Creditor List Screening Practices: Certain Implications Under the Fair Credit Reporting Act and the Equal Credit Opportunity Act

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The direct mail or telephone solicitation of targeted individuals to accept offers of preapproved credit or to apply for credit is an increasingly prevalent practice today, particularly for retailers and credit card issuers.[1] The manner in which a creditor selects the individuals to receive its offers of or applications for credit is critical in identifying potential customers likely to be approved for extensions of credit under the creditor's credit criteria. Creditors commonly employ the practice of list screening, otherwise known as prescreening,[2] to determine their target audience. List screening typically begins with a creditor renting a list or lists of names from various sources (e.g., magazine subscription lists). Potential customers who represent a suspected credit risk are then deleted from these lists by consumer reporting agencies, which apply various criteria specified by the creditor against information in the consumer reporting agency's files.[3] Alternatively, lists of prospective customers are developed from names on file at the consumer reporting agency and are again screened using the creditor's criteria to delete those persons suspected of being less creditworthy.[4] List screening is regulated under federal law, primarily by the Fair Credit Reporting Act.[5] Further, although not currently directly applicable to list screening,

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1. Smith, *Revision of the Board's Equal Credit Regulation: An Overview,* 71 Fed. Res. Bull. 913, 922 (1985). *See also* Fed. Res. Bd. Staff Mem. 4, 5 (Sept. 29, 1978).

2. *Id.* Screening methods other than list screening, such as extending credit only to depositors of a bank, local residents, or applicants who meet minimum income requirements, may be employed to target potential customers. Hsia, *Credit Scoring and the Equal Credit Opportunity Act,* 30 Hastings L.J. 371, 438 (1978). Many points raised in this article would also apply to these more informal methods of screening.

3. *See* Smith, *supra* note 1, at 922.

4. *See* Fed. Res. Bd. Staff Mem. 2 (Aug. 24, 1984).

5. 15 U.S.C. §§ 1681–1681t (1982 & Supp. V 1987).

the principles of the Equal Credit Opportunity Act[6] should be considered by creditors with respect to their list screening practices.

FAIR CREDIT REPORTING ACT

SUMMARY OF THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act ("FCRA")[7] regulates the providing of "consumer reports"[8] by "consumer reporting agencies."[9] A consumer reporting agency may furnish a consumer report only for the permissible purposes specified in the FCRA.[10] Under the FCRA, a consumer reporting agency also must comply with requirements regarding, inter alia, the accuracy of information reported on consumers,[11] the deletion of obsolete information from consumer reports,[12] the disclosure to consumers of information in their files,[13] and procedures in cases of disputed accuracy of information in consumers' files.[14] A creditor may not willfully obtain a consumer report from a consumer reporting agency under false pretenses.[15] Whenever a creditor denies consumer credit based wholly or partly upon information obtained either in a consumer report furnished by a consumer reporting agency or from any other person, it must disclose certain information about its sources to the consumer.[16]

6. *Id.* §§ 1691–1691f (1982 & Supp. V 1987).
7. *Id.* §§ 1681–1681t.
8. A "consumer report" is

> 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 . . . credit . . . . The term does not include . . . any report containing information solely as to transactions or experiences between the consumer and the person making the report . . . .

Id. § 1681a(d) (1982).

9. The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Id. § 1681a(f).

10. Permissible purposes for furnishing a consumer report include a court order; a consumer's written instructions; or the creditor's intention 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 the consumer. *Id.* §§ 1681b(1), 1681b(2), 1681b(3)(A).
11. *Id.* § 1681e(b).
12. *Id.* § 1681c.
13. *Id.* § 1681g.
14. *Id.* § 1681i.
15. *Id.* § 1681q.
16. *Id.* § 1681m.

Both consumer reporting agencies and creditors that willfully[17] or negligently[18] fail to comply with the FCRA face civil liability. Creditors that willfully obtain consumer reports from a consumer reporting agency under false pretenses are subject to criminal liability as well.[19] Moreover, the Federal Trade Commission ("FTC") and other federal agencies may enforce compliance with the FCRA through judicial or administrative proceedings.[20]

The FCRA preempts state fair credit reporting laws only to the extent that such laws are inconsistent with the FCRA.[21] Consequently, states may impose more stringent requirements upon consumer reporting agencies and users of consumer reports. However, the effect of such state laws on list screening practices is beyond the scope of this article.

APPLICATION OF THE FCRA TO LIST SCREENING

Presenting a creditor with a list of names that has been screened by a consumer reporting agency constitutes the furnishing of a consumer report.[22] In 1973, the FTC construed the FCRA to permit the practice of list screening by a consumer reporting agency subject to certain restrictions ("Prescreening Interpretation").[23] The FTC initially found that a creditor does not deny credit to anyone whose name was deleted from the initial list and is therefore not

17. *Id.* § 1681n.
18. *Id.* § 1681o.
19. *Id.* § 1681q.
20. *Id.* § 1681s (1982 & Supp. V 1987).
21. *Id.* § 1681t (1982).
22. See definition of "consumer report," *supra* note 8.
23. 38 Fed. Reg. 4947 (1973) (codified at 16 C.F.R. § 600.5 (1987)). The Prescreening Interpretation provides:

> (a) The practice of prescreening is common in the consumer reporting industry. One typical situation arises when a consumer reporting agency performs a list editing service for customers that market their products by direct mail solicitations. The seller sometimes sends his list to a consumer reporting agency, where the list is edited by deletion of those names that have an adverse credit record in the files.
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> (b) In this instance, the editing process is only used for the purpose of determining to whom the initial mailing is sent. Those individuals edited from the original list may apply for credit at a later date, in which case a new credit determination is made without reference to the mailing list either edited or unedited. In other situations, the consumer reporting agency is asked to create its own list of credit worthy individuals, based upon the soliciting business's criteria.
>
> (c) The contention is put forth that the company does not deny credit to anyone whose name was deleted from the initial list and therefore it is not required to give notice to the consumer pursuant to section 615(a). It is also asserted that the prescreening service constitutes a permissible purpose to receive consumer reports under section 604(3)(A). That is, each individual whose name remains on the list then receives a solicitation involving an offer of extension of credit from the company. Finally, the list is used solely for the purpose stated above and is not used at any future date as a basis for denying credit.
>
> (d) The user of a consumer report must be considering a business transaction involving each consumer upon whom a consumer report is furnished. Unlike credit guides, users of prescreened lists have a present intention to have a business transaction with every person on the prescreened list. Moreover, the furnishing of prescreened lists of consumers will only be

required to provide notice to any such consumer under FCRA section 615(a).[24] It also determined that a prescreening service constitutes a permissible purpose to receive consumer reports under FCRA section 604(3)(A)[25] if (i) each person whose name remains on the list is solicited for an extension of credit by the user of the list, (ii) the list is used solely for such solicitation purposes, and (iii) the list is not used in the future as a basis for denying credit.[26] Finally, the FTC cautioned that the creditor may not delegate to the consumer reporting agency its credit granting decisions such that an applicant for consumer credit would be denied the right to section 615 disclosures or any other rights under the FCRA.[27]

ISSUES UNDER THE FCRA

The critical date for purposes of the application of the Prescreening Interpretation is the date when the prescreened list is furnished to the creditor. Once the list is delivered to the creditor, that creditor must extend a credit offer to each person whose name remains on the list.[28] It is thus useful to examine separately the issues which arise under the FCRA before and after the list is furnished to the creditor.

Before List Is Furnished to Creditor

Under the FCRA, every consumer reporting agency must maintain procedures to ensure that a prescreened list is furnished for a permissible purpose. Any creditor receiving a list must certify to the consumer reporting agency the purpose for which the consumer report is sought.[29] In the case of a prescreened

> permissible when the user can certify that every person listed will be the subject of an offer to enter into the particular business relationship involved.
>
> (e) The Commission recognizes that the legislative history of the FCRA reveals a concern for the consumer's privacy and the accuracy of information stored at credit bureaus, and demonstrates a sensitivity as to the balance between the free flow of credit information for legitimate business purposes and the right of the consumer to keep his affairs private. However, the practice of prescreening results in no significant harm to consumers and the practice is not inconsistent with the basic purposes of the Act. Further, the ability of the consumer reporting agency to perform these prescreening services for a credit grantor shall not be deemed to permit delegation to a consumer reporting agency by a business of its credit granting, employment, insurance, or other business decisions whereby the consumer applying for such would be denied the right to the section 615 disclosures or any other rights under the Act.

24. 16 C.F.R. § 600.5(c) (1987). *See* 15 U.S.C. § 1681m(a) (1982).

25. *See* 15 U.S.C. § 1681b(3)(A) (1982).

26. 16 C.F.R. § 600.5(c) (1987). *See* FTC Staff Op. Letter No. 342 (May 1, 1985) (notes that only a list of names, not a collection of written consumer reports on individuals, is furnished to a creditor and asserts that the Prescreening Interpretation authorizes this activity because there is a "minimum intrusion on consumers' privacy"), *reprinted in* R. Clontz, Jr., Fair Credit Reporting Manual E-276 (Cum. Supp. 1987). *See also* 16 C.F.R. § 600.5(e) (1987).

27. *Id.* § 600.5(e).

28. *Id.* § 600.5(c).

29. 15 U.S.C. § 1681e(a) (1982).

list, the creditor must certify that an offer to extend credit will be made to each person on the final list.[30]

In a 1985 FTC staff opinion,[31] the Division of Credit Practices endorsed a creditor's use of a service bureau to perform additional screening following the screening performed by the consumer reporting agency but before the list was furnished to the creditor. The letter noted that the service bureau permitted to use the consumer reporting agency's files also would be operating as a consumer reporting agency on behalf of its particular subscriber. It concluded that the consumer reporting agency which allowed its files to be used by the service bureau would not be in violation of the permissible purpose requirement because the bureau's subscriber would have a permissible purpose to use the file.

It is also clear that disclosures need not be provided to consumers whose names are deleted from the initial list. A creditor need not provide section 615(a) disclosures to consumers whose names are screened and deleted from the initial list before the final list is furnished to the creditor.[32] Moreover, a consumer reporting agency which screens a list is not required either to record an inquiry against such consumers or to disclose to those consumers that their names appeared on the initial list.[33]

After List Is Furnished To Creditor

Whether further screening is permitted after the final list is furnished depends upon the nature and timing of the "postscreening." Once the creditor receives the final list, no further screening is allowed before the credit offer is extended to the consumer.[34] Thus, the creditor may not update a "stale" list before mailing the prescreened solicitation. Further screening apparently is also impermissible if the consumer rejects the offer, at least if the rejection is in response to a telephone solicitation.[35] In this situation, there would not appear to be a permissible purpose for the creditor's further use of the consumer's name.

30. 16 C.F.R. § 600.5(d) (1987). *See* 15 U.S.C. §§ 1681b(3)(A), 1681e(a) (1982 & Supp. V 1987). This certification commonly is incorporated into the agreement between the consumer reporting agency and the creditor.

31. FTC Staff Op. Letter No. 342, *supra* note 26. The FTC has ruled that "(a)dvice rendered by the [FTC] staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding." 16 C.F.R. § 1.3(c) (1987). *See* Hulshizer v. Global Credit Servs., 728 F.2d 1037, 1038 (8th Cir. 1984) (even if creditor relied upon an informal FTC advisory opinion, it would not be shielded from liability under the federal Fair Debt Collection Practices Act arising from a good faith error).

32. 16 C.F.R. § 600.5(c) (1987). *See* 15 U.S.C. § 1681m(a) (1982).

33. *See* FTC Staff Op. Letter No. 218 (C. Lee Peeler, author, Sept. 14, 1976) ("Peeler Letter I") (by implication), *reprinted in* R. Clontz, Jr., *supra* note 26, at E-24; FTC Staff Op. Letter No. 211 (not dated) (by implication), *reprinted in* R. Clontz, Jr., *supra,* at E-13. *See also* 15 U.S.C. § 1681g(a)(3)(B) (1982).

34. 16 C.F.R. §§ 600.5(c), 600.5(d) (1987). *See* FTC Staff Op. Letter No. 327 (Mar. 28, 1984), *reprinted in* R. Clontz, Jr., *supra* note 26, at E-241.

35. *See* FTC Staff Op. Letter No. 130 (May 7, 1974) (notes with approval that, under creditor's plan, "(a)n individual who responds negatively to any solicitation receives no further solicitation and

However, nothing prohibits a creditor from resoliciting persons on the final list who do not respond to the credit offer. The Prescreening Interpretation provides that the final list may not be used at a future date as a basis for denying credit.[36] This restriction should be considered inapplicable to a resolicitation because the denial of credit to a prescreened consumer subsequent to the resolicitation will be based upon information obtained by the creditor in the consumer's application or during the response verification process.[37] Information contained in the final list will only be used for solicitation purposes and will have no impact upon the determination to deny credit.

The FTC staff has provided the most extensive guidance concerning permissible additional screening in instances where the consumer accepts the credit offer. In 1978, C. Lee Peeler, an attorney in the Division of Credit Practices, issued an opinion ("Peeler Letter II") that a

> creditor's decision to obtain a hard copy of the consumer's credit report after an application is submitted by a prescreened consumer and to use the information on the report to further evaluate the application would not necessarily disqualify an otherwise legitimate prescreening. The same would be true for evaluation of the information contained on the application form. . . . One acceptable further evaluation would be verifying that the customer's credit status has not changed since the date of prescreening.[38]

Thus, the creditor apparently may verify the information contained on the application and confirm that the applicant is the person who was solicited.[39] Peeler Letter II concluded, however, that a full reevaluation of the applicant's creditworthiness would seemingly be impermissible because it would "render the [creditor's] intention to enter into a business transaction with each consumer on the prescreened list illusory."[40] Consequently, a creditor should refrain from applying new criteria in its evaluation of applications submitted by prescreened consumers. Nevertheless, if the creditor discovers during the verification process that a prescreened consumer has experienced a decline in credit status since the date of the prescreening and the decline would have caused the consumer's name to have been deleted from the initial list had it predated the prescreening, Peeler Letter II implies that the creditor may deny credit to such a consumer.

no further use is made of his name or his consumer report."), *reprinted in* R. Clontz, Jr., Fair Credit Reporting Manual E-213 (rev. ed. 1977).

36. 16 C.F.R. § 600.5(c) (1987).

37. *See infra* text accompanying notes 38–41.

38. FTC Staff Op. Letter No. 248 (C. Lee Peeler, author, Apr. 21, 1978) ("Peeler Letter II"), *reprinted in* R. Clontz, Jr., *supra* note 26, at E-77.

39. *Id.* The creditor may, for example, contact the applicant's employer or an address verification service.

40. *Id.* (citing 16 C.F.R. § 600.5(d) (1987)). Peeler Letter II cautions creditors not to imply in their solicitations that consumers' accounts are preauthorized if that is not true. The letter notes that violation of this requirement would subject a creditor to the sanctions imposed under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982 & Supp. V 1987).

Peeler Letter II does not analyze the situation in which, during the verification process, a creditor obtains derogatory information concerning a prescreened consumer which predates the prescreening. Such information would first become relevant to the credit determination during the postscreening either because the consumer reporting agency conducting the prescreening did not apply the credit criteria to the information or because the information was not recorded in its files. In either case, the consumer's credit status has not changed since the date of the prescreening; the prescreening simply did not reveal the unfavorable data. Assuming that, if considered, such information would have caused the consumer's name to have been deleted from the initial list, the creditor should be entitled to deny credit to the consumer. The creditor has neither applied new credit criteria to the consumer's application nor engaged in a complete reevaluation of the applicant's creditworthiness. Instead, it has merely applied the original criteria to information that should have been considered during the prescreening. Thus, there is no significant harm to the consumer, and the FCRA's goal of promoting the "free flow of credit information for legitimate business purposes"[41] is vindicated.

In connection with postscreening activities, creditors should note that the staffs of the FTC[42] and the Federal Reserve Board ("FRB")[43] have issued opinions that any creditor subject to their jurisdiction that submits credit and trade references from credit applications to a credit bureau in order to have such information verified and to have consumer reports concerning such applicants issued does not become a "consumer reporting agency" under the FCRA. Conversely, the staff of the Office of the Comptroller of the Currency ("OCC") continues to interpret the FCRA to provide that a national bank that submits credit and trade references from an application to a credit bureau for such purposes is a "consumer reporting agency."[44] The OCC staff interpretation is subject to attack, however, because it focuses on whether the applications constitute "consumer reports" rather than on the threshold inquiry as to whether the creditor is a "consumer reporting agency."[45]

41. 16 C.F.R. § 600.5(e) (1987).

42. FTC Staff Op. Letter No. 373 (May 2, 1986), *reprinted in* R. Clontz, Jr., *supra* note 26, at E-330.

43. Letter from Griffith L. Garwood, Director of the Division of Consumer and Community Affairs (Sept. 3, 1986). The Garwood letter limits the earlier FRB Staff Op. Letter (Jerauld C. Kluckman, author, Dec. 1, 1971), *reprinted in* R. Clontz, Jr., *supra* note 35, D-6, to the situation in which a state Federal Reserve member bank "transmits information from credit applications to a credit bureau simply to supplement or improve the credit bureau's files without requesting that the information be verified and a consumer report issued." In this situation, the Garwood letter confirms that the bank would be a "consumer reporting agency."

44. Letter from Charles F. Byrd, Assistant Director of the Legal Advisory Services Division (Apr. 9, 1985), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 85,505.

45. Both FTC Staff Op. Letter No. 373, *supra* note 42, and the Garwood letter, *supra* note 43, focus on whether a creditor is a "consumer reporting agency." *See supra* note 9. Both letters conclude that the creditor does not assemble information for a fee or on a cooperative nonprofit basis, but instead pays the credit bureau to verify the information contained in the applications. Moreover, they note that the creditor's purpose in providing the applications is not to furnish

The FCRA imposes certain disclosure requirements upon a consumer reporting agency that has screened, and a creditor that has used, a prescreened list. Upon receiving an inquiry under FCRA section 609(a)(3)(B),[46] the consumer reporting agency must disclose to a consumer the recipients of any prescreened lists containing the consumer's name that it furnished in the six-month period preceding the request.[47] In balancing the consumer's right of privacy and the free flow of credit information for legitimate business purposes, the Prescreening Interpretation concludes that "the practice of prescreening results in no significant harm to consumers and . . . is not inconsistent with the basic purposes of the [FCRA]."[48] The creditor therefore is not required to reveal the source of a prescreened list.[49] Nevertheless, a creditor that denies credit to a prescreened applicant based upon information obtained during postscreening from a consumer report supplied by a consumer reporting agency or from any other person must provide section 615 disclosures to the consumer.[50] The creditor cannot delegate its credit granting decisions to a consumer reporting agency such that the consumer would be deprived of these disclosures or other rights under the FCRA.[51]

FCRA CONCLUSION

The FTC has provided clear guidelines to creditors concerning permissible additional screening both before the creditor obtains the final list and during the period between its receipt of the list and its receipt of the applications resulting from its solicitation. The most significant open question remaining in the wake of the Prescreening Interpretation and the FTC staff opinions is whether and to what extent a creditor, in order to deny credit to prescreened applicants, may apply the original credit criteria to information obtained after the date of the prescreening but that predates the prescreening. Moreover, the FTC, FRB, OCC, and other regulatory agencies that enforce the FCRA need to develop a consistent and principled position as to whether a creditor that provides credit and trade references from applications to a credit bureau in order to verify data and obtain consumer reports is a "consumer reporting agency." Given the nonbinding effect of FTC staff opinions,[52] the FTC should be encouraged to resolve these and other issues surrounding prescreening and postscreening practices by publishing official staff commentary to the FCRA.[53]

consumer reports to third parties but rather to obtain consumer reports on such applicants from the credit bureau.

46. 15 U.S.C. § 1681g(a)(3)(B) (1982).

47. Peeler Letter I, *supra* note 33; FTC Staff Op. Letter No. 211, *supra* note 33.

48. 16 C.F.R. § 600.5(e) (1987).

49. Peeler Letter I, *supra* note 33.

50. 15 U.S.C. § 1681m (1982). *See supra* text accompanying note 16.

51. 16 C.F.R. § 600.5(e) (1987).

52. *See supra* note 31.

53. As this article went to press, the FTC staff was preparing final revisions to proposed official staff commentary to the FCRA. Discussions with Clarke Brinckerhoff, Program Adviser—FCRA, Division of Credit Practices (Nov. 1987). In contrast to the FRB's authority to issue regulations to

EQUAL CREDIT OPPORTUNITY ACT

SUMMARY OF THE EQUAL CREDIT OPPORTUNITY ACT

The Equal Credit Opportunity Act ("ECOA")[54] and regulation B[55] proscribe discriminatory practices based on various prohibited factors in the extension of credit;[56] establish rules concerning the types of information that can be requested and how that information can be used, both during the application process[57] and in the evaluation of applications received;[58] require creditors to notify applicants of action taken on their applications;[59] and provide for various other requirements designed to further the purposes of the ECOA.[60] The prohibited bases of discrimination are race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), the fact that all or part of the applicant's income derives from a public assistance program, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[61] Creditors that fail to comply with the ECOA face administrative enforcement,[62] civil liability for actual and punitive damages in individual or class actions,[63] and even equitable or declaratory relief.[64]

The threshold question is whether the ECOA and regulation B apply to, and therefore prohibit, discrimination in a creditor's list screening activities. Fur-

carry out the purposes of the Truth in Lending Act ("TILA") and the Equal Credit Opportunity Act, the FTC has no such authority under the FCRA and the Fair Debt Collection Practices Act ("FDCPA"). *Compare* 15 U.S.C. §§ 1605(a), 1691b(a) (1982) *with* §§ 1681s(a), 1692*l*(a) (1982 & Supp. V 1987). Consequently, in promulgating proposed official staff commentary under the FDCPA, the FTC staff referred to the commentary as "Statements of General Policy or Interpretation." 51 Fed. Reg. 8019 (1986). Any official staff commentary under the FCRA thus will merely establish guidelines as to the FTC's enforcement position. Good faith compliance with such commentary will not insulate creditors from civil liability under the FCRA, in contrast to the situation under the TILA and the official staff commentary to regulation Z and the ECOA and such commentary to regulation B. *See* 15 U.S.C. §§ 1640(f), 1691e(f) (1982); 16 C.F.R. § 1.3(c) (1987).

54. 15 U.S.C. §§ 1691–1691f (1982 & Supp. V 1987).

55. 12 C.F.R. § 202 (1987). The FRB's Division of Consumer and Community Affairs is authorized to issue official staff interpretations of regulation B. 12 C.F.R. § 202 app. D (1987). Good faith compliance with any rule, regulation, or interpretation issued by the FRB shields any creditor from civil liability under the ECOA. 15 U.S.C. § 1691e(e) (1982).

56. 15 U.S.C. § 1691(a) (1982); 12 C.F.R. § 202.2(z) (1987).

57. 12 C.F.R. § 202.5 (1987).

58. *Id.* § 202.6.

59. *Id.* § 202.9.

60. For example, creditors must retain certain key records from the application process, *id.* § 202.12(b), and gather monitoring information for certain dwelling secured loans, *id.* § 202.13.

61. 15 U.S.C. § 1691(a) (1982); 12 C.F.R. § 202.2(z) (1987).

62. 15 U.S.C. § 1691c (1982 & Supp. V 1987); 12 C.F.R. § 202.14(a) (1987).

63. 15 U.S.C. § 1691e(a),(b) (1982); 12 C.F.R. § 202.14(b)(1) (1987).

64. 15 U.S.C. § 1691e(c) (1982); 12 C.F.R. § 202.14(b)(1) (1987).

ther, other federal[65] or state[66] laws may apply to list screening practices, but this article does not review such other laws.

APPLICATION OF THE ECOA/REGULATION B TO LIST SCREENING

The ECOA makes it unlawful for a "creditor"[67] to discriminate on a prohibited basis against any "applicant"[68] in any aspect of a "credit transac-

65. For example, such practices may be covered under § 5(a)(1) of the Federal Trade Commission Act's prohibition against unfair or deceptive acts and practices in or affecting commerce. 15 U.S.C. § 45(a)(1) (1982 & Supp. V 1987).

66. Various state statutes could conceivably apply to list screening practices. For example, state "little FTC acts" (*see, e.g.*, Conn. Gen. Stat. Ann. § 42-110g(a) (West Supp. 1985); Mass. Gen. Laws Ann. ch. 93A, § 9 (West 1984)), state credit discrimination statutes (*see, e.g.*, a Connecticut statute which prohibits discrimination on various bases in any "credit transaction," defined as "*any invitation to apply for credit,* application for credit, extension of credit, or credit sale." Conn. Gen. Stat. Ann. § 46a-65 (West Supp. 1985) (emphasis added)), and even certain state civil rights legislation, such as statutes that prohibit discrimination by places of public accommodation (*see, e.g.*, N.Y. Exec. Law § 296(2)(a) (McKinney 1982); Mass. Gen. Laws Ann. ch. 272, §§ 92A, 98 (West Supp. 1985); Conn. Gen. Stat. Ann. § 46a-64 (West Supp. 1985); Cal. Civ. Code § 51 (West Supp. 1985)), or statutes that prohibit a boycott of any group through discriminatory practices based on prohibited criteria (*see, e.g.*, N.Y. Exec. Law § 296(13) (McKinney 1982); Cal. Civ. Code § 51.5 (West Supp. 1985)). *See also* Maltz & Miller, *The Equal Credit Opportunity Act and Regulation B*, 31 Okla. L. Rev. 1, 8–19 (1978).

67. A "creditor" is defined in the ECOA as

> any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

15 U.S.C. § 1691a(e) (1982), and in regulation B as

> a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit. The term includes a creditor's assignee, transferee, or subrogee who so participates. For purposes of §§ 202.4 and 202.5(a), the term also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made. A person is not a creditor regarding any violation of the act or this regulation committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction. The term does not include a person whose only participation in a credit transaction involves honoring a credit card.

12 C.F.R. § 202.2(*l*) (1987).

68. An "applicant" is defined in the ECOA as

> any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C. § 1691a(b) (1982), and in regulation B as

> any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit.

tion."[69] The definitions of "applicant" under both the ECOA and regulation B limit the term to any person who requests or receives an extension of credit from a creditor.[70] Therefore, list screening activity that occurs before a request for credit by an individual has generally been considered outside the coverage of the ECOA and regulation B.[71]

Regulation B does extend its protection to prospective applicants in certain instances, however, by prohibiting creditors from discouraging applicants or prospective applicants on a prohibited basis from making or pursuing an application.[72] This protection afforded prospective applicants appears to apply to face-to-face or telephone communications, or to the content of a creditor's advertising, but not to list screening.[73] The distinction under regulation B appears to be that an applicant or potential applicant who is directly confronted by a creditor's practices or attitude and may be affirmatively discouraged from pursuing an application for credit is protected, but a prospective applicant who is unaware of and therefore unaffected by a screening process that occurs prior to submission of an application is not.

List screening is similar in some respects to the selective use of advertising media that, debatably, is covered by regulation B. Since both practices target individuals to receive a solicitation of an offer of credit, it might be suggested that if selective advertising is covered by regulation B, list screening should be as well. A narrative summary of the ECOA published by the FRB staff in 1981 indicates that the ECOA and regulation B proscribe the selective use of advertising media having a well-defined audience that would exclude, as a class,

> For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers and similar parties.

12 C.F.R. § 202.2(e) (1987). Although the latter definition is somewhat broader than that in the ECOA, it does not extend coverage to prospective applicants involved in a list screening process.

69. A "credit transaction" is defined as:

> every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures).

12 C.F.R. § 202.2(m) (1987).

70. *See supra* note 68.

71. *See* Fed. Res. Bd. Staff Mem. (Sept. 29, 1978, Aug. 24, 1984, Feb. 26, 1985). *See also* Smith, *supra* note 1, at 922, 923.

72. 12 C.F.R. § 202.5(a) (1987).

73. Practices prohibited by [§ 202.5(a) of regulation B] include—

- A statement that the applicant should not bother to apply, after the applicant states that he is retired.
- Use of words, symbols, models or other forms of communication in advertising that express, imply or suggest a discriminatory preference or a policy of exclusion in violation of the act.
- Use of interview scripts that discourage applications on a prohibited basis.

Regulation B Official Staff Interpretations, 12 C.F.R. pt. 202, supp. I, comment to § 202.5(a) (1987). *See also* Smith, *supra* note 1, at 922, 923.

members of a protected class from becoming potential customers.[74] This description of the ECOA's coverage, however, is broader than the coverage outlined in the FRB's Official Staff Commentary adopted in 1985.[75] Therefore, it appears that the selective use of advertising media is not currently covered by regulation B and that any attempt to establish that such coverage extends to list screening practices by analogy should fail.[76]

Administrative history also supports the view that list screening is not currently covered by the ECOA and regulation B. In 1978, the FRB staff specifically addressed the issue of expanding regulation B coverage to include prescreening practices. The staff recommended that the FRB seek public comment on the issue and accept a recommendation by the FTC staff to expand regulation B's definition of "credit transaction" to include direct mail or telephone solicitations of prospective applicants.[77] However, the FRB did not adopt this recommendation.[78] In a more recent review of this issue, the FRB staff retreated from its past position and supported the view that regulation B should not cover such prescreening practices.[79] The FRB staff's current position appears to be due in part to the absence of any indication of creditor abuses in this area, and also to a recognition that prescreening may in fact promote credit availability generally.[80]

Nonetheless, use of nondiscriminatory list screening practices by creditors may be prudent for a number of reasons. Creditors may wish to avoid adverse publicity for practices that may be technically legal but contrary to the purposes of the ECOA and regulation B. The FRB could decide to change its current position and extend regulation B protection to list screening practices, particularly if it were to encounter overt instances of discriminatory practices.[81] Further, discriminatory list screening practices may raise allegations of discrimination based on the "effects test" concept described later in this article.[82] Finally, as mentioned above, other federal or state laws could regulate such practices.[83] Thus, the authors suggest that creditors should comply fully with the principles of the ECOA and regulation B in their list screening practices.

74. 2 Fed. Res. Reg. Serv. ¶ 6-113 (June 1981). This narrative description does not have the force of law.

75. *See* description of practices covered by 12 C.F.R. § 202.5(a), *supra* note 73.

76. *Cf.* 24 C.F.R. § 109.25 (1987) (Housing and Urban Development's Fair Housing Advertising Regulation issued under the Fair Housing Act sets forth examples of similar selective advertising methods that may be discriminatory in effect).

77. *See* Fed. Res. Bd. Staff Mem. (Sept. 29, 1978).

78. That the recommendation was not adopted is evidenced by the fact that the proposal was not published for public comment. *See* 43 Fed. Reg. 49,987 (1978).

79. *See* Fed. Res. Bd. Staff Mem. (Feb. 26, 1985), in which the staff adopts the general understanding that prescreening practices are covered only after an individual requests credit. *See also* Smith, *supra* note 1, at 922, 923.

80. *See* Fed. Res. Bd. Staff Mem. (Feb. 26, 1985); Smith, *supra* note 1, at 922, 923.

81. *See* Smith, *supra* note 1, at 923, for indication that FRB will monitor any abuses in creditors' list screening practices.

82. *See infra* discussion beginning in text accompanying note 88.

83. *See supra* notes 65 & 66.

ISSUES UNDER THE ECOA/REGULATION B

Assuming that a creditor complies with the ECOA and regulation B in its list screening practices, the primary inquiry should be whether the various criteria used to screen lists of prospective applicants,[84] or the proportionate representation of protected classes of individuals in the lists of names themselves,[85] could support an allegation of discrimination. Overt discrimination (also known as disparate treatment) can be avoided by using lists or screening criteria that do not involve any of the prohibited bases under the ECOA or regulation B. Creditors may be guided further in the selection of lists or list screening criteria by reviewing information specifically permitted[86] or prohibited[87] to be requested or considered under regulation B with respect to credit applications or evaluation.

It is much more difficult for the creditor to protect against an allegation of discrimination based on the "effects test" (also known as disparate effect discrimination).[88] Screening criteria or lists that appear not to involve a prohib-

84. *See* Maltz & Miller, *supra* note 66, at 37.

85. A creditor acquiring a list that excludes a protected class or comprises fewer of that class than their statistical representation in the creditor's target market or trade area arguably is as much at risk as a creditor that uses discriminatory criteria in screening a previously acquired list. An example of a list that may be suspect is a men's magazine subscription list, which would likely contain the names of very few women. Alternatively, a creditor may purchase such lists but also purchase other lists (e.g., women's magazine subscription lists) favoring the protected class so that, overall, protected classes will be included in proportion to their representation in the creditor's target market or trade area.

86. Presumably, criteria permitted or prohibited under regulation B with respect to credit evaluation systems would also be permitted or prohibited with respect to list screening practices to the extent that such information is available at the time the list screening would be performed. Under regulation B, permitted criteria include: age, in certain circumstances (12 C.F.R. § 202.6(b)(2) (1987)); existence of a telephone in residence (*id.* § 202.6(b)(4)); income, with certain qualifications (*id.* § 202.6(b)(5)); credit history, with some qualifications (*id.* § 202.6(b)(6)); and immigration status or permanent residency in United States (*id.* § 202.6(b)(7)).

87. In addition to the standard prohibited bases of the ECOA, other information prohibited for consideration by a creditor includes: assumptions or aggregate statistics relating to the likelihood that women will bear children or will, for that reason, result in diminished or interrupted income (*id.* § 202.6(b)(3)); the existence of the telephone listing in one's name (*id.* § 202.6(b)(4)); and discounting or excluding income on a prohibited basis or because it is derived from part-time employment or is an annuity, pension, or other retirement benefit (*id.* § 202.6(b)(5)).

88. The effects test is a judicial doctrine developed in employment cases decided under tit. VII, subch. VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1982 & Supp. V 1987). The effects test clearly applies to a creditor's evaluation of the creditworthiness of an "applicant." *See* Regulation B Official Staff Interpretations, 12 C.F.R. pt. 202, supp. I, comment to § 202.6(a), para. (2) (1987). *See also* Vander Missen v. Kellogg-Citizens Nat'l Bank, 481 F. Supp. 742, 745 (E.D. Wis. 1979). It is not clear what other creditor practices would be subject to the effects tests.

Certain decisions of the Supreme Court in the employment area may be interpreted to indicate that the application of the effects test should be limited to particular employment practices, and therefore the test may similarly be applied to only limited creditor practices. However, commentators generally appear to agree that a limited application of the effects test is not supported by the legislative history of the ECOA. *See* Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 Wis. L. Rev. 655, 669–72; Maltz & Miller, *supra* note 66, at 36 n.165; Baer, *The Equal Credit Opportunity Act and the "Effects Test,"* 95 Banking L.J. 241, 244–51 (1978). *See also*

ited basis of discrimination may nonetheless have the actual, although unintended, effect of discriminating against a protected class of individuals.[89] Further, to the extent the use of such criteria or lists distort a creditor's customer base, any credit scoring system developed from that base to assist in the credit evaluation of future applicants also may be subject to challenge.[90]

The effects test, which is expressly applicable to regulation B,[91] is a judicial doctrine developed in the employment field by the U.S. Supreme Court in *Griggs v. Duke Power Co.*[92] and *Albemarle Paper Co. v. Moody.*[93] Under the effects test, criteria used to screen lists or lists themselves which appear neutral may be found to be discriminatory if they have a disproportionately negative effect on a protected class, even though the creditor has no intent to discriminate.[94] If a plaintiff is able to establish a prima facie case of discrimination, a creditor can justify the challenged list or screening criteria by showing that it is related to a legitimate business need (i.e., predicts creditworthiness).[95] If the creditor establishes such a legitimate business need, the plaintiff nonetheless can prove discriminatory effect by showing that the creditor could have used another means to meet its need that is less disparate in its effect.[96]

Very few civil or administrative actions have been brought under the ECOA or regulation B using the effects test theory. Nonetheless, some observations can be made from certain of those cases about the types of screening criteria or lists that may be challenged as suspect and the difficulties a plaintiff may encounter in proving a claim or a defendant in defending against it.

First, in evaluating the types of criteria or lists that may be suspect under the effects test, the use of geographic factors such as zip codes and "blacklisted" addresses has been challenged as discriminatory when used in credit evaluation systems. In administrative actions, the FTC has obtained two consent decrees preventing the use of zip codes in evaluating applicants' creditworthiness,[97] and the Civil Aeronautics Board (the federal agency charged with the enforcement of the ECOA for air carriers) obtained an agreement by a major airline to cease

Note, *Credit Scoring and the ECOA: Applying the Effects Test,* 88 Yale L.J. 1450, 1450 n.4, 1459 (1979).

89. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

90. *See* Fed. Res. Bd. Staff Mem. (Aug. 24, 1984), in which an effects test concern was raised with respect to prescreened solicitations. Specifically, it was indicated that: ". . . it is possible that these transactions [prescreening], *having become part of the creditor's portfolio, might be subject to scrutiny under the effects test.* Creditors that presolicit using prohibited bases may be vulnerable to a charge under the effects test that their practice results in discrimination." *Id.* at 3 (emphasis added). *See also* Note, *Credit Scoring and the ECOA, supra* note 88, at 1457.

91. 12 C.F.R. § 202.6(a) n.2 (1987).

92. 401 U.S. 424.

93. 422 U.S. 405 (1975).

94. *Griggs,* 401 U.S. at 432.

95. *Id.*

96. *Albemarle Paper Co.,* 422 U.S. at 425.

97. U.S. v. Amoco Oil Co., FTC Consent Decree (Apr. 1980); U.S. v. Montgomery Ward, C.A. No. 79-1412 (D.D.C. May 29, 1979) (FTC Consent Decree) (June 14, 1979), *reprinted in* 5 Consumer Credit Guide (CCH) ¶ 97,732.

denying credit to individuals living near blacklisted addresses representing high credit risk.[98] In one reported civil action, the use of zip codes in a credit scoring system was challenged, but the defendant prevailed.[99]

Other criteria, although not challenged formally, have been criticized as capable of supporting a complaint of discrimination based on the effects test. Examples of such criteria include the length of time on a job or at a current residence, minimum income requirements, and extensive credit history standards.[100] That such criteria have not been the basis of effects test litigation may be explained by a number of factors, including their traditional usage in the credit industry,[101] their known value for determining creditworthiness,[102] regulatory recognition of certain of the criteria,[103] and the likelihood that certain of the criteria are less discriminatory in effect today than over a decade ago when the ECOA was first enacted.[104] In any event, based on the criteria known to have been challenged to date, it appears that the use of geographic criteria in list screening practices may entail more risk than the use of certain other facially neutral criteria.

Concerning the difficulties that parties to an effects test suit may encounter in proving their respective claims or defenses, it should first be noted that the development and application of the effects test to the credit area has been left to the courts.[105] There has been little litigation under regulation B involving the effects test concept, so further development of various issues remains, including how a plaintiff can prove a prima facie case of discrimination, what level of justification is required to establish a legitimate business need for the challenged practice, and how courts will interpret the third prong of the effects test that permits proof by a plaintiff of a less discriminatory alternative.[106] A review of certain cases provides partial answers to some issues but leaves others unanswered.

In *Carroll v. Exxon Co., U.S.A.*,[107] plaintiff contended that considering the number of dependents in defendant's scoring system constituted discrimination on the basis of marital status. The court held that the plaintiff failed to establish a prima facie case of discrimination because she did not show that this criterion

98. Order 78-8-101, 78 C.A.B. Rep. 886 (Aug. 17, 1978).

99. Cherry v. Amoco Oil Co., 490 F. Supp. 1026 (N.D. Ga. 1980).

100. *See* Anderson, *The Antidiscrimination Provisions of the Equal Credit Opportunity Act*, 12 U.C.C. L.J. 248, 254 (1980). *See also* Butler, Chandler, Geltzer, O'Conner & Pohl, *Equal Credit Opportunity Act*, 33 Bus. Law. 1073, 1083 (1978).

101. Anderson, *supra* note 100, at 254.

102. Butler, *supra* note 100, at 1081–83.

103. Regulation B Official Staff Interpretations, 12 C.F.R. pt. 202, supp. I, comment to § 202.6(a), para. (2) (1987) (minimum income); 12 C.F.R. § 202.6(b)(6) (1987) (credit history).

104. For example, since many women have developed more extensive credit histories in their own names since enactment of the ECOA, such a criterion should not have as discriminatory an effect today as it may have had when the ECOA was enacted.

105. *See* Smith, *supra* note 1, at 923. *See also* Blakely, *supra* note 88, at 679.

106. For discussion of these and other issues regarding effects test litigation in the credit area, *see* Maltz & Miller, *supra* note 66, at 37–45; Blakely, *supra* note 88, at 682–89.

107. 434 F. Supp. 557 (E.D. La. 1977).

resulted in the selection of credit card holders "in a pattern significantly different from that of the pool of applicants."[108] The court noted that a prima facie case of discrimination may be established by statistical evidence alone[109] or by statistical evidence in conjunction with other evidence.[110] Plaintiff had not employed either approach and therefore failed to establish her case.

In *Cherry v. Amoco Oil Co.*,[111] plaintiff, a white applicant for credit living in a predominantly black neighborhood, asserted racial discrimination because of the oil company's practice of assigning fewer points in its thirty-eight-factor credit scoring system to applicants living in zip code areas that were predominantly black. Plaintiff, who demonstrated at trial a correlation between the percentage of applicants rejected in low rated zip code areas and the percentage of black population in these areas, was held not to have established a prima facie case that the inclusion of the zip code criterion in the credit scoring system was discriminatory.[112] The court explained the conventional method of proving an effects test case as follows:

> The conventional statistical methodology for showing disparate effect of a facially neutral test or practice is to compare representation of the protected class in the applicant pool with representation in the group actually accepted from the pool. If the statistical disparity is significant, then plaintiff is deemed to have made out a prima facie case.[113]

The court held that the plaintiff failed to prove her case because she did not test the effect of an applicant's zip code as a criterion but rather tested the overall scoring system.[114] Further, her proof did not deal with the actual or a representative applicant pool.[115]

These cases indicate some of the difficulties a plaintiff challenging a list screening practice would experience in establishing a prima facie case under the effects test. First, under *Cherry*, plaintiff would have to demonstrate the disparate impact of an individual criterion (or an individual list) within the creditor's entire set of screening criteria (or lists), rather than establish the disparate impact of the creditor's screening activity as a whole.[116] Further, under

108. *Id.* at 563. Under 12 C.F.R. § 202.5(d)(4) (1987), this criterion is expressly permitted.

109. *Id.* at 563 n.17 (citing Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974)).

110. *Id.*, citing Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975).

111. 490 F. Supp. 1026 (N.D. Ga. 1980).

112. *Id.* at 1030, 1031.

113. *Id.* at 1030.

114. *Id.* at 1031.

115. *Id.*

116. *Accord,* Maltz & Miller, *supra* note 66, at 37; Blakely, *supra* note 88, at 675, where the difficulties in identifying individual discriminatory criteria also are mentioned. *Cf.* Butler, *supra* note 100, at 1082, where it is argued that the effect of the entire system of evaluation is relevant.

Carroll, it appears that a "significant" disproportionate effect must be shown to establish a prima facie case of discrimination.[117]

More importantly, plaintiff may not be able to prove the disparate effect of a facially neutral practice under conventional statistical methodology that, as described above, compares representation of a protected class in the applicant pool with representation of the group actually accepted from the pool.[118] In a challenge to a list screening practice, there would be no pool of applicants on which to base a statistical comparison. Further, creditors generally do not have statistics about their customer bases that may be useful in establishing a claim of discrimination because a creditor is generally forbidden under regulation B to request information about, among other things, an applicant's race, color, religion, national origin, sex, or marital status.[119] However, a plaintiff possibly could rely on national statistics or statistics involving all or a relevant portion of the population of the geographic or trade area served by the creditor[120] to establish a disparate effect. A relevant portion of the population might include individuals who are within a reasonable income range that satisfies the creditor's credit standards.[121] The court in *Cherry* indicated that a plaintiff may be able to establish its initial burden of proof by using statistics involving the population of the geographic area served by the creditor, but it also stated that a plaintiff would have to justify the use of such statistics.[122] In any event, the unavailability of relevant statistics, or the likely expense entailed in obtaining such statistics if they are available,[123] represents a significant obstacle to a plaintiff seeking to challenge a suspect list or list screening criteria based on the effects test.

The plaintiff's burden of proof appears to be even more difficult to meet with respect to any challenge that use of a credit scoring system developed from a skewed data base results in discrimination in selecting new applicants. Not only would the individual suspect criterion or list used in the list screening have to be identified and shown to have a discriminatory effect against protected groups, but a plaintiff also may have to show that reliance on that skewed data base causes the selection of criteria for the scoring model that have a discriminatory effect against protected groups.

In cases brought under the ECOA or regulation B, the courts have not directly addressed the level of justification required for a creditor to establish its defense of a legitimate business need for its challenged practice.[124] Employment

117. Carroll v. Exxon Co., 434 F. Supp. 557, 563 (E.D. La. 1977). *See* Blakely, *supra* note 88, at 688.

118. *See supra* text accompanying note 113.

119. 12 C.F.R. § 202.5(b) (1987).

120. *See* Maltz & Miller, *supra* note 66, at 39; Note, *Credit Scoring and the ECOA*, *supra* note 88, at 1463–64.

121. See Note, *Credit Scoring and the ECOA*, *supra* note 88, at 1475.

122. Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1031 n.9 (N.D. Ga. 1980).

123. See Note, *Credit Scoring and the ECOA*, *supra* note 88, at 1478 n.109.

124. For discussion of this issue, *see* Blakely, *supra* note 88, at 684–88; Maltz & Miller, *supra* note 66, at 39–43.

cases that have addressed the legitimate business need issue have developed various tests to identify the required threshold level of justification: a strict "business necessity" test requiring an overriding legitimate business purpose necessary to the operation of the business,[125] a test requiring a "manifest relationship" between the disputed practice and the legitimate business interest,[126] and a test that requires merely that there be some direct and positive relationship between the practice and the business purpose.[127] Authority for a more lenient standard may be derived from the official staff interpretations to regulation B, which indicate, with respect to minimum income requirements, that only a "demonstrable relationship" between the income requirement and the creditworthiness for the level of credit involved may be needed to establish a legitimate business need.[128] The court in *Carroll* indicated in dictum that the "manifest relationship" test is appropriate,[129] but it did not decide the issue directly. Therefore, it remains to be seen what test will be followed for cases brought in the credit area.[130]

Courts also have little guidance available about how to apply the "less discriminatory alternative" prong of the effects test. Given the difficulties discussed above in establishing a prima facie case of discrimination, it is likely that proving a less discriminatory alternative may be similarly problematic. In addition, any less discriminatory alternative established by the plaintiff arguably would also have to be capable of being developed or implemented by the creditor at reasonable effort and expense.[131] If this "reasonable implementation" requirement were part of the third prong of the effects test as applied in the credit area, it would present an additional difficulty to any plaintiff attempting to prove a discrimination claim.[132]

Determining the appropriate business need test and how the "less discriminatory alternative" prong will be applied by the courts is crucial in determining whether successful claims can be brought in the credit area under the effects test.[133] If courts allow a lenient business need test and require proof of a less

125. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. denied,* 404 U.S. 1007 (1972).

126. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

127. Washington v. Davis, 426 U.S. 229, 250 (1976).

128. Regulation B Official Staff Interpretations, 12 C.F.R. pt. 202, supp. I, comment to § 202.6(a), para. (2) (1987). See also Maltz & Miller, *supra* note 66, at 41, where it is suggested that the more lenient "direct and positive relationship" standard is more appropriate for cases brought in the credit area.

129. Carroll v. Exxon Co., 434 F. Supp. 557, 563 (E.D. La. 1977).

130. *See* Blakely, *supra* note 88, at 688.

131. *See* Regulation B Official Staff Interpretations, 12 C.F.R. pt. 202, supp. I, comment to § 202.6(a), para. (2) (1987), which indicates that a less discriminatory alternative must be able to "reasonably be achieved" by the creditor.

132. *See* Blakely, *supra* note 88, at 686 n.168, which suggests that courts should also address whether the "less discriminatory alternative" prong should be part of the effects test at all since it forces creditors to use information that has the least discriminatory effect on protected classes.

133. *See* Blakely, *supra* note 88, at 686, 687.

discriminatory alternative that can be implemented at reasonable effort and expense, creditors should almost always be able to successfully defend against allegations of discrimination.[134]

THE ECOA CONCLUSION

In summary, although list screening practices appear to be beyond the direct reach of the ECOA or regulation B, creditors should strive to comply with their requirements to avoid effects tests challenges or a future amendment to regulation B to bring such practices within its direct coverage. Creditors should implement a policy of reviewing lists and screening criteria to avoid use of those that are clearly or arguably suspect. Such a policy, coupled with the difficulties a plaintiff may face in proving a claim of discrimination based on the effects test, should mitigate the risk that a creditor would incur liability or negative publicity for its list screening practices.

134. *Id.*