to make a firm offer of credit.[102]

It was predictable that there would be some disagreement about the meaning of a "firm offer of credit." The statute defines the term as "any offer of credit . . . to a consumer that will be honored if the consumer is determined, based on information in a report on the consumer, to meet the specific criteria used to select the consumer for the offer . . . ."[103] The offer may be conditioned on certain pre-selected criteria relating to the consumer's creditworthiness and on the consumer's continuing ability to satisfy those criteria.[104] Nevertheless, there is always a question about the amount of information that the creditor must include in its offer, and whether the offer has some value for the consumer, or is simply a solicitation the creditor is using to accomplish other objectives.

B. The Relevance of Value to the Consumer

The Seventh Circuit gave some early indication of the "value" component in *Cole v. U.S. Capital, Inc.*[105] In *Cole*, the creditor sent the consumer a mailing informing her that she was eligible for a Visa or Mastercard with limits to $2,000, as well as for maximum automobile credit of $19,500.[106] The mailing stated that the creditor did not guarantee the consumer a credit card, but that if the consumer met certain conditions, the creditor would guarantee a credit line of at least $300 for the purchase of a vehicle.[107] The creditor was confident

---

102. *See* § 1681b(c)(1)(B)(i). A consumer has the right to opt out of such prescreened lists. *Id.* § 1681b(e)(1); FAIR CREDIT REPORTING, *supra* note 35, § 7.3.4.4.

103. 15 U.S.C. § 1681a(l). It is to be noted that although the offer to someone on a prescreened list is made because of that person's impressive credit history, sometimes creditors will target consumers with less than a spectacular record. *See* Murray v. E Trade Fin. Corp., No. 05 C 5433, 2006 WL 2054381, at *1 (N.D. Ill. July 19, 2006) (creditor made offer of credit to consumers with poor credit or bankruptcy discharges); Murray v. Sunrise Chevrolet Inc., 441 F. Supp. 2d 940, 943 (N.D. Ill. 2006) (creditor made offer of credit to consumers with bankruptcies during a certain period and consumers with a credit score between 529-629).

104. 15 U.S.C. § 1681a(l)(1).

105. Cole v. U.S. Capital, Inc., 389 F.3d 719 (7th Cir. 2004).

106. *Id.* at 722.

107. *Id.* at 723.

that the guarantee of any amount of credit would satisfy the requirement that there be a firm offer of credit.[108]

The court was not convinced that a guaranteed nominal amount of credit would satisfy the definition, for it was more interested in the offer having sufficient value for the consumer to justify the creditor's invasion of the consumer's privacy under the pretext of granting credit.[109] In the court's view, an offer of credit that provides no value to the consumer is more like a solicitation, which the prescreening process is not intended to accommodate.[110] In determining value, one consideration is the amount of credit that is involved in the transaction. But the *Cole* court also recognized other important considerations. It could not assess the true value of an offer without considering such terms as the interest rate, the repayment period, and the method of assessing interest.[111] The court could not decide on the value of the offer without reviewing the essential elements of the transaction. It was not surprising that the court failed to be impressed with the small amount of credit available to the consumer, $300, but even if that amount might have passed the test, the offer limited its use to the purchase of a vehicle.[112] It was reasonable to query whether this was really a firm offer of credit or merely a solicitation for the purchase of a vehicle. If the latter, the creditor should have had no access to the consumer's records because the consumer stood to derive no value from the offer of credit.[113] Furthermore, although the

108. *Id.* at 726. The creditor believed that the offer of credit could be as low as one dollar and still be considered a firm offer of credit. *Id.*

109. The court wanted to avoid giving a creditor access to a consumer's record on the basis of some nominal amount of credit. *See id.* It stated that "[f]rom the consumer's perspective, an offer of credit without value is the equivalent of an advertisement or solicitation." *Id.* at 727. Prescreened offers are not intended for that. "Congress did not intend to allow access to consumer credit information for 'catalogs and sales pitches.'" *Id.* (quoting Trans Union Corp. v. FTC, 267 F.3d 1138, 1143 (D.C. Cir. 2001)).

110. *See id.* at 728; *see also* FAIR CREDIT REPORTING, *supra* note 35, § 7.3.4.3. The Seventh Circuit reversed the district court's decision to dismiss the plaintiff's complaint, because the plaintiff's allegations stated facts that would allow the plaintiff to show that the offer had no real value. *See Cole*, 389 F.3d at 728.

111. *See id.*

112. *See id.*

113. In allowing a consumer reporting agency to release a consumer's information for a creditor to extend a firm offer of credit, Congress balanced the

defendant in *Cole* had guaranteed a minimum credit line of $300, it stated later in the offer that "[g]uaranteed approval [was] neither express nor implied."[114] It was not altogether clear, therefore, that the defendant was prepared to honor the offer of credit or that the obligation to do so was part of the definition of "firm offer of credit."[115] Surely the offer could not be firm if there was doubt about the creditor's willingness to honor its commitment.

Although the small amount under consideration in *Cole* made a difference to the court, it took on added significance because the consumer could use the credit only towards purchase of a vehicle.[116] The same Seventh Circuit later found value in a credit card limit of $250, which was lower than the $300 limit considered in *Cole*. The court in *Perry v. First National Bank*[117] acknowledged that the limit was quite low, but was comforted by the fact that the consumer could use the money to buy anything he wanted, while the consumer in *Cole* was limited to the purchase of a car from a designated dealership.[118] Furthermore, in *Cole*, the credit paled in comparison to the cost of the vehicle.[119] Nevertheless, the consumer in *Perry* did not have much money to spend after paying the required fees to the creditor.[120] It was true that some of those fees were not recurring items, but they were

---

privacy interests of consumers against the benefit of consumers getting the benefit of an offer of credit. This is why the statute requires the offer of credit to be firm, so a creditor cannot use the prescreening process merely to solicit business. *See* S. REP. NO. 103-209, at 13 (1993).

114. *Cole*, 389 F.3d at 728.

115. The statute provides in pertinent part that "[t]he term 'firm offer of credit or insurance' means any offer of credit or insurance to a consumer that will be honored" if the consumer meets certain criteria. 15 U.S.C. § 1681a(l) (2006).

116. *Cole*, 389 F.3d at 728.

117. Perry v. First Nat'l Bank, 459 F.3d 816 (7th Cir. 2006).

118. *Id.* at 825.

119. The creditor offered the consumer a credit line of "at least three hundred dollars for the purchase of a vehicle." *Cole*, 389 F.3d at 723.

120. The court recognized that the creditor's solicitation required consumers to pay "a significant amount of money in fees, which are quite high in relation to the credit line offered." *Perry*, 459 F.3d at 825. In *Perry*, the consumer had to pay one-time charges of $9 for a processing fee and $119 for an acceptance fee. He also had to pay $6 monthly for a participation fee and $50 the following year for the annual membership fee. *Id.* at 824. Since the minimum credit line was $250, the consumer did not have much to work with. *Id.*

substantial enough to raise a question about the value of the offer. The court itself observed that the offer was "not an attractive deal for the great majority of consumers."[121]

Nevertheless, the court recognized some redeeming features in the offer. If the consumer paid off the card each month, he could use as much as $3,000 for purchases during any one year, while at the same time establishing his credit.[122] The saving grace in *Perry* was that the offer related to credit, no matter how small, and it was not a guise for peddling a product to the consumer.[123] The offer of credit therefore had value as an "extension of credit alone" to the normal consumer,[124] and that could be determined by ascertaining whether "the four corners of the offer [satisfied] the statutory definition.[125]

The Seventh Circuit's "four corners" approach has not been universally accepted. Other courts have not required a creditor's offer to contain specific information about terms such as interest rates and repayment periods in order for there to be a firm offer of credit.[126] They are interested only in determining whether a creditor has made an offer of credit that it will honor once the consumer meets certain criteria. The FCRA does not demand that a creditor disclose the exact terms of the consumer's loan at the time it makes the offer because the

---

121. *Id.* at 825; *see also* Bonner v. Cortrust Bank, N.A. No. 2:05-CV-137, 2006 WL 1980183, at *4 (N.D. Ind. July 12, 2006) (finding that an offer while plainly a "lousy deal for consumers of credit" was a firm offer); Poehl v. Countrywide Home Loans, Inc., 464 F. Supp. 2d 882, 886 (E.D. Mo. 2006) (observing that "[i]t is not the court's job to decide whether a particular offer might be unwise"), *aff'd*, 528 F.3d 1093 (8th Cir. 2008).

122. *Perry*, 459 F.3d at 825.

123. This was not enough to convince Judge Evans in his dissent. He observed that "[i]n *Cole*, the sales pitch was for a car; in this case, it is for an unconscionably one-sided financial deal that defies a reasonable concept of sufficient value." *Id.* at 827 (Evans, J., dissenting).

124. Murray v. GMAC Mortgage Corp., 434 F.3d 948, 955 (7th Cir. 2006).

125. *Id.* at 956; *see also* Klutho v. Fourth Fleet Fin. Inc., 529 F. Supp. 2d 1016, 1020 (E.D. Mo. 2007); Hyde v. RDA, Inc., 389 F. Supp. 2d 658, 665 (D. Md. 2005).

126. *See* Poehl v. Capital One Auto Fin., 528 F.3d 1093, 1098 (8th Cir. 2008); Dixon v. Shamrock Fin. Corp., 522 F.3d 76, 81 (1st Cir. 2008); Kennedy v. Chase Manhattan Bank USA, NA, 369 F.3d 833 (5th Cir. 2004).

statute allows the creditor to attach conditions thereto that take into account a particular consumer's situation.[127]

The Fifth Circuit gave us a glimpse of its view on a "firm offer of credit" in *Kennedy v. Chase Manhattan Bank USA, NA.*[128] In that case, the creditor informed the consumers that they had been approved for a credit card, but then denied them credit when they applied for it.[129] The creditor based its denial on pre-established criteria that did not appear in the creditor's mailing.[130] The court found that the statute allowed a creditor to make a conditional firm offer of credit, one that was based on pre-determined criteria that did not have to be included in that offer.[131] From the consumer's perspective, it seemed odd that an offer could be firm if it was subject to criteria that were absent from the original language.[132] The *Kennedy* court was keen to point out that the phrase "firm offer of credit" is only a firm offer if the consumer meets certain criteria previously established by the creditor, in addition to the permissible verification and collateral requirements.[133]

Although the *Kennedy* court did not have to sort out the specific information that a creditor had to include in its offer of credit, other courts have nevertheless relied on the *Kennedy* approach in concluding that the FCRA does not require that a firm offer of credit must contain such material credit terms as will allow a consumer to determine from the four corners of the mailing whether the offer is of value to him.[134] This disagreement with the Seventh Circuit's

---

127. *See* Villagran v. Central Ford, Inc., 524 F. Supp. 2d 866, 879 (S.D. Tex. 2007); Crossman v. Chase Bank USA NA, No. 2:07-116-CWH, 2007 WL 2702699, at *4 (D.S.C. Sept. 12, 2007); Phinn v. Capital One Auto Fin., Inc., 502 F. Supp. 625 (E.D. Mich. 2007); Putkowski v. Irwin Home Equity Corp., 423 F. Supp. 2d 1053 (N.D. Cal. 2006) (concluding that the FCRA allows firm offers to have a range of rates which may vary based on the recipient).

128. *Kennedy*, 369 F.3d 833.

129. *Id.* at 837.

130. *Id.*

131. *Id.* at 842.

132. *Id.* at 838.

133. *Id.* at 841.

134. *See* Poehl v. Countrywide Home Loans, Inc., 528 F.3d 1093 (8th Cir. 2008); Phinn v. Capital One Auto Fin., Inc., 502 F. Supp. 2d 625 (E.D. Mich. 2007); Putkowski v. Irwin Home Equity Corp., 423 F. Supp. 2d 1053 (N.D. Cal. 2006).

approach was based on the theory that the statute nowhere requires a lender to be specific about loan terms, and that it is permissible, for example, for an offer to contain a range of interest rates without affecting its firmness in any way.[135] The statute merely provides the creditor an opportunity to make an offer of credit that it will honor if the consumer meets certain pre-established criteria. But the statute goes further by allowing the creditor to condition the offer on the consumer's fulfillment of additional criteria.[136] The FCRA therefore sanctions the creditor's initial invitation to the consumer, but certainly contemplates further contact between the creditor and the consumer to work out the details of the particular loan transaction.[137]

C. Disagreement on the Definition

The phrase "firm offer of credit" has caused its own difficulties, for it has produced an occasional query about the possibility of having a firm offer when the creditor does not yet know about the possibilities surrounding a particular consumer. In *Sullivan v. Greenwood*,[138] the consumer tried to convince the First Circuit that the statutory definition related only to the firmness of an offer and that the court should rely on the common law to determine whether there has been an offer of credit.[139] The only problem is that the statutory definition relates to the entire phrase, "firm offer of credit," and so

---

135. *See Poehl*, 528 F.3d at 1098; Dixon v. Shamrock Fin. Corp., 522 F.3d 76, 81 (1st Cir. 2008); Soroka v. JP Morgan Chase & Co., 500 F. Supp. 2d 217, 222 (S.D.N.Y. 2007). The court in *Dixon* observed that the Truth in Lending Act regulates the disclosure of loan terms and that Regulation Z identifies the specific disclosures that a lender must make to a borrower in a loan transaction. *Dixon*, 522 F.3d at 81 (citing Truth in Lending Act, 15 U.S.C. § 1601 and Regulation Z, 12 C.F.R. §§ 226.5(a), 226.5(b)). The mere fact that the Truth in Lending Act and Regulation Z require specific items to be disclosed in a loan transaction serves as a contrast to the prescreening mechanism in the FCRA, where the latter does not require any specific disclosures in the lender's firm offer of credit.

136. 15 U.S.C. § 1681a(l) (2006).

137. *See Poehl*, 528 F.3d at 1097; Sullivan v. Greenwood Credit Union, 520 F.3d 70, 76 (1st Cir. 2008); Hoge v. Parkway Chevrolet, Inc., No. H-05-2686, 2007 WL 3125298 (S.D. Tex. Oct. 23, 2007).

138. *Sullivan*, 520 F.3d 70.

139. *Id.* at 75.

there is no place for a common law approach in this context.[140] Therefore, the court was not left to its own devices in trying to conjure up some definition of the term that would leave room for additional factors such as interest rates and terms of repayment. Nevertheless, the question still remains whether the drafters accomplished much by requiring a creditor's offer to be "firm," when they then allowed it to be subject to conditions that the consumer must meet in order to benefit from the offer.

The *Kennedy* court itself deemed it helpful to explain the "firmness" element as not being inconsistent with the conditional nature of a creditor's offer.[141] The consumer has a firm offer if he meets certain criteria. But in *Cole*, the court was not happy with just any offer that the creditor would honor.[142] It was interested in looking at the entire offer and the effect of all its material conditions.[143] This was the court's method of determining whether the offer was a solicitation in disguise, rather than an offer of credit.[144] The court in *Cole* was really concerned about whether there was any real prospect of credit to the consumer. It is one thing to be concerned about the attractiveness of an offer, but it is quite another to say that an offer is not one for credit simply because it is not the kind that would impress most consumers. After all, the definition of "credit" itself looks to the debtor's right to incur debt and defer its payment, and does not address the terms of a particular loan.[145]

The *Kennedy* and *Sullivan* formulations seem more consistent with the statutory prescription for a firm offer of credit. Even so, the confusion produced by the word "firm" in this context cannot be

---

140. *Id.*

141. The Fifth Circuit explained in *Kennedy v. Chase Manhattan Bank USA, NA*, that "the Act permits a creditor to make a 'conditional' firm offer of credit; that is an offer that is conditioned on the consumer meeting the creditor's previously-established criteria for extending credit." 369 F.3d at 841.

142. It would be elevating form over substance to define a firm offer of credit in this way. *See* Cole v. U.S. Capital, Inc., 389 F.3d 719, 727 (7th Cir. 2004). This is where the court introduced its concept of the offer's value to the consumer. *Id.* at 726-27.

143. *Id.* at 727-28.

144. *Id.* at 728.

145. The term "credit" in the FCRA has the same meaning as in § 1691a of the Equal Credit Opportunity Act. 15 U.S.C. § 1681a(r)(5) (2006).

attributed to the courts, for they must do the best with what they have. But they need not succumb to the temptation that the Seventh Circuit could not resist of importing requirements into the statute that the drafters did not think belonged there. If the drafters contemplated that a firm offer of credit would simply require an acceptance or refusal from the consumer, they certainly would not have provided for other contingencies in the same section, including the consideration of "information in the consumer's application for the credit."[146] Perhaps the problem lies with the term "firm offer," which for all intents and purposes assures the consumer that all he has to do is to accept the creditor's offer, which will contain all the essential elements of the transaction.[147]

The "firmness" element can be explained as giving meaning to the offer, so that the creditor promises to honor the offer if the consumer meets not only the pre-determined criteria that the creditor used in selecting a consumer for the offer in the first place, but also the creditor's other standards of creditworthiness and any collateral requirements.[148] It may be that as a result of these other conditions a creditor will decide not to extend credit. In that event, the consumer will not have met the terms of the creditor's offer and the consumer will have nothing to complain about. It is not as if the creditor offers a guarantee to all respondents on its list. The initial screening mechanism does its work by compiling a list of eligible consumers who may or may not eventually qualify for an extension of credit, depending on the circumstances of each case. The saving grace is that the creditor must establish the specific criteria to select the consumers for consideration before a consumer reporting agency can respond to

---

146. 15 U.S.C. § 1681a(l). Section 1681a(l) allows the creditor to condition the offer on the consumer's fulfillment of one or more additional criteria, one of which is that the consumer continues to meet the criteria that the creditor used to select the consumer in the first place. The consumer's application is simply one place where the creditor can verify the consumer's continued eligibility. *Id.*

147. This is where the disagreement arises. Some consumers have tried to promote a common law definition of the term "offer" instead of looking at the statutory definition of "firm offer of credit." *See* Poehl v. Countrywide Home Loans, Inc., 528 F.3d 1093, 1095 (8th Cir. 2008); Dixon v. Shamrock Fin. Corp., 522 F.3d 76, 79 (1st Cir. 2008).

148. *See* NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 7.3.4.3 (6th ed. 2006).

the creditor's request, leaving the creditor to verify whether the consumer continues to meet those criteria.[149]

D. Downplaying the Role of "Value"

After *Cole*, it was obvious that the Seventh Circuit attached importance to the value of a creditor's offer to the consumer. It was a way of distinguishing between a true offer of credit and a sales solicitation.[150] When there is merely an offer of credit, a court does not have to worry so much about its value to the consumer because the basic inquiry ought to be whether the offer is firm and not whether it is valuable to the consumer.[151] It is understandable that in *Cole* the Seventh Circuit had to ask whether the creditor's offer of credit had value to the consumer standing alone, because the consumer had an offer of credit that was tied to a sale of goods.[152] It was one way of determining whether the creditor was using the enticement of a small loan, for example, to push the sale of merchandise that might not ordinarily have attracted the consumer. When the Seventh Circuit took the opportunity in *Murray v. New Cingular Wireless Services*[153] to clarify the relevance of the value of the creditor's offer, it identified no role for that element in the case where the offer was one for credit only.[154] In that event, the only concern should be whether the creditor has made a firm offer.[155]

149. *See* 15 U.S.C. § 1681a(l).

150. The court in *Cole* observed that "the relatively small amount of credit combined with the known limitations of the offer–that it must be used to purchase a vehicle–raises a question of whether the offer has value to the consumer." Cole v. U.S. Capital, Inc., 389 F.3d 719, 728 (7th Cir. 2004).

151. *See* Murray v. New Cingular Wireless Servs., Inc., 523 F.3d 719, 722 (7th Cir. 2008).

152. The problem in *Cole* was the small amount of credit which could be used only for buying a vehicle. *See Cole*, 389 F.3d at 728. A similar situation arose in *Hyde v. RDA, Inc.* where the offer guaranteed the consumer a minimum loan of $300 towards the purchase of a 1999 or newer vehicle. The only problem was that the dealer had no vehicles for sale in that price range. 389 F. Supp. 2d 658, 666-67 (D. Md. 2005). There seemed to be no value in the offer that the dealer made to the consumer. *See id.*

153. *Murray*, 523 F.3d 719.

154. *Compare* Murray v. New Cingular Wireless Servs., Inc., 523 F.3d at 722 (the court firmly held that the *Cole* directive about finding value was no longer

The Seventh Circuit's clarification came none too soon for the Eighth Circuit to concur in *Poehl v. Countrywide Home Loans, Inc.*[156] that there is no place for the "value" test when the creditor is offering only credit.[157] After all, in *Cole*, the Seventh Circuit was really trying to separate an offer of credit from a solicitation for merchandise, and the court saw that one way of doing that was to determine the value of the credit to the consumer.[158] If the so-called credit was merely a cover for peddling the merchandise, then the value component could help a court to reach a decision on the merits of the offer. Otherwise, there was no need to cling to the value component for a decision about whether the creditor had made a firm offer of credit.[159]

E. Lack of an Offer

Despite the courts' liberal interpretation of the term "firm offer of credit," sometimes a creditor throws caution to the wind by using loose language that provides no inkling that the creditor is making any offer of credit. In *McDonald v. NextStudent Inc.*,[160] the creditor merely invited the plaintiff to contact it regarding the plaintiff's student loans.

---

tenable where the court is dealing with a pure offer of credit) *with* Murray v. GMAC Mortgage Corp., 434 F.3d 948, 955 (7th Cir. 2006) (a point which the court merely observed).

155. In that scenario, there is nothing else in the creditor's offer that competes for the consumer's attention. Where an advertisement for a product is tied up with an offer of credit, then the "value" component is much more important in deciding on the legitimacy of the credit offer. *Compare* Cole v. U.S. Capital, Inc., 389 F.3d 719 (7th Cir. 2004) (finding that the small amount of credit combined with the fact that it has to be used for buying a vehicle raised questions of whether the offer of credit was of value to the consumer) *with* Murray v. New Cingular Wireless Servs., Inc., 523 F.3d 719 (7th Cir. 2008) (holding that when the offer is one of pure credit only, the question is whether the offer is firm, not whether it has value).

156. 528 F.3d 1093 (8th Cir. 2008).

157. *Id.* at 1098-99. The *Poehl* court also was not bothered by the lack of material loan terms in the offer of credit, preferring instead to rely on the creditor's preselection criteria. *See id.* at 1098; *see also* Dixon v. Shamrock Fin. Corp., 522 F.3d 76, 81 (1st Cir. 2008); Sullivan v. Greenwood Credit Union., 520 F.3d 70, 76 (1st Cir. 2008).

158. *See Cole*, 389 F.3d at 728.

159. *See* Cavin v. Home Loan Ctr., Inc., 531 F.3d 526, 531 (7th Cir. 2008); *Poehl*, 528 F.3d at 1098.

160. McDonald v. NextStudent Inc., 542 F. Supp. 2d 956 (E.D. Mo. 2008).

The creditor's opt-out notice indicated that the creditor had selected the plaintiff to receive an offer because she had met certain criteria, but there was no indication anywhere in the notice about the nature of the offer.[161] Although the court did not think it necessary for the creditor to specify the amount of credit being offered, the amortization period, or the interest rate, it nevertheless still looked for some evidence that the creditor's invitation to the consumer constituted a firm offer of credit and was not merely a preliminary overture to a later offer.[162] Therefore, the creditor could not use the statute to secure information about the consumer when a firm offer of credit was not contemplated. Although the absence of loan terms does not necessarily detract from the legitimacy of a creditor's offer, there must be something in the creditor's communication that makes it effective as an offer of credit, rather than merely a notice requesting her to contact the creditor.

The *McDonald* scenario placed the creditor's letter outside the statutory framework because a mere invitation to the consumer to contact the creditor did not fit the bill.[163] The creditor had hoped that its reference to how the consumer could stop receiving prescreened offers of credit would have led the court to view the creditor's letter as an offer in itself; if not, it would have been unnecessary to give advice

161. *See id.* at 957.

162. *See id.* at 962. The court observed that the letter was "not labeled or presented as an offer, but as a 'Notice.'" *Id.* The word "offer" appeared only in the opt-out notices and the only places that the word "credit" appeared were in notification about how to stop prescreened offers. *Id.*

163. The creditor's invitation read as follows: "Dear Ana, Please contact us regarding your student loans at your earliest convenience, toll free at (800)799-7318. This is not a late payment notice. NextStudent is not your current lender. [Hours of Operation.] Respectfully yours, NextStudent [contact information]." *Id.* at 957. This must be contrasted with the creditor's language in *Sullivan v. Greenwood Credit Union* which advised the consumer: "Because of your excellent credit, you have been preapproved for a home loan, up to 100% of the value of your home." 520 F.3d 70, 72 (1st Cir. 2008). Even though the consumer in *Sullivan* did not know the specific terms of the loan for which he would eventually qualify, at least he knew that the creditor was offering a loan, conditioned on the satisfaction of certain criteria. *See First Circuit Rules on "Firm Offer of Credit,"* 39 Consumer Cred. & Truth-In-Lending Comp. Rep. 1, 2 (Earl Phillips ed.) (A.S. Pratt & Sons, May 2008).

on that topic.[164] Furthermore, the creditor expected the consumer to read between the lines when the consumer saw the explanation about how the creditor happened to select her for "this offer."[165] But there was nothing in the creditor's introductory language that suggested an offer, and the creditor's advice that the consumer could opt out of receiving prescreened offers assumed that the creditor was making such an offer in the first place. There was no room for the theory that the creditor was merely beginning a multistep process towards the eventual offer of credit.[166]

There is little doubt that the creditor in *McDonald* could have been more direct in its approach to the consumer. Instead of telling the consumer that the communication "[was] not a late payment notice,"[167] it would have been more productive for the creditor to say what the letter was all about. No doubt the creditor was waiting to

---

164. A consumer may elect to have his name removed from any list maintained by a consumer reporting agency in connection with prescreened offers. 15 U.S.C. § 1681b(e) (2006).

165. The consumer was none the wiser about what the creditor had in mind. The consumer had to guess that there was some connection between the contact that the creditor requested and the offer referred to on the back of the creditor's letter. *See McDonald*, 542 F. Supp. 2d at 957.

166. The legislative history of § 1681b(c)(1)(B)(i) gives some idea of the rationale for requiring a creditor to make a firm offer of credit. The Senate Committee on Banking, Housing and Urban Affairs issued a report on the bill, Consumer Reporting Reform Act of 1994, that explained the prescreening mechanism as follows:

> The Committee seeks to balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers identified through the screening process. While the direct marketing portion of section 103 prevents consumer reporting agencies from providing lists that are based on credit limit, credit payment history, credit balance, or negative information, the Committee understands that such factors must be considered in order to market credit or insurance. For this reason, the prescreening section of the Committee bill allows credit and insurance providers to obtain lists for credit and insurance transactions not initiated by the consumer based on this more sensitive information. In exchange for allowing credit and insurance providers to obtain lists on more sensitive information, however, the bill requires that the credit or insurance provider make a "firm offer," as defined in section 101 of the Committee bill, of credit or insurance to all consumers on the list.

S. REP. NO. 103-209, at 13-14 (1993).

167. *McDonald*, 542 F. Supp. 2d at 957.

share the good news once the consumer responded to the creditor's initial overture.[168] But the basis on which a creditor secures a consumer's contact information from a reporting agency is that the consumer meets certain criteria. The firm offer of credit should then result from that prescreening process and not left to subsequent inquiries. Absent a firm offer of credit, a creditor enjoys the luxury of soliciting the consumer for other matters having nothing to do with credit, and that is precisely what the FCRA was designed to avoid.

A creditor does not have to delve into the terms of a particular loan in order for it to make a firm offer of credit, and courts will bend over backwards to make that point.[169] It is understood that the statutory definition of a firm offer leaves room for a subsequent negotiation between the parties about specific terms.[170] Therefore, a creditor's offer of credit may not necessarily be immediately subject to acceptance if the consumer does not meet the conditions that are statutorily permissible. Nevertheless, the statutory flexibility sometimes raises questions about the creditor's language, even when that language is not as weak as in *McDonald.*

In *Dixon v. Shamrock Financial Corp.*,[171] the creditor prevailed against the consumer's claim that there was no firm offer of credit, but it is questionable whether the creditor's invitation to the consumer to have "a free consultation" and the assurance that the creditor's letter was "not a commitment to make a loan" led in the direction of a firm

---

168. The defendant contemplated "a multi-step process whereby the offer of credit is later extended to the consumer orally." *Id.* at 963. By then the creditor would have had access to the information that allows it to prescreen in the first place, thus defeating the purpose of the legislation. *See* FAIR CREDIT REPORTING, *supra* note 35, § 7.3.4.3.

169. *See* Cavin v. Home Loan Ctr., Inc., 531 F.3d 526, 529 (7th Cir. 2008) (stating that terms of loan need not be explained in initial offer letter); Poehl v. Countrywide Home Loans, Inc., 528 F.3d 1093, 1098, (8th Cir. 2008) (finding firm offer of credit even though information contained only general range of loan amounts available); Sullivan v. Greenwood Credit Union, 520 F.3d 70, 76 (1st Cir. 2008) (finding no statutory requirement for inclusion of specific loan terms).

170. *See Sullivan*, 520 F.3d at 76 (recognizing that a firm offer may be conditioned on the consumer's meeting certain criteria); Kennedy v. Chase Manhattan Bank USA NA, 369 F.3d 833, 841-42 (5th Cir. 2004) (holding that creditor had made a firm offer of credit even though consumer could not meet criteria).

171. Dixon v. Shamrock Fin. Corp., 522 F.3d 76 (1st Cir. 2008).

offer of credit.[172] This was not an offer in the common law sense, but one statutorily prescribed, and the *Dixon* court did not look for the usual trappings which would make the offer immediately acceptable to the consumer.[173] Nevertheless, the deference to a creditor's loose language does not sit well in this context if the statutory definition still requires that there be an offer, even if it is subject to all the demands of the consumer's eventual qualifications. Surely a statement that the creditor *can* pay off the consumer's debt and refinance the consumer's mortgage is on the fringe of an offer, which although better than the *McDonald* attempt, still does not represent the kind of invitation that one would expect from a prescreening lender. Even if it is not necessary to include all of a loan's material terms, a creditor should still have to make an offer of credit and not refer merely to a free consultation to start the ball rolling.[174]

V. THE DEMANDS OF EQUAL CREDIT OPPORTUNITY

A. *Explaining the Denial*

If a lender denies credit to a consumer, it must give the consumer specific written reasons for its denial.[175] This requirement is consistent with the legislative objective of ensuring that a lender does not discriminate in its lending practices, and gives a rejected consumer an opportunity to address any deficiencies or to correct any mistakes in

---

172. *See id.* at 78.

173. *See id.* at 79-80; *see also Poehl*, 528 F.3d at 1097 (finding that "the statutory definition of 'firm offer of credit' precludes reliance on common law definitions."); *Sullivan*, 520 F.3d at 75 (stating that the general rule that a common law term in a statute comes with a common law meaning does not apply because the term "firm offer of credit" is defined explicitly in the FCRA). The United States Supreme Court recently reinforced the common law approach in finding that the phrase "willfully fails to comply" in § 1681n(a) reaches reckless FCRA violations, following the general rule that "a common law term in a statute comes with a common law meaning, absent anything pointing another way." Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57-58 (2007); *see also* 1 JOHN E. MURRAY, JR. & TIMOTHY MURRAY, CORBIN ON CONTRACTS, § 1.11 (rev'd ed. Fall Cum. Supp. 2008).

174. In *Dixon*, the invitation for a "free consultation" was accompanied by the creditor's reminder that it was not committing to make a loan. 522 F.3d at 78.

175. 15 U.S.C. § 1691(d); 12 C.F.R. § 202.9(a)(2).

his credit file.[176] Although the Federal Reserve Board has published several sample forms to guide lenders in giving reasons for the denial of credit,[177] lenders are not duty bound to use those forms, and a lender's decision to craft its own rejection notice has often led to questions about the sufficiency of the lender's notice to the consumer.[178] When a lender clearly conveys the reason for its adverse action by identifying one or more of the grounds identified in the sample notice, it satisfies the requirement of giving a statement of the specific reasons for the action taken.[179] Nevertheless, the sample form does not meet every contingency, and sometimes a lender will have to improvise in order to address a particular situation.[180] In that event, a lender should modify the checklist by substituting or adding other reasons for denying credit.[181]

Occasionally a lender will run into difficulty by using language that comes close to that suggested in the sample form, while still leaving the consumer in a quandary about the rationale for its decision. In *Fischl v. General Motors Acceptance Corp.*,[182] the lender could not have come any closer to the mark when it used the phrase

---

176. *See* Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971, 977 (7th Cir. 2004); Padin v. Oyster Point Dodge, 397 F. Supp. 2d 712, 717 (E.D. Va. 2005). The legislative history of the ECOA gives some idea of the requirement for a creditor to give reasons for its adverse action:

> The requirement that creditors give reasons for adverse action is, in the Committee's view, a strong and necessary adjunct to the antidiscrimination purpose of the legislation, for only if creditors know they must explain their decisions will they effectively be discouraged from discriminatory practices. Yet this requirement fulfills a broader need: rejected credit applicants will now be able to learn where and how their credit status is deficient and this information should have a pervasive and valuable educational benefit.

S. REP. NO. 94-589, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406.

177. *See* 12 C.F.R. pt. 202 app. C (2009).

178. Appendix C to Regulation B provides that "[a] creditor may design its own notification forms or use all or a portion of the forms contained in [the] appendix." 12 C.F.R. pt. 202 app. C-5 (2009).

179. *See* 15 U.S.C. § 1691(d)(3); 12 C.F.R. § 202.9(a)(2)(i).

180. The Federal Reserve Board, the agency responsible for issuing Regulation B, advises that "[t]he sample forms are illustrative and may not be appropriate for all creditors." 12 C.F.R. pt. 202 app. C-3 (2009).

181. *Id.*

182. Fischl v. Gen. Motors Acceptance Corp., 708 F.2d 143 (5th Cir. 1983).

"credit references are insufficient" in conveying its reason for rejecting the consumer's application.[183] The phrase that would have kept it out of trouble was "insufficient credit references," for the Board's sample form had used that language in its approved list of reasons.[184] It is left to conjecture whether the lender regarded the two phrases as synonymous, but the court in *Fischl* was keen enough to observe that the Board's statement conveyed a "quantitative inadequacy" in the consumer's credit status, while the lender's phrase implied some "qualitative deficiency."[185] Even if the lender was persuaded by the similarity in terms that its message was precise enough to comply with the statutory mandate, one might still query the wisdom of the lender's decision to run the risk of creating even a slight ambiguity in its rejection notice. After all, Congress viewed the notice requirement as an essential feature of the overall statutory scheme to advise the consumer of the specific reasons behind a denial of credit and to discourage lenders from engaging in discriminatory practices.[186] The lender in *Fischl* left the consumer pondering how he could satisfy the lender's requirements for credit when confronted only with the "insufficiency" language. A lender surely has an obligation to give some clue about the nature of the deficiency, if not it would be able to seek refuge in the vagueness of the language conveying the bad news, while also not giving any guidance about the prospects for rehabilitating the consumer's record.

One can understand a lender's dependence on the similarity of the regulatory language, but perhaps the Board should bear some responsibility for a lender's dilemma. The phrase "insufficient credit references" does not rank much higher than "credit references are insufficient" in terms of precision and clarity, for the consumer is still

---

183. *Id.* at 145.

184. *See* 12 C.F.R. § 226.9(b)(2) (1983).

185. *Fischl*, 708 F.2d at 147.

186. *See* Williams v. MBNA Am. Bank, N.A., 538 F. Supp. 2d 1015, 1018-1019 (E.D. Mich. 2008); Diaz v. Paragon Motors of Woodside, Inc., 424 F. Supp. 2d 519, 532 n.22 (E.D.N.Y. 2006); S. REP. NO. 84-589, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406; Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Discrimination Laws,* 26 U. MICH. J.L. REFORM 527, 547-48 (1993).

left to wonder about the real reason for the lender's disapproval.[187] The lender must have thought that it was improving the Board's handiwork, but if anything, the lender created more doubt in the consumer's mind about the denial of credit. The consumer could have interpreted the language to mean that the lender was dissatisfied with the quality of the references offered, or he might have wondered whether the addition of one or two more references would have saved his application.[188] A consumer should not be left to drift in a sea of uncertainty about the reasons for a lender's decision, but this does not mean that the lender must use the exact language suggested by the Board. If a lender wants to be original, it must at least convey a message that helps the consumer appreciate the soundness of its decision.

There is little doubt that in many cases a lender can alter or improve the Board's suggested language because that language may not always give an adequate statement of the reasons for the creditor's adverse decision.[189] It is comforting that the Board recognized the ambiguity of the previous "insufficiency" language by identifying one of the current possibilities for adverse action as "[i]nsufficient number of credit references provided."[190] That language underscores the quantitative nature of the creditor's assessment, a feature that was less than obvious from the Board's former phrase.[191] It may simply be a

---

187. The ECOA's legislative history shows that Congress was concerned about the specific reasons for a creditor's adverse action. The Conference Report on the bill to amend the Consumer Credit Protection Act made the point that the Report was modifying the Senate language to require that the creditor give "'the specific reasons for the adverse action taken.'" H.R. REP. No. 94-873, at 8 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 403, 428.

188. The language simply raised questions about the "sufficiency" bar. A consumer would not know how he could satisfy the creditor's requirements, and that was, after all, part of the rationale for specific reasons. *See* Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971, 977 (7th Cir. 2004), Jochum v. Pico Credit Corp. of Westbank, Inc., 730 F.2d 1041, 1043 (5th Cir. 1984).

189. The appendix to Regulation B recognizes that "[i]f a creditor chooses to use the checklist of reasons provided in one of the sample forms in this appendix and if reasons commonly used by the creditor are not provided on the form, the creditor should modify the checklist by substituting or adding other reasons." 12 C.F.R. pt. 202 app. C-3 (2009).

190. *Id.* at Form C-1.

191. The court in *Fischl v. General Motors Acceptance Corp.* observed that the phrase "insufficient credit references" connoted "quantitative inadequacy." 708

clarification of what the Board had in mind in the first place, but it also puts in perspective the *Fischl* court's appeal for clarity in the notification scheme.[192] That appeal may not have fallen on deaf ears, for the replacement phrase conveys the message that the creditor is looking for a certain number of references,[193] even though a consumer will be none the wiser about the magical number required. It is left then to the consumer to explore the requirements with the creditor if he wants more details, once he knows about the quantitative element. Suffice it to say that the introduction of this numerical aspect facilitates the creditor's message to the consumer that there is a deficiency that he can understand and remedy.

There are other examples of a creditor's ambiguous use of language in rejecting a consumer's application. In *Higgins v. J.C. Penney, Inc.*,[194] the lender rejected the consumer's application on the basis of the "type of bank accounts" and the "type of credit references."[195] How was the consumer to know that a savings account would not give her as high a rating as a checking account, or that her credit score was harmed by the lack of a major bank card? Nevertheless, the court saw nothing wrong with the lender's reasons, since they were specific enough in the court's view to resemble some of those already listed in the regulation.[196] The Board reflects this thinking in its comment, where it states "[a] creditor need not describe how or why a factor adversely affected an applicant."[197] A lender is

---

F.2d 143, 147 (5th Cir. 1983). It went on, however, to discuss the concern of consumers and of governmental agencies alike with the vagueness of the language. *See id.* at 148 (citing Winnie Taylor, *Meeting the Equal Opportunity Act's Specificity Requirement: Judgmental and Statistical Scoring Systems*, 29 BUFFALO L. REV. 73, 90 (1980)).

192. The operative phase in *Fischl* was "credit references are insufficient." 708 F.2d at 145. The consumer was still left wondering what was sufficient in the creditor's view. The court stated that "the reason articulated was misleading, or at best excessively vague." *Id.* at 148.

193. *See* 12 C.F.R. pt. 202 app. C (Form C-1).

194. Higgins v. J.C. Penney, Inc., 630 F. Supp. 722 (E.D. Mo. 1986).

195. *Id.* at 723.

196. *Id.* at 725.

197. Official Staff Commentary, 12 C.F.R. pt. 202 supp. 1, cmt. 9(b)(2)-3 (2009). The Federal Reserve Board issued an Official Staff Commentary on Regulation B that protects a creditor from liability for "any act done or omitted in

protected if it gives the reason for denial as "length of residence" rather than "too short a period of residence."[198] In *Higgins*, the court admitted that the lender's response required "some degree of deductive reasoning,"[199] but found no fault with the language, no doubt relying on the "residence" example given by the Board.[200] In either case, the reasons the lender gave did not get to the heart of the matter, and the consumer was left to fend for himself after only being given some general idea of the category that worried the lender.

If the regulatory mandate requires a lender to give specific reasons, a consumer should not be left to wonder which type of account was the cause of the rejection. It is fair to say that a consumer may wonder whether the lender was sending a message to stay away from certain types of accounts, or whether it was stipulating that a consumer must have a certain type of account for the lender to look favorably on his application. In *Higgins*, the consumer had only a savings account, but the "type of account" language did not give the consumer any confidence about the types that the lender would find acceptable.[201] It is hard to support this degree of generality on the basis of administrative convenience, for the consumer is in no better position to determine the deficiency in his credit application. Furthermore, this approach gives a lender an advantage by allowing it to couch its decision in a way that may make it easier for the lender to hide its discriminatory practices.[202] There may always be a debate about how far a lender should go when informing a consumer about its precise reasons for denying credit. At a minimum, however, a lender

---

good faith in conformity with an interpretation issued by a duly authorized official of the Federal Reserve Board. 12 C.F.R. pt. 202 supp. 1 (Introduction).

198. Official Staff Commentary, 12 C.F.R. pt. 202 supp. 1, cmt. 9(b)(2)-3.

199. *Higgins*, 630 F. Supp. at 725.

200. *See id.*

201. The *Higgins* court acknowledged that "[t]he second and third reasons given by [the creditor], 'type of bank accounts' and 'type of credit references,' [were] less obviously sufficient." *Id.* at 724. The court was comparing the message gleaned from those phrases with that flowing from the language for the first reason, "'credit bureau report/ delinquent history.'" *Id.* One can understand why the court was less confident about the "bank account" language.

202. If creditors know that they must explain their decisions, they may be deterred from unlawful discrimination. *See* S. REP. No. 94-589, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406.

should be expected to give some clue about the key elements affecting the lender's adverse decision.

It is true that a lender does not have to use the exact language contained in the model form, but when a lender uses its own version to convey the bad news about its loan denial, a consumer should expect even more precision and clarity.[203] It is pointless for a lender to come up with some general category that leaves the consumer ignorant about the rationale for its decision. Take, for instance, a notice that lists "excessive credit obligations" and "credit file" as the reasons for the lender's adverse action.[204] It would only be natural for a consumer to ask why a lender would opt for "excessive credit obligations" as the proper formulation when the model form suggests a possible alternative such as "excessive obligations in relation to income."[205] There is a difference between the two phrases. In one case, a lender may be simply sending a message that the consumer is overextended with respect to his credit obligations, while the latter phrase takes into account all the consumer's obligations in relation to his income. A lender would be legitimately concerned about the amount of credit that a consumer has assumed, and therefore the lender's reference to the consumer's excesses in this regard seems specific enough to meet the regulatory requirements. At least the consumer is put on notice that he has taken on more than he can handle, and that there are problems with his credit record that merit his attention.

The lender in *Aikens v. Northwestern Dodge, Inc.*,[206] deviated from the model language because it wanted to emphasize the unhealthy ratio of the consumer's credit obligations to the creditor's

---

203. The Official Staff Commentary states that a creditor's adverse action notice may say "length of residence" instead of "too short a period of residence." 12 C.F.R. pt. 202 supp. 1, cmt. 9(b)(2)-3. It is questionable whether this is a good example of the rationale for not requiring a creditor to give details about how a factor adversely affected an application. Surely when the consumer finds out that the reason for the creditor's rejection of his application relates to his length of residence, he will not pause for any period of time to wonder whether he has lived too long in one place to qualify for a loan. Therefore, it should not be necessary for a creditor to expand on the phrase "length of residence" in this context. But that is a little different, for example, from referring to "types of bank accounts."

204. *See* Aikens v. Nw. Dodge, Inc., No. 03 C 7956, 2006 WL 59408, at *1 (N.D. Ill. Jan. 5, 2006)

205. 12 C.F.R. pt. 202 app. C (Form C-1) (2009).

206. *Aikens*, 2006 WL 59408.

income.[207] It was necessary, therefore, for the lender to include the term "credit" in the reasons given for its adverse decision, but it was certainly not necessary to include a reference to "income" when it was already sending a message about the consumer's credit obligations. The consumer already knew that the amount of credit available would be related to his income, and that the lender would make its decision about credit in the context of the consumer's resources.[208]

A consumer will always wonder how many obligations are too many, but a lender need not get into that kind of detail in trying to give the consumer the specific reasons for denial.[209] It is left to the consumer to pursue matters further if he wants to rehabilitate his record. The lender's response to the consumer's application will certainly put the consumer on the right track to resolving his credit problems, but it is not intended to give a full explanation of how he can accomplish that.[210]

On the other hand, one might query a lender's use of the term "credit file" as a reason for a denial of credit.[211] It is one thing to hinge a refusal on the absence of a credit file in the consumer's name, but quite another just to mention "credit file" without any explanation.

---

207. *See id.* at *4. The court made the following observation: "The phrase 'excessive credit obligations' confirms what Plaintiff already knew to be true about her credit status: i.e., that she had 'several' outstanding credit obligations, including a federal tax lien." *Id.* The message was certainly that the consumer did not have enough income to meet her credit obligations.

208. The lender's notice "adequately advised Plaintiff that she had too many . . . credit obligations to qualify for additional credit from [lender], which is all the ECOA requires." *Id.*

209. The ECOA's legislative history gives some idea of how a creditor may comply with a "statement of reasons" requirement:

> The Committee does not expect or intend that statements of reasons be given in the form of long, detailed personal letters. The bill calls for a "concise indication" of the applicant's deficiencies, and a short check-list statement will be sufficient so long as it reasonably indicates the grounds for adverse action.

S. REP. NO. 94-589, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 410; *see also* Anderson v. Capital One Bank, 224 F.R.D. 444, 447 (W.D. Wis. 2004).

210. The Official Staff Commentary indicates that "[a] creditor need not describe how or why a factor adversely affected an applicant." 12 C.F.R. pt 202 supp.1, cmt. 9(b)(2)-3 (2009); *see also* NAT'L CONSUMER LAW CTR., CREDIT DISCRIMINATION § 10.5.4.2.2 (5th ed. 2009) [hereinafter CREDIT DISCRIMINATION].

211. *See Aikens*, 2006 WL 59408, at *4.

Maybe the *Aikens* court was trying to come close to the model language "no credit file," but at least that language conveys the message that the consumer had no credit history on which a lender could base its decision. This attempt at brevity simply underscores the challenge that lenders face in being succinct in their rejection notices without compromising quality and precision. Some lenders strive to give the consumer as little information as possible, hoping that the consumer will draw his own inferences. Nowhere was this more evident than in *Aikens*, where the reference to "credit file" was short and imprecise.[212] Perhaps lenders have been led astray by congressional assurance that they do not have to give long, personal statements of reasons for their decisions, and that it is sufficient instead to provide a short checklist that reasonably explains such reasons.[213]

The challenge lies in meeting the "reasonable explanation" criterion.[214] In some ways, the search for such reasonableness does not become any easier when a lender knows that it can opt for the checklist approach.[215] A lender's use of that mechanism tends to trivialize matters instead of encouraging a lender to reveal the true rationale for its rejection. It is not clear why a creditor would want to settle for a brief phrase taken from a checklist when that phrase leaves doubts in the consumer's mind about the reasons for the creditor's decision. The most that can be said about the phrase "credit file" is that it is a respectable generality that leaves a slight clue that the lender based its decision on something in the consumer's file. It is true that in *Aikens* the reference to "excessive credit obligations"

---

212. The lender advised the consumer that it based its denial of credit on the consumer's "excessive credit obligations and credit file." *Id.* at *3.

213. *See* S. REP. NO. 94-589, at 8.

214. *Compare* O'Dowd v. S. Cent. Bell, 729 F.2d 347, 352 (5th Cir. 1984) (finding that company's threat to cut off consumer's telephone service due to past payment record of deposit not made by certain date provides specific reason for adverse action), *with* Fischl v. Gen. Motors Acceptance Corp. 708 F.2d 143, 147 (5th Cir. 1983) (finding the language "credit references are insufficient" misleading and vague, and therefore not fulfilling the requirement for a specific reason for adverse action).

215. The Board explains, however, that "[i]f the reasons listed on the [sample] forms are not the factors actually used, a creditor will not satisfy the notice requirement by simply checking the closest identifiable factor listed." 12 C.F.R. pt. 202 app. C-3 (2008).

overshadowed the reference to "credit file" and so no damage was done, but the court may have left the impression that the "credit file" designation could stand on its own merits in fulfillment of the specific reasons for the lender's denial.[216] It would have been misleading for the lender to say "no credit file," but merely dropping the "no" did not say much about the consumer's situation.[217] Nevertheless, even with that modification, there was still room for improvement. The simple reference to "credit file" really does not identify the problem with the applicant's file, and the notice to the applicant does not achieve the desired specificity stipulated in the regulation. On the other hand, if the applicant does not have a credit file at all, a creditor may be reluctant to extend credit because there is nothing there on which a creditor can base its decision.

B. The Problem of Vagueness

It is understandable that a creditor should not have to give its statement of reasons to an applicant in a detailed personal letter,[218] but a creditor should not go to the other extreme in making a general reference to an applicant's file that does not leave a single clue about the deficiency in the applicant's record. This is not to say that an applicant must find the creditor's notice "educational" or "helpful" for the notice to pass muster,[219] but the notion that the notice need only meet the test of general transparency runs counter to the proposition that the creditor must identify the specific reasons for its adverse decision.[220] A creditor compromises specificity when its statement of

---

216. It is not clear that the consumer's challenge of the phrase "credit file" was based on the consumer's interest in having the creditor use the sample form language, "no credit file." That would have been misleading, because the consumer did have a credit file. *See Aikens*, 2006 WL 59408, at *4. But the creditor's modification of the sample language made the message vague and meaningless. This part of the notice provided a good example of imprecise language.

217. *Id.*

218. *See* Anderson v. Capital One Bank, 224 F.R.D 444, 447 (W.D. Wis. 2004); *O'Dowd*, 729 F.2d at 352; S. REP. NO. 94-589, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 410.

219. *See Aikens*, 2006 WL 59408, at *5.

220. The court in *Pettineo v. Harleysville National Bank & Trust Co.* approved this "general transparency" approach. No.Civ.A 05-4138, 2006 WL 241243, at *3 (E.D. Pa. Jan. 31, 2006). One wonders whether the court went to the other extreme

reasons includes not only grounds that apply to an applicant, but others that do not.[221] Allowing a creditor this leeway avoids the legislative purpose of requiring a creditor to explain its decision, for the obligation to do so discourages a creditor from engaging in discriminatory practices.[222] It is indeed a reasonable objective to save creditors from long, detailed statements, but certainly not at the expense of clarity and precision. Furthermore, there is no excuse for a creditor to confuse an applicant with grounds that are not relevant to his situation.

In many cases it is a question of how vague a creditor can be in giving its reasons for declining credit. In *Stoyanovich v. Fine Art Capital*,[223] the creditor based its decision on "credit-related information obtained from sources other than consumer reporting agencies."[224] The creditor did not give the applicant any specific reason for the denial, and the court found that the creditor did not meet the statutory mandate.[225] The only information the applicant gleaned from the creditor's message was that "a consumer reporting agency was not the *source* of the 'credit-related information' that [the creditor] relied upon" for its decision.[226] There was no way that the applicant could rely on the creditor's statement in order to ascertain the weaknesses in his record and take the necessary remedial measures

---

in trying to avoid the requirement of a creditor's detailed statement. *See* CREDIT DISCRIMINATION, *supra* note 210, § 10.5.4.2.1.

221. If a creditor uses the Board's sample form, it should adapt the form to meet the demands of a particular case. A creditor cannot escape liability by merely checking off factors that are not relevant to the denial. *See* 12 C.F.R. pt. 202 app. C-3 (2009).

222. *See* S. REP. NO. 94-589, at 8. It is to be noted, however, that the adverse notice requirements apply to all applicants, and not only to applicants alleging discrimination. *See* Williams v. MBNA Am. Bank, N.A., 538 F. Supp. 2d 1015, 1019 (E.D. Mich. 2008); Diaz v. Paragon Motors of Woodside, Inc., 424 F. Supp. 2d 519, 532 n.22 (E.D.N.Y. 2006); Costa v. Mauro Chevrolet, Inc., 390 F. Supp. 2d 720, 728 (N.D. Ill. 2005).

223. Stoyanovich v. Fine Art Capital L.L.C., No. 06 Civ. 13158, 2007 WL 2363656 (S.D.N.Y. Aug. 17, 2007).

224. *Id.* at *6.

225. *Id.*

226. *Id.*

to improve it.[227] The creditor narrowed the sources of information for the applicant's benefit, but in the final analysis, the applicant still did not know why the creditor had denied him credit.

A creditor also fails the statutory test if it merely lists only one factor, when in fact relying on several in reaching its decision.[228] The creditor's objective should be to give the applicant a complete picture of the situation, covering not only the creditor's perspective, but also the grounds upon which that perspective is based. If the creditor omits any of the reasons underlying its decision, the consumer will hardly be able to correct any deficiencies in his record, and the creditor will be at liberty to avoid telling the whole story. While it is true that a creditor does not have to write an essay detailing the reasons for refusing credit to the consumer, at least one court has gone to the other extreme of requiring only transparency in the notice of adverse action.[229] The court in *Pettineo v. Harleysville National Bank and Trust Company*[230] was satisfied that the ECOA and Regulation B did not require that "the [notification letter] be narrowly tailored to fit the specific instance of a denied applicant."[231] The creditor's rejection letter indicated one basis for the creditor's action as "[g]arnishment, attachment, foreclosure, repossession, collection action or judgment."[232] The only problem was that the plaintiff was never involved in a garnishment, attachment, foreclosure, repossession, or judgment.[233] Among all the possibilities mentioned, only one ground was relevant to the consumer's situation.

---

227. *See id.* The consumer in *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983), had a similar experience with the phrase "credit references are insufficient." *Fischl*, 708 F.2d at 145. In both *Stoyanovich* and *Fischl*, the consumer was left in a quandary about the real state of affairs.

228. Regulation B requires that "[t]he statement of reasons for adverse action . . . must be specific and indicate the principal reason(s) for the adverse action." 12 C.F.R. § 202.9(b)(2) (2008). The Official Staff Commentary notes, however, that disclosing more than four reasons is not likely to help the applicant. 12 C.F.R. pt. 202 supp. 1, cmt. 9(b)(2) (2009).

229. *See* Pettineo v. Harleysville Nat'l Bank & Trust Co., No. Civ.A. 05-4138, 2006 WL 241243, at *3 (E.D. Pa. Jan 31, 2006).

230. 2006 WL 241243.

231. *Id.* at *3.

232. *Id.* at *1.

233. *Id.*

The court was too lenient in allowing the lender to list the possibilities for the lender's rejection; it was not bothered by the lender's lack of focus on the consumer's application.[234] It is not asking too much for a lender to "describe the factors actually considered or scored by a creditor."[235] If the lender presents a list of real and unreal reasons, it leaves the consumer in a quandary about the real state of affairs and defeats the purpose of the notice requirement. This notion of general transparency does not allow a lender free rein to muddy the waters with information that is not relevant to the particular applicant.[236] If the lender wants to use a checklist approach with several possibilities, that is one thing, for then the lender can merely check off those that apply to the application under consideration. But it is quite another to place all the possibilities in narrative form, merely hoping that the disjunctive "or" will solve the problem of ambiguity and confusion.

Despite its best efforts, a creditor will sometimes fall short of a consumer's expectations. In *Williams v. MBNA America Bank*,[237] the consumer was not satisfied when the creditor informed her that she had "sufficient balances on [her] revolving line of credit," and that she had "sufficient credit available considering [her] income."[238] The consumer was a student with no income of her own, and the creditor was legitimately concerned about her ability to assume new debt. The creditor's reasons for denying the consumer's application seemed legitimate enough, but the consumer thought them to be "incoherent" and "illogical."[239] The applicant must have been frustrated by the creditor's negative message, for she viewed it as falling short of the standard of clarity and conspicuousness required by the regulation.[240] The only problem was that Regulation B's reference to clarity and conspicuousness relates to the format of disclosures, and not to the

234. *Id.* at *3

235. Official Staff Commentary, 12 C.F.R. pt. 202 supp. 1, cmt. 9(b)(2)-2 (2009).

236. *See* CREDIT DISCRIMINATION, *supra* note 210, § 10.5.4.2.2.

237. Williams v. MBNA Am. Bank, N.A., 538 F. Supp. 2d 1015 (E.D. Mich. 2008).

238. *Id.* at 1017.

239. *Id.* at 1020.

240. *See id.* at 1021.

notice of a creditor's adverse action.[241] There was no evidence in *Williams* that the creditor had obscured any required information relating to the creditor's reason for declining the credit application.[242] The applicant's plea for a readily understandable explanation of the reasons behind the creditor's decision did not carry much weight because there was no ambiguity and no hidden message in the creditor's language.[243] Unlike the situation in *Fischl v. General Motors Acceptance Corp.*,[244] where the creditor missed the mark with its message that the applicant's credit references were insufficient,

---

241. Regulation B provides as follows with respect to the form of disclaimers: "A creditor that provides in writing any disclosures or information required by the regulation must 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." 12 C.F.R. § 202.4 (d) (2009). The Official Staff Commentary supports the idea that clarity and conspicuousness relate to the form of disclosures, rather than the content of the notice about any adverse action. It requires a creditor to make disclosures "in a reasonably understandable format that does not obscure the required information." The disclosures must be "legible, whether type-written, handwritten, or printed by computer." 12 C.F.R. pt. 202 supp.1, cmt. 4(d)-1 (2009).

242. The creditor's letter gave the reasons for rejection in the following language: "After careful review, we are unable to approve your request because you have sufficient balances on your revolving credit lines and you have sufficient credit available considering your income. Our credit decision was based in whole or in part on information obtained in a report from Experian . . . ." *Williams*, 538 F. Supp. 2d at 1017.

243. The Official Staff Commentary ties a creditor's disclosures to a "reasonably understandable format." 12 C.F.R. pt. 202 supp.1, cmt. 4(d)-1. In this respect Regulation B is similar to Regulation M (consumer leasing), which requires a creditor to make disclosures "clearly and conspicuously." 12 C.F.R. § 213.3(a) (2009). This does not mean that the disclosures are unclear unless the average consumer can understand them. For example, in *Jordan v. Toyota Motor Credit Corp.*, the Seventh Circuit held that a lessor's reference to the "constant-yield method" of calculating an early termination charge in a lease passed the clarity test. 236 F.3d 866, 868 (7th Cir. 2001); *see also* Applebaum v. Nissan Motor Acceptance Corp., 226 F.3d 214, 220 (3d Cir. 2000) (holding that lease's reference to "constant-yield method" satisfies Regulation M even if the average consumer does not understand the term). Nevertheless, when the Federal Trade Commission was agitating in its 2005 annual report for an amendment to the Fair Debt Collection Practices Act that would add clarity to section 809(a), it suggested that "clear and conspicuous" should be defined as "'readily noticeable, readable, and comprehensible to the ordinary consumer.'" 2006 FTC ANNUAL REP.: FAIR DEBT COLLECTION PRACTICES ACT 14.

244. Fischl v. GMAC, 708 F.2d 143 (5th Cir. 1983).

there was no doubt here about the specific reason for the creditor's action. The applicant might have thought that he needed more references or that he had to improve his quality if he hoped to be successful the next time around. In *Williams*, however, the message was clear; the applicant already had sufficient credit and more of it would only get her into trouble.[245]

Sometimes a consumer may be unhappy about a creditor's stated reasons for the adverse action taken because he believes that they are not true. In *Para v. United Carolina Bank*,[246] the consumer alleged that the creditor denied her application because she was an unmarried female,[247] but the notice of denial indicated that she lacked an established earnings record and had inadequate capital.[248] There could hardly be any argument here about specificity, and the court did not see any violation on that ground when the creditor gave its reasons for denying the consumer's application.[249] There was no allegation in *Para* that the creditor had listed only one or two factors from among several that might have contributed to the decision.[250] The consumer was actually asserting a claim of discrimination, and the court treated any disagreement about the true reasons for the denial as relating to that claim, rather than to the adequacy of the denial notice.[251] It meant, therefore, that even if the creditor had hidden its discrimination with plausible phraseology, it was on safe ground because "discriminatory animus is clearly not a specific reason a lender might be expected to include an ECOA notice."[252]

It is open to question, however, whether a creditor's statement of reasons for denial should be deemed adequate if they are not true because the creditor's motivation was to discriminate against the

245. *See Williams*, 538 F. Supp. 2d at 1020.

246. Para v. United Carolina Bank, No. 7:97-CV-54-BR(1), 1998 U.S. Dist. LEXIS 16843 (E.D.N.C. Aug. 26, 1998).

247. *Id.* at *9.

248. *Id.* at *8.

249. *Id.* at *10.

250. The *Para* case was not like *Caroll v. Exxon Co., U.S.A.* where the defendant failed to meet statutory requirements by listing only one of at least five factors when it denied the consumer's application for credit. *See* Carroll v. Exxon Co., U.S.A., 434 F. Supp. 557, 562 (E.D. La. 1977).

251. *See Para*, 1998 U.S. Dist. Lexis 16843, at *21-*22.

252. *Id.* at *9.

consumer. In *Fischl*, the creditor did not escape liability with its perfunctory reliance on the phrase "credit references are insufficient," when the real reasons for the adverse action were related to the consumer's brief credit history and the large amount of the loan.[253] There was little doubt that the creditor had other reasons for denying credit other than those stated in the notice of adverse action.[254] But if the creditor's notice must be regarded as unacceptable under these circumstances because the creditor could just as easily give the real reasons for its action, then the creditor ought not to be able to avoid liability simply because the real reason would bear some stigma on account of its discriminatory component.[255] It is true that a creditor would not be expected to reveal its discriminatory intent in assessing credit applications, but on the other hand, there is no good reason for giving a creditor an advantage when the real reason for rejecting the consumer will put the creditor in a bad light.[256] The statute should provide an incentive for the creditor to do the right thing, and the notice provision is not a mechanism that is intended to accommodate the creditor's unlawful conduct.

VI. NOTICE OF ADVERSE ACTION

A. *The Nature of the Obligation*

A creditor is the one who must take adverse action for it to have an obligation to give notice to the consumer.[257] When a lender makes a negative decision about a consumer's application, there is usually no

---

253. The court in *Fischl* recognized that "[g]iven that a combination of factors contributed to GMAC's adverse credit determination, the reason articulated was misleading, or at best excessively vague." 708 F.2d 143, 148 (5th Cir. 1983).

254. The *Fischl* court believed that the term "credit references are insufficient" gave some indication of a qualitative deficiency in the consumer's credit standing. *See id.* at 147. The real reasons for rejection were the consumer's brief credit history and the excessive loan amount involved in the transaction.

255. *See* CREDIT DISCRIMINATION, *supra* note 210, § 10.5.4.2.2.

256. *See id.* n.94.

257. With respect to credit applications, the term "adverse action" means "[a] refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered." 12 C.F.R. § 202.2(c)(1)(i) (2009).

controversy about the notification requirement in that context.[258] On the other hand, when someone merely refers a consumer to a lender, he does not thereby become a creditor, and thus will not be obligated to give notice about any adverse action.[259] Nevertheless, the case is not that clear-cut when an automobile dealer does more than merely referring a consumer, but stops short of making the final decision about the loan. A question may arise in this context about whether the dealer has reached the threshold of participating in the credit decision, and thus should be recognized for all intents and purposes as a creditor that is subject to the notice requirements relating to adverse action.

The dealer in *Treadway v. Gateway Chevrolet Oldsmobile, Inc.*[260] thought that it had fallen short of the participation benchmark when it decided not to forward its customer's credit application to any lender after reviewing the customer's credit report. If Gateway Chevrolet was right in excluding itself from the definition of "creditor," it meant that it did not have to give Treadway any notice of adverse action, including its decision not to submit Treadway's application to lenders.

The Seventh Circuit viewed the dealer's decision to hold back the credit application not merely as a participatory action, but as a decision about whether to extend credit.[261] The court looked at the dealer's restructuring of the loan terms to meet the lender's expectations.[262] It was not at all unusual for the dealer to insist on a bigger down payment or a cosigner in order to make the customer's application more attractive.[263] Furthermore, the dealer frequently set a higher loan interest rate than the lender required and then split the

---

258. It is the creditor that must give notice of adverse action. *See* 12 C.F.R. §§ 202.21, 202.9(a)(1),(2) (2009).

259. Such a person is merely an arranger and would not therefore be a creditor for the purpose of being obligated to give notice of adverse action. *See* Official Staff Commentary, 12 C.F.R. pt. 202 supp. 1, cmt. 202.2(l)-2 (2009). Nevertheless, an arranger is still liable for violations of § 202.4(a) prohibiting discrimination and of § 202.4(b) prohibiting the discouragement of applications on a prohibited basis. *See id.*

260. Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971 (7th Cir. 2004).

261. *Id.* at 980.

262. *See id.*

263. The dealer might also reduce the car's price to provide a more attractive loan-to-value ratio. *Id.*

difference with the lender.[264] The court did not have to rely only on the dealer's decision not to send the consumer's application to any lender; the other cumulative factors surely indicated the level of the dealer's involvement in the credit decision. The dealer's failure to forward the application to any lender deprived all lenders of the opportunity to make a decision on the merits, and the dealer's inaction therefore prevailed on the basis of the applicant's unsatisfactory credit rating.[265]

It is the dealer's regular participation in the credit decision, including setting the terms of the credit, which persuades many courts to recognize a dealer as a creditor. In *Padin v. Oyster Point Dodge*,[266] the dealer did not demand a higher down payment from the applicant, suggest that the applicant produce a cosigner, nor negotiate with the applicant for a higher interest rate.[267] Nevertheless, the dealer stood to gain when the lender added for the dealer's benefit an additional 2% interest to the rate that the lender was prepared to accept for the loan.[268] This aspect of the transaction mirrored that already recognized in *Treadway*.[269] It was an example of a dealer's participation in setting the terms of the loan that affected the consumer by resulting in an increased rate. One can only surmise what the result would have been if the dealer had not sought that advantage. Nevertheless, its attempt

264. This was as the "reserve." *Id.*

265. The dealer could not avoid being categorized as a creditor just because the consumer never submitted her application to an actual lender. *See id.* at 981. But Regulation B merely requires the applicant to request credit from a "creditor" as defined under the ECOA, and the dealer was such a creditor in this case. *See* 12 C.F.R. § 202.2(l) (2009).

266. Padin v. Oyster Point Dodge, 397 F. Supp. 2d 712 (E.D. Va. 2005).

267. *Id.* at 719.

268. *See id.*

269. *See Treadway*, 362 F.3d at 980. In both *Treadway* and *Padin* the dealer participated in setting the interest rate in order to benefit from the transaction with the lender. In other words, the dealer participated in setting the terms of credit. *See id.; Padin,* 397 F. Supp. 2d at 719. This must be contrasted with the situation in *McWhorter v. Elsea, Inc.*, No. 2:00-CV-473, 2007 U.S. Dist. LEXIS 26914, at *63 (S.D. Ohio Apr. 11, 2007), where the defendant was not a participating creditor because it did not benefit from a reserve and did not coordinate with a lender in structuring the loan. The defendant had merely inquired of Bank One whether the latter would purchase the installment sale contract and on what terms if defendant made a loan to the consumer. *Id.* at *63-*64.

to do so only managed to accord it a designation as a creditor, which carried with it attendant responsibilities for informing the applicant about the ensuing adverse action. In this scenario, the dealer seeks the best of both worlds. It wants to enjoy the advantages of having a loan funded without the corresponding duty to fulfill the notice requirements if the loan application fails.

Occasionally, a court will recognize a dealer as a creditor, but will find nevertheless that the dealer has taken no adverse action against an applicant. In *Barnette v. Brook Road*,[270] the court recognized the dealer as a creditor, but refused to lay the blame for adverse action at the dealer's doorstep because the dealer would not have profited directly from the financing part of the transaction.[271] The *Barnette* court recognized that the dealer "did not deny credit, refuse to grant credit on substantially the terms requested, or change the terms set forth in the [contract]."[272] It is true that in *Barnette* the dealer did not take an action like that in *Padin*, when the dealer raised the interest rate set by the lender in order to profit from the "reserve."[273] Nevertheless, the dealer in *Barnette* seemed to be involved in setting the financial terms for each transaction, and as a matter of fact, those terms were subject to the dealer's approval.[274] The dealer had the right to cancel any transaction if it found the financing terms unacceptable.[275] It was the dealer that informed the consumer about the need for a cosigner and convinced one lender to accept a lower down payment from the consumer.[276] The *Barnette* court seemed content that the dealer did not directly profit, aside from the sale of the car, from the consumer's financing arrangement with the lender.[277]

---

270. Barnette v. Brook Road, 457 F. Supp. 2d 647 (E.D. Va. 2006).

271. *See id.* at 656.

272. *Id.*

273. *Compare Padin,* 397 F. Supp. 2d at 719 (finding adverse action when the dealer raised the interest rate above that set by the lender in order to benefit from the "reserve"), *with Barnette*, 457 F. Supp. 2d at 656 (finding that the dealer did not take any adverse action when it circulated application to lenders that later denied it, because dealer would not have directly profited from transaction other than through the sale of car to consumer).

274. *Barnette*, 457 F. Supp. 2d at 655.

275. *Id.*

276. *Id.*

277. *See id.* at 656.

The dealer did not seek an increase in the interest rate in order to enhance its yield.[278]

But the question remains whether a dealer must be poised to receive something additional from the transaction for it to have an obligation to give notice to the consumer if the application fails. The court in *Bayard v. Behlmann Automotive Services, Inc.*[279] certainly did not think so, and with good reason. The dealer there went through the usual ritual of assisting the consumer with the credit application, obtaining the credit report, and then forwarding both to the lender.[280] When the lender denied the application, the dealer took up the challenge to obtain credit for the consumer and convinced the lender that it should grant the credit at a rate of 10.9%, rather than the anticipated 3.9% that was available to qualified buyers.[281]

The consumer did not receive the news of the 10.9% loan approval with good humor, for not only did he reject that offer, but he wanted a written statement of the reasons for not getting a loan at 3.9%.[282] The dealer never provided that statement; instead he called the consumer with the mixed news of the denial at 3.9%, but approval at 10.9%.[283] There was no benefit to the dealer beyond that arising directly from the sale of the car, but nevertheless the court recognized this transaction as more than a mere referral by the dealer to the lender.[284] It was the dealer's intervention that produced results,

---

278. In *Padin*, the dealer "became a 'participating creditor' required to give notice to the consumer of any adverse credit decision by virtue of a higher interest rate being charged than would otherwise have been required by the lender." 397 F. Supp. 2d at 719. In *Barnette* the dealer did not participate in changing the terms of the loan for its own advantage. 457 F. Supp. 2d at 656.

279. Bayard v. Behlmann Auto. Servs., Inc., 292 F. Supp. 2d 1181 (E.D. Mo. 2003).

280. *See id.* at 1184.

281. *See id.*

282. The consumer believed that the dealer and the lender (GMAC) had violated the statute by not giving him written notice of adverse action because he did not get the 3.9% rate. *See id.*

283. *Id.*

284. *Id.* at 1187. The regulation applicable at the time of the *Bayard* decision defined a creditor for purposes of the adverse notification requirement as "a person who in the ordinary course of business, regularly participates in the decision of whether or not to extend credit." 12 C.F.R. § 202.2(l) (2002). In 2003, the language was revised to define "creditor" as "a person who, in the ordinary course of

although at the disappointing rate of 10.9%.[285] The "more than a referral" in this case resulted in the dealer's participation in the decision about credit. The dealer must have thought that it could avoid liability on the ground that the decision on the 3.9% rate was not an adverse action because the application did not specify such a rate, but rather sought approval at "the lowest rate available."[286] It was to no avail, for the court concluded that all parties understood that the consumer was applying for the 3.9% rate.[287] Had the court interpreted "the lowest rate available" to mean the 10.9% rate, then of course there would have been no adverse action because the lender would not have refused to grant credit on the consumer's terms. The 3.9% rate was the lowest rate available, but it was not available to the consumer because he did not qualify.

B. The Effect of a Counteroffer

Sometimes a creditor makes a counteroffer to the consumer that is not regarded as an adverse action. This is so because Regulation B recognizes adverse action as 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."[288] It is not always easy to ascertain whether a counteroffer is in play, or whether the creditor has denied credit and the parties have followed up with a new transaction. If there is first a denial, a subsequent transaction would not be regarded as a counteroffer, and the creditor must give written notice of

---

business, regularly participates in a credit decision, including setting the terms of the credit." 68 Fed. Reg. 13144, 13155, 13162 (Mar. 18, 2003). Nevertheless, the *Bayard* court made the point that under either definition, the dealer was definitely a creditor because it did not "merely accept and refer credit applications." 292 F. Supp. 2d at 1187.

285. The court observed that "GMAC agreed to finance Bayard's purchase at an APR of 10.9%, and . . . [the dealer] called Bayard and told him that he had been denied credit at 3.9 % but that GMAC would extend him credit at 10.9%." *Bayard*, 292 F. Supp. 2d at 1184.

286. *Id.* at 1187.

287. *Id.*

288. 12 C.F.R. § 202.2(c)(1)(i) (2009).

an adverse action within thirty days after receiving a completed application.[289]

If the creditor makes a counteroffer that is not an adverse action, courts have differed not only on the timing of the notice concerning the counteroffer, but also on the question whether the notice must be in writing. In *Newton v. United Companies Financial Corp.*,[290] the lender extended credit to the consumers in higher amounts than requested in the applications, but did not give the consumers any notice of a counteroffer as required.[291] The lender was confident of its compliance with Regulation B because the loans had closed within thirty days of approval in the new amounts.[292] It was significant that the consumers never filled out an application for credit, but the lender filled out a written application for each consumer after an initial request for credit by the applicant or his broker.[293] Thus, at closing the consumer saw for the first time the application that the lender had created for him, reflecting loan amounts that the consumer knew nothing about.[294]

The court was persuaded that the lender should have given written notice of its counteroffer, rejecting the proposition that the loan documents themselves gave implicit notice at the closing of the terms

289. This situation will normally arise in spot delivery transactions where a dealer and a consumer will agree on loan terms; the consumer takes possession of the automobile that is the subject of the transaction, but the consumer is then offered different terms because the lender rejects the original arrangement. The second transaction would not be a counteroffer, but instead should be treated as a denial of credit in the first instance that requires notice of an adverse action. *See* Miller v. River Oaks Lincoln Mercury, Inc., 2005 WL 2284268 (N.D. Ill. Sept. 19, 2005) (denying defendant's motion for summary judgment where dealer was successful in arranging financing but did not give notice of prior denials); CREDIT DISCRIMINATION, *supra* note 210, § 10.4.2; *Cf.* Madrigal v. Kline Oldsmobile, Inc., 423 F.3d 819 (8th Cir. 2005) (finding no adverse action where dealer did not secure credit for consumer on the terms covered in the installment contract but the dealer continuously advised consumer about the steps taken to obtain financing for the consumer).

290. Newton v. United Cos. Fin. Corp., 24 F. Supp. 2d 444 (E.D. Pa. 1998)

291. *Id.* at 461.

292. The court observed that "the lender must notify the borrower of the making of a counteroffer, not just the ultimate approval or denial of that counteroffer." *Id.* at 461-62.

293. *See id.* at 462.

294. *See id.*

of the counteroffer.[295] Perhaps the court was persuaded about the writing requirement because the plaintiffs did not get any kind of notice from the lender.[296] After all, the system in place encouraged the lender to maintain constant contact with contractors and brokers, while keeping the consumers in the background. When the lender did not initially approve an application, it would put that application in a file pending resubmission by a loan agent with different terms.[297] At no time during that process was the consumer advised about any change in the application. The *Newton* court did not have to insist on a writing because the defendant did not give any kind of notice about a counteroffer. The borrowers had submitted completed applications and the defendant had an obligation to notify them of the making of the counteroffer within the thirty-day period, and to not have them confronted at the closing with loan documents containing different terms from those anticipated.[298]

Regulation B requires written notice only in connection with an adverse action and makes no mention of such a requirement for an approval of, or a counteroffer to, an application for credit.[299] Therefore, a court should always determine whether a lender has taken adverse action before imposing a writing requirement on the lender. The regulation excludes from the definition of "adverse action" any denial of credit that is accompanied by a counteroffer that the

---

295. *See id.*

296. There was evidence that the consumer did not get "any notice of the initial denial or the resubmission with different terms that was ultimately approved." *Id.* at 461.

297. The court explained the process this way:

> When her Request for Loan Approval was sent to Baton Rouge, the underwriting department turned down that Request by "pending" the Request (which apparently was a common practice in which the loan was not explicitly denied, but left in limbo until resubmitted differently), and it was only after the loan agent spoke with the underwriting department and resubmitted the loan with different proposed terms that it was approved.

Id.

298. Both the statute and the regulation require written notice if the lender takes adverse action. 15 U.S.C. § 1691(d)(2)(B) (2006); 12 C.F.R. § 202.9(a)(2) (2009). But the *Newton* court did not seem to think that the lender took adverse action. It spoke of the "violation of ECOA's notice of counteroffer requirement." *Newton,* 24 F. Supp. 2d at 461.

299. 12 C.F.R. § 202.9(a)(1)(i).

applicant accepts.[300] The appropriate inquiry is whether the lender has taken adverse action, and not merely whether it has denied credit. In refining the statutory definition of "adverse action," the regulation leaves room for the creditor and consumer to agree on new terms for a loan that the lender was unwilling to make in the first instance. If the applicant accepts the lender's counteroffer, there is no good reason to attach any adverse label to the transaction.[301] After all, the applicant may recognize the new arrangement as more advantageous to himself under the circumstances, and thus the rejection of the adverse characterization actually recognizes the true state of affairs. It is perhaps more realistic to regard the accepted counteroffer as providing a satisfactory result for an application that was destined to fail, but that succeeded instead on different terms.[302]

It was this approach that found favor with the court in *Diaz v. Paragon Motors of Woodside, Inc.*,[303] when the applicant argued that the dealer's decision to send his application to subprime lenders constituted an "adverse action requiring written notification to the applicant."[304] There was no hope of getting any financing from the prime lenders, so the dealer rescued the sale by approaching subprime lenders.[305] The applicant was fully informed about the new financing when he signed the retail installment contract.[306] As a matter of

300. *Id.* § 202.2 (c)(1)(i).

301. *See* Ricciardi v. Ameriquest Mortgage Co. 164 F. App'x 221 (3d Cir. 2006); Diaz v. Paragon Motors of Woodside, Inc., 424 F. Supp. 2d 519 (E.D.N.Y. 2006); Diaz v. Va. Hous. Dev. Auth., 117 F. Supp. 2d 500 (E.D. Va. 2000); *In re* United Cos. Fin. Corp., 277 B.R. 596 (Bankr. D. Del. 2002).

302. This is why Regulation B recognizes that there is no adverse action when "the creditor makes a counteroffer . . . and the applicant uses or expressly accepts the credit offered." 12 C.F.R. § 202.2(c)(1)(i). It is to be noted that it is not necessary for a lender to provide notice of a counteroffer before loan closing, as long as the notice is given within thirty days. *See* Soslau v. PHH Mortgage Corp. No. 06-1422, 2008 U.S. Dist LEXIS 55575, at *9 (E.D. Pa. July 18, 2008).

303. *Diaz v. Paragon*, 424 F. Supp. 2d 519.

304. *Id.* at 532.

305. The dealer's representative could not recall if he had submitted the consumer's application to primary lenders, but concluded that he would have sent it to subprime lenders only because of the consumer's "inferior credit score, a 2001 bankruptcy, and a $17,179 charge-off to Chase Manhattan Bank . . . that would immediately disqualify him for approval." *Id.* at 531 n.24.

306. *See id.* at 533.

principle, the applicant could not be heard to complain about any adverse action when he dutifully accepted the counteroffer that ensued from the dealer's efforts. The applicant was probably relieved to get it in light of the anticipated negative reaction from a prime lender.[307]

C. Role of Consumer Credit Report

A consumer will certainly know that a lender took adverse action when it notifies him that his loan was not approved. When the lender bases its decision on information in the consumer's credit report, the FCRA requires the lender to give notice to the consumer about the adverse action, and provide him with other information, including details about the right to obtain a free copy of his credit report.[308] In the case of insurance, the definition of "adverse action" is not that clear-cut and in *Safeco Insurance Co. of America v. Burr,*[309] the Supreme Court had to determine whether a new applicant had experienced an "increase" in his insurance premium when the insurance company offered him a higher initial rate because of his credit report.[310]

The interesting thing about *Safeco* is that the consumers' claims were based on the initial rates the insurance company charged for new insurance policies.[311] As a result, the company's position was that it did not have to give the consumer an adverse action notice because there could be no increase in any insurance charge when there was no actual change in the premium.[312] Nevertheless, the Court was keen to recognize the statutory purpose in reaching the adverse effects of inaccurate credit reporting and, in this respect, it was necessary to take

---

307. The Official Staff Commentary advises that "[n]otifiction of approval may be express or by implication." 12 C.F.R. pt. 202, supp. 1, cmt. 9(a)(1)-2 (2008). There is no such provision covering either adverse action or a counteroffer.

308. The Fair Credit Reporting Act (FCRA) imposes this notice obligation on any person who takes "adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a) (2006).

309. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007).

310. *Id.* at 60-61.

311. *See id.*

312. The company said in effect that there could be no increase due to the absence of a prior dealing between the parties. *See id.*

stock not only of consumers with prior dealings, but also of consumers who were being disadvantaged on their initial encounter with a company.[313] A newly insured consumer who pays a higher premium because of an erroneous report is in the same position as a repeat customer whose renewal premium suffers the same fate.[314] In both cases, any action that is adverse to the consumer's interest and that is based on a consumer report should give rise to an adverse action notice that gives a consumer the information he needs to contest the company's decision.[315] Although an increase may be more easily recognizable when there is a renewal, an initial charge may be more burdensome when a company issues a policy for a single, long-term premium that may escape the consumer's notice, and the consumer does not get the chance to revisit the transaction at any time in the near future.[316]

The adverse action must be based on the consumer report.[317] This means that "consideration of the report must be a necessary condition for the increased rate."[318] It is not enough for the company merely to consult the credit report; the report must have some identifiable effect

---

313. Congress found that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1). In this connection, the legislative history does not indicate any congressional intent to limit a remedy to consumers who had prior dealings with the user of a credit report. *See* S. REP. NO. 91-517, at 7 (1969) (stating that the user of a credit report that charges a higher rate for credit or insurance because of that report must so advise the consumer upon request); H.R. REP. NO. 103-486, at 33 (1994) ("[W]henever a consumer report is obtained for a permissible purpose . . . , any action taken based on that report that is adverse to the interests of the consumer triggers the adverse action notice requirements . . . .").

314. *See* Safeco, 551 U.S. at 62-63. The Court pointed out that notice about an initial rate may be even more important than notice about a renewal rate because "if . . . insurance is offered on the basis of a single, long-term guaranteed rate, a consumer who is not given notice during the initial application process may never have an opportunity to learn of any adverse treatment." *Id.* at 62 n.12.

315. The term "adverse action" includes "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i).

316. *See Safeco*, 551 U.S. at 62 n.12.

317. 15 U.S.C. § 1681m(a).

318. *Safeco*, 551 U.S. at 63.

on the company's decision to assess a higher premium rate.[319] If the credit report made no difference to the company's decision, then it is not in keeping with the statutory purpose that the consumer should have any right to a notice if the company has not relied on the report.[320] The rationale for a notice of adverse action is to provide a mechanism for a consumer to raise questions about the company's action if the consumer believes that the company has treated him less favorably on the basis of his credit report.

It remains then to determine whether an initial rate is disadvantageous to the consumer, and for that there must be a basis of comparison. In this context, a consumer wants to know whether he would have received a better rate if the company did not take his credit report into account in setting its premium. It must be acknowledged that the consumers in *Safeco* preferred the baseline for the company's decision to be the rate that they would have obtained if they had the best possible credit score,[321] but the Court was more concerned with the actual effect that the credit report had on the consumer's premium.[322] The Court found it more meaningful, therefore, to rely on the neutral score which the consumers would receive if the company did not consider the credit report, even though

319. *Id.* The Court provided the following example:

> For instance, if a consumer's driving record is so poor that no insurer would give him anything but the highest possible rate regardless of his credit report, whether or not an insurer happened to look at his credit report should have no bearing on whether the consumer must receive notice, since he has not been treated differently as a result of it.

Id. at 64 n.13.

320. The Court referred to the FCRA's history to emphasize the importance of the user's reliance on information in the consumer report. *See id.* at 63. The original version of § 1692 m(a) required an increase to occur "because of" information in the report. 15 U.S.C. § 1681m(a) (1976). The change to "based on," 15 U.S.C. § 1681m(a), only raises questions about congressional intent in this context, especially when § 1681m(b) employs the phrase "based on" in dealing with adverse action that is based on information from third parties other than consumer reporting agencies. The Court saw no problem with the variation in language and did not think that Congress meant it as a substantive alteration of the statute. *See Safeco*, 551 U.S. at 63.

321. *See id.* at 65.

322. *See id.*

it may prevent some first-time consumers who deserve better-than-neutral credit scores from getting an adverse action notice.[323]

VII. CONCLUSION

Congress has done its best to promote equal opportunities for borrowers and fairness in reporting the credit history of consumers. Both the ECOA and FCRA have laudable objectives,[324] and they work together to guarantee that lenders and credit reporting agencies live up to their responsibilities in the credit arena. Nevertheless, the details of the statutory and regulatory schemes inevitably pose challenges to lenders and credit reporting agencies alike, for lenders generally depend upon their agencies to report credit information accurately.[325] When there is a breakdown in communication between them, consumers suffer the consequences. This does not mean that every

---

323. *See id.* at 65-66.

324. Congress identified the purpose of the ECOA as follows:

> The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the bases of sex or marital status . . . . It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit available to all creditworthy customers without regard to sex or marital status.

Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1500 (1974) (amended 1976). Congress amended the ECOA in 1976 to cover discrimination based on "race, color, religion, national origin, sex or marital status, or age." Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251. With respect to the FCRA, Congress expressed the purpose this way:

> It is the purpose of [the Act] to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of [the Act].

15 U.S.C. § 1681(b) (2006).

325. It must be noted, however, that a consumer reporting agency's obligation is to follow "reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b) (2006). Therefore, a lender's dependence on the information that an agency provides does not necessarily lead to an agency's liability. *See* FAIR CREDIT REPORTING, *supra* note 35, § 4.4.1; 2 RALPH C. CLONTZ, JR., FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL § 11.04 [3] (rev'd ed. 2008).

adverse action by a creditor results from an inaccurate credit report, but there is ample opportunity for lenders to play an important role in ensuring that a consumer understands the reasons for a decision not to grant credit.

Regulation B requires a lender to give specific reasons for its adverse action on an application for credit.[326] Although the Board has provided some guidance on the kind of language that a creditor may use to categorize the reasons for its denial,[327] from time to time creditors have formulated their own rejection language. One cannot be sure whether they have done so because they are dissatisfied with the Board's handiwork, or whether the Board's formulation does not meet the standards of precision that would clearly identify the lender's reasons for declining an application.[328] Nevertheless, the Board should not be discouraged by the inventiveness of some lenders in crafting their own phrases. Instead, this should provide an incentive for the Board to compile as exhaustive a list as possible, with a view to helping lenders avoid the pitfalls of imprecision.[329] It is understandable that it may be impossible to cover every conceivable reason for a lender's adverse action, but in those few cases where the lender finds itself outside the mainstream because of unique circumstances, it will know that the reasons it gives must be no less specific than those identified in the Board's sample form. Nevertheless, it should have sufficient guidance from the Board's efforts to comply with the notice requirements.

The FCRA also provides some opportunity for reflection on the mechanism for allowing a consumer reporting agency to supply a prescreened list of consumer reports to lenders that intend to make a firm offer of credit to each consumer on the list. Many an argument

---

326. 12 C.F.R. § 202.9(b)(2) (2009).

327. 12 C.F.R pt. 202 app. C (2009).

328. *See, e.g.*, Aikens v. Nw. Dodge, Inc., No. 03C 7956, 2006 WL 59408, at *3 (N.D. Ill. Jan. 5, 2006), where the lender preferred to use the term "excessive credit obligations" instead of the language in the Board's sample form, "excessive obligations in relation to income."

329. The Federal Reserve Board recognizes that the sample forms may not be appropriate for all lenders and suggests that lenders should modify the checklist where appropriate. 12 C.F.R. pt. 202 app. C (2008). It then gives an example when a lender might have to use the terms "inadequate down payment" or "no deposit relationship with us" as the reason for taking adverse action. *Id.* These would be good candidates for inclusion on the list.

has been made that the so-called "firm offer of credit" should contain the material terms of the credit so that a consumer will have all the details at hand in order to decide whether to accept the offer. Although the courts have not seen the need for a creditor's disclosure of all material terms,[330] it is evident that the statutory term "firm offer of credit" continues to cause problems. The difficulty lies not with the courts, but rather with a definition that holds out more hope for the consumer than is really intended, and therefore what may be firm in statutory terms turns out lacking meaningful details. The drafters were rightly concerned with not allowing credit report users to have access to consumer reports simply to advertise their products.[331] This is why some courts were concerned about the value of the offer to the consumer.[332] Although the Seventh Circuit later explained that its ruling in *Cole v. U.S. Capital, Inc.* was limited to situations where there was both an offer of credit and an offer of merchandise,[333] this still did not remove the challenge of dealing with the firmness of an offer of credit. It is one thing to suggest that a creditor does not have to list all the material terms in its offer of credit, but it is quite another for a creditor to advertise that it is willing to lend money to consumers on a prescreened list when the offer is skimpy on information. The challenge here is for the statute to strike a happy medium, and not allow a creditor too much leeway to solicit customers without providing the contours of the credit or insurance contemplated. This focus would improve the benefit to consumers that ensues from prescreened solicitations.[334]

---

330. *See* Poehl v. Countrywide Home Loans, Inc., 528 F.3d 1093 (8th Cir. 2008); Murray v. New Cingular Wireless Serv., Inc., 523 F.3d 719 (7th Cir. 2008); Dixon v. Shamrock Fin. Corp., 522 F.3d 76 (1st Cir. 2008); Putkowski v. Irwin Home Equity Corp., 423 F. Supp. 2d 1053 (N.D. Cal. 2006); Soroka v. Homeowners Loans Corp., No. 8:05 CV 2029 T 17MAP, 2006 WL 4031347 (M.D. Fla. Jan. 12, 2006).

331. Congress was interested in balancing the privacy concerns of consumers about prescreening with the benefits accruing from a "firm offer of credit or insurance." *See* S. REP. NO. 103-109, at 13-14 (1993).

332. *See* Cole v. U.S. Capital, Inc., 389 F.3d 719 (7th Cir. 2004); Hyde v. RDA, Inc., 389 F. Supp. 2d 658 (D. Md. 2005)

333. *Murray*, 523 F.3d at 722.

334. One report has found that "prescreened solicitations are important in promoting competition and enhancing consumer welfare in the markets for credit and insurance." BOARD OF GOVERNORS OF THE FED. RESERVE SYSTEM, REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE 3 (2004).