

# Howard Howard

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**Steve Van Beek, Esq., NCCO, Attorney and Counselor**  
svb@h2law.com | (248) 723-0521

## Understanding FCRA Permissible Purposes in Obtaining Credit Reports

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**Disclaimer:** This presentation does not constitute legal advice or a legal opinion on any matter discussed. This presentation is for educational purposes only. If you have a specific legal question, please consult with an attorney of your own choice.

# Today's Presenter – Steven Van Beek

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Steve Van Beek is an attorney at Howard & Howard Attorneys PLLC where he concentrates his practice in the area of financial regulations. He has intimate knowledge of the operational issues facing financial institutions and the best practices they can follow to reduce compliance, strategic, and reputation risks. Prior to joining Howard & Howard, he served as the Vice President of Regulatory Compliance at the National Association of Federal Credit Unions (NAFCU).

He received his Bachelor's from Hope College and his J.D. from George Mason University School of Law and is a member of the American Bar Association.

# Overview

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- Key Definitions
- Permissible Purposes
- Cross-Selling
- Prescreen Offers
  - Required Disclosure & Opt-Out
- Negative Information Notice

# Fair Credit Reporting Act

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- Definition of Consumer Report – Section 603(d)(1)
  - “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under Section 604”

# Fair Credit Reporting Act

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- Definition of Consumer Report – Section 603(d)(1)
  - Includes “credit reports” from TransUnion, Equifax, Experian
    - “Nationwide CRA”
  - Includes reports from “nationwide specialty CRAs”
    - ChexSystems, TeleCheck Services, Early Warning Services, CoreLogic Teletrack
  - Includes credit scores
  - Excludes the institution’s own information regarding the consumer’s prior transactions or experience (no info provided by CRA)

[http://files.consumerfinance.gov/f/201604\\_cfpb\\_list-of-consumer-reporting-companies.pdf](http://files.consumerfinance.gov/f/201604_cfpb_list-of-consumer-reporting-companies.pdf)

# Fair Credit Reporting Act

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- Section 604 of Fair Credit Reporting Act
  - 15 U.S.C. 1681b
  - Except for prescreen offers, a **consumer reporting agency** may furnish a consumer report under the following circumstances and no other:
    - **Permissible Purposes** = the specific circumstances that are authorized

# Fair Credit Reporting Act

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## ■ **Permissible Purposes**

- General prohibition on other uses: “and no other”
- “Curiosity” is not a permissible purpose
- Do not need consumer’s permission when the institution has a permissible purpose
  - Employment purpose is an exception
- FCRA does not prohibit providing a copy of the report or score to consumer

# Fair Credit Reporting Act

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- Section 604(f) of Fair Credit Reporting Act
- **(f) Certain use or obtaining of information prohibited.**

A person shall not use or obtain a consumer report for any purpose unless

- (1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and
- (2) the purpose is certified in accordance with section 607 [§ 1681e] by a prospective user of the report through a general or specific certification.



# Fair Credit Reporting Act

- Section 619 of Fair Credit Reporting Act [15 U.S.C. § 1681q]
- **§ 619. Obtaining information under false pretenses**  
Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, United States Code, imprisoned for not more than 2 years, or both.

# Fair Credit Reporting Act

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- Except for prescreen offers, a **consumer reporting agency** may furnish a consumer report under the following circumstances and no other:
  1. In response to court order or a grand jury subpoena (not directly applicable)
    - Generally, administrative subpoenas, attorney-issued subpoenas and other similar attempts are not a permissible purpose
      - Needs to be signed by judge to be “order of a court”

# Fair Credit Reporting Act

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- Under the following circumstances and no other:
  2. In accordance with the written instructions of the consumer to whom it relates;
  
- Strongest permissible purpose:
  - Consumer gives authorization, in writing
  - *Example:* Consent to credit report pull to establish new account or apply for service

# Fair Credit Reporting Act

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- Written Instruction of Consumer
  - Must clearly authorize the issuance of a consumer report
  - “I authorize you to procure a consumer report on me”
    - Compare with: “I understand that, where appropriate, credit bureau reports may be obtained.”
  - The consumer’s authorization should be clear and direct
  - Under the E-SIGN Act, “written” includes obtaining a consumer’s consent electronically

# Fair Credit Reporting Act

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- Under the following circumstances and no other:
  3. To a person which it has reason to believe
    - A. Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer;
      - Loan application
      - Review existing open-end loan or account

# Fair Credit Reporting Act

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- Review existing open-end loan or account
  - Must have an existing loan or account with institution
  - Use of report must be to consider taking account with respect to the account
    - *Example:* Risk-based pricing of credit cards – does the borrower still qualify for the best APR?
    - *Example:* Should we increase the credit limit on the consumer's line of credit?
  - Not a permissible purpose for closed-end credit or for paid off or closed loans (no account to “review”)

# Fair Credit Reporting Act

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- Under the following circumstances and no other:
  3. To a person which it has reason to believe
    - B. Intends to use the information for employment purposes;
    - C. Intends to use the information in connection with the underwriting of insurance involving the consumer;
- For employment purposes, special requirements under 15 U.S.C. 1681b(b) apply
  - Employer must certify to CRA that it has disclosed information to the consumer and information will be used for lawful purpose
  - **Must obtain consumer's written authorization**

# Fair Credit Reporting Act

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- Under the following circumstances and no other:
  3. To a person which it has reason to believe
    - D. Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status;
    - E. Intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation;



# Fair Credit Reporting Act

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- Under the following circumstances and no other:
  3. To a person which it has reason to believe
    - F. Otherwise has a legitimate business need for the information
      - i. In connection with a business transaction that is initiated by the consumer; or
      - ii. To review an account to determine whether the consumer continues to meet the terms of the account
- “business transaction that is initiated by the consumer”
  - Primarily for personal, family or household purposes

# Fair Credit Reporting Act

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- Legitimate business need
  - Applying for a checking account with debit card and overdraft protection
  - Opening an investment or retirement account
- Not a legitimate business need
  - Litigation or threatened litigation (although other purposes may allow access to consumer report – such as suing to recover on a loan)
  - Auto dealer for “test drive”
    - There is no “transaction” initiated by the consumer yet
  - Consumer simply asks for information about loan rates

# Fair Credit Reporting Act

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- Review Purpose
  - Review existing accounts (such as savings or checking) to determine if accounts should be modified
    - Does the consumer still qualify for the terms of the account?
- “Review” does not include determining if consumer qualifies for other accounts or services
  - Must look to another permissible purpose
    - Written instructions of consumer
    - Business transaction initiated by consumer
    - Application for credit

# Fair Credit Reporting Act

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- Under the following circumstances and no other:
  3. To a person which it has reason to believe
    - F. Executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.
  4. State or local child support agency
  5. Agency setting initial or modified child support award
  6. FDIC or NCUA – to obtain reports in connection with their duties as conservator, receiver, or liquidating agent of failed institutions

# Fair Credit Reporting Act

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- Three Main Permissible Purposes for Transactions
  1. Written instructions
  2. In connection with a credit transaction (including review and collection on existing loans)
  3. Other legitimate business need:
    - Transaction initiated by the consumer
    - Review an account to determine if consumer still meets the terms
- Each credit pull must have a permissible purpose
- Review existing procedures

# Fair Credit Reporting Act

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## ■ Compliance Review

- When does our institution obtain consumer reports?
  - Credit report versus consumer report?
  - Soft pull vs. Hard pull; “Refresh” score
  - Beacon, ChexSystems, FICO, VantageScore
- What is disclosed to consumers?
  - Account application
  - Loan application
  - Written authorization?
- **Do we have a permissible purpose?**

# Cross-Selling

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- Can we use a consumer report pulled for a checking account to cross-sell a credit card?
  - **What was the permissible purpose?**
    - If it was to open the checking account, the permissible purpose is limited to that action
      - Transaction initiated by the consumer
        - Opening of new checking account
        - Consumer did not request or authorize the cross-sell of the credit card or other loans

# Cross-Selling

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- Federal Trade Commission Opinion
  - “Gowen Letter” – 1999
    - “Your questions raise the issue of whether a creditor in a **closed end credit transaction** may exploit consumer reports obtained for "review" purposes in order to market its products or services. In the circumstances you described, we believe the answer is "no."”



# Cross-Selling

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- No permissible purpose for cross-selling
  - “First, "review" is not a purpose for which a closed-end creditor would ordinarily need to obtain consumer reports on its customers.... The terms of a closed-end credit transaction are predetermined and generally may not be changed unilaterally by the creditor unless the contract expressly provides for such action (e.g., in the event of default). Therefore, the creditor is unlikely to have a reason to consider "whether to retain or modify current account terms" and, thus, would not have any routine need to procure consumer reports to "review" its accounts.”

# Cross-Selling

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- No permissible purpose for cross-selling
  - “Second, the credit bureau must, pursuant to Section 607(a), require the creditor to *“certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.”* (emphasis added). **Because Section 604(a) provides no authority for a creditor (or any party) to use a consumer report for marketing purposes,** a creditor would violate its certification by using an existing report in such a manner.”

<https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-gowen-04-29-99>

# Cross-Selling

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- No permissible purpose for cross-selling
  - Institution **cannot** use a consumer report obtained for an account or loan application for a second purpose
  - Similarly, institution **cannot** use a consumer report obtained for an “account review” for a second purpose
  - FCRA requires the institution to always be able to “point back to” the permissible purpose for that specific consumer report usage
  
- **Solution:** Obtain the consumer’s written authorization that specifically grants the ability to cross-sell

# Cross-Selling

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## ■ Written Instruction

- Look into adding to account and loan application documents or could be a stand-alone, separate authorization form
- Consumer gives written authorization for institution to use consumer report to cross-sell other financial products and services

By signing below, I authorize \_\_\_\_\_ to use my credit report for marketing purposes, including but not limited to loan pre-approvals, and in considering whether to offer other credit and services to me.

- Is the authorization ongoing? When does it end?
- Can the consumer revoke the authorization? If so, how?

# Prescreen Offers

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- Prescreen Offers
  - Section 604(c) allows the institution to prescreen consumers for “credit transactions that are not initiated by the consumer”
    - Prescreening is the consumer reporting agency determining which consumers meet an institution’s *predetermined criteria*
      - Excludes consumers who have opted out of prescreening and consumers under 21 (unless the consumer has opted in)

# Prescreen Offers

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- Prescreen Offers
  - Institution must provide a “firm offer of credit” to consumers meeting the criteria
    - **Firm Offer of Credit:** “any offer of credit...to a consumer that will be honored if the consumer is determined, based on information in a consumer report...to meet the specific criteria used to select the consumer for the offer...”
      - *Example:* All consumers with a 720 credit score will be offered a 9.99% APR credit card

# Prescreen Offers

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- Prescreen Process
  - The institution sends criteria to the consumer reporting agency
  - Consumers meeting that criteria are sent the prescreened offer
  - A consumer accepting the offer must receive the offer (as long as they still meet the criteria – the institution can verify this fact)
  - The institution cannot **add** new criteria or requirements (“postscreen”) when the consumer attempts to “accept” the firm offer
    - Cannot use a “Two-Step” process

# Prescreen Offers

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- Prescreen Disclosure and Opt-Outs
  - Regulation V – 12 CFR 1022.54
  - (c) *Prescreen opt-out notice*. Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, and that is provided to that person under section 604(c)(1)(B) of the FCRA (15 U.S.C. 1681b(c)(1)(B)), shall, with each written solicitation made to the consumer about the transaction, provide the consumer with the following statement, consisting of a **short portion and a long portion**, which shall be in the same language as the offer of credit or insurance:



# Prescreen Offers

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- Prescreen Disclosure and Opt-Outs
  - Regulation V – 12 CFR 1022.54
  - Short Notice (Appendix D to 1022):

**You can choose to stop receiving “prescreened” offers of credit from this and other companies by calling [toll-free number]. See PRESCREEN & OPT-OUT NOTICE on the other side for more information about prescreened offers.**

# Prescreen Offers

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- Prescreen Disclosure and Opt-Outs
  - Regulation V – 12 CFR 1022.54
  - Long Notice (Appendix D to 1022):

**PRESCREEN & OPT-OUT NOTICE:** This “prescreened” offer of credit is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria [including providing acceptable property as collateral]. If you do not want to received prescreened offers of credit from this or other companies, call the consumer reporting agencies toll-free, [toll-free number]; or write: [consumer reporting agency name and mailing address].

# Negative Information Notice

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- Fair Credit Reporting Act

- Section 623(a)(7)

- “(A) Notice to Consumer Required

- (i) *In general.* If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 603(p) furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.”

# Negative Information Notice

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- Appendix B to 12 CFR 1022 (Regulation V)

- **Model B-1**

- We may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.

- **Model B-2**

- We have told a credit bureau about a late payment, missed payment or other default on your account. This information may be reflected in your credit report.

# Key Takeaways

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- Which permissible purposes can we use?
- **Which permissible purpose are we using?**
- What disclosure are we giving to consumers?
- Are we obtaining a consumer's written authorization?
  - Does that written authorization specifically discuss our ability to obtain and use credit reports for cross-selling?
    - If not, how should we change our procedures going forward to ensure we have the required written authorization to cross-sell?
- If we are prescreening, are we making firm offers of credit?
- Confirm we are providing negative information notice

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## Thank you for participating!

**Steve Van Beek, Esq., NCCO**

**Attorney and Counselor**

[svb@h2law.com](mailto:svb@h2law.com) | (248) 723-0521

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