FEDERAL RESERVE SYSTEM

12 CFR Part 202

[Regulation B; Docket No. R-0955]

Equal Credit Opportunity

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is publishing revisions to Regulation B (Equal Credit Opportunity). The revisions implement recent amendments to the Equal Credit Opportunity Act (ECOA). These amendments create a legal privilege for information developed by creditors as a result of "self-tests" that they voluntarily conduct to determine the level of their compliance with the ECOA. The Department of Housing and Urban Development will publish similar revisions to the regulations implementing the Fair Housing Act.

DATES: The rule is effective January 30, 1998**.**

FOR FURTHER INFORMATION CONTACT: James A. Michaels, Senior Attorney, or Natalie E. Taylor, Staff Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452-3667 or 452-2412; for the hearing impaired only, Diane Jenkins, Telecommunications Device for the Deaf (TDD), at (202) 452-3544.

SUPPLEMENTARY INFORMATION:

I. Background

The Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691, makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, age (provided the applicant has the capacity to contract),

because all or part of an applicant's income derives from any public assistance, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act. The act is implemented by the Board's Regulation B (12 CFR Part 202).

On September 30, 1996, the President signed into law amendments to the ECOA as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Pub. L. 104-208, 110 Stat. 3009) (1996 Act). Section 2302 of the 1996 Act creates a legal privilege for information developed by creditors through voluntary "self-tests" that are conducted to determine the level or effectiveness of their compliance with the ECOA, provided that appropriate corrective action is taken to address any possible violations that may be discovered. Privileged information may not be obtained by a government agency for use in an examination or investigation relating to compliance with the ECOA, or by a government agency or credit applicant in any proceeding in which a violation of the ECOA is alleged. The 1996 Act also provides that a challenge to a creditor's claim of privilege may be filed in any court or administrative law proceeding with appropriate jurisdiction.

The 1996 Act directs the Board to issue implementing regulations, including a definition of what constitutes a "self-test." The Act also establishes a privilege for creditor self-testing under the Fair Housing Act (42 U.S.C. 3601 et seq.), which is administered by the Department of Housing and Urban Development (HUD). The statute directs the Board and HUD to issue substantially similar regulations. In January, the Board published a proposed rule to Regulation B implementing the amendments to the ECOA (62 FR 56, January 2, 1997). After consultation with the federal agencies responsible for enforcing the ECOA and with HUD, the Board is publishing

final rules to implement the 1996 Act's amendments to the ECOA. HUD will publish rules to implement the amendments to the Fair Housing Act.

After reviewing both regulations, the Board and HUD believe that there is no substantial difference in the final rules and that they should be interpreted to have the same effect, except where differences in the coverage of the ECOA and FHA dictate otherwise. For example, the ECOA covers nonmortgage credit transactions that are not covered by the FHA. Moreover, although there are organizational differences in the agencies rules, these differences are not intended to have any substantive effect, and merely reflect the Board's longstanding practice of publishing its interpretative rules in a separate Staff Commentary. HUD has no staff commentary and has generally included these interpretations in the text of its regulation. The consistency of the Board and HUD rules is evident based on a comparison of the complete documents published by the agencies, including the preambles to the regulatory amendments, and the revisions to the Board's Official Staff Commentary to Regulation B.

II. Regulatory Provisions

The amendments to Regulation B implement the 1996 Act by defining what constitutes a privileged self-test. A "self-test" is defined as any program, practice, or study that is designed and used specifically to determine the extent or effectiveness of a creditor's compliance with the ECOA or Regulation B, if it creates data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions. The privilege serves as an incentive, by assuring that evidence of discrimination voluntarily produced by a self-test will not be used against a creditor, provided the creditor takes appropriate corrective actions for any discrimination that is found.

This definition of "self-test" includes, but is not limited to, the practice of using fictitious applicants for credit (testers). A creditor also may develop and use other methods of generating information that is not available in loan and application files, for example, by surveying mortgage loan applicants to assess whether applications were processed appropriately. The definition does not include creditor reviews and evaluations of loan and application files, either with or without a statistical analysis.

The 1996 Act makes the results or report of a self-test privileged if the creditor takes appropriate corrective action to address possible violations identified by the self-test. In response to commenters' concerns about the proposal's effectiveness as an incentive for self-correction, the final rule provides additional guidance on the corrective action requirement.

The Board's final rule becomes effective January 30, 1998. The 1996 Act provides that self-tests will be privileged even if they were conducted before the regulation's effective date, with two exceptions. Self-tests previously conducted will not become privileged on the regulation's effective date if a court action or administrative proceeding has already commenced against the creditor alleging a violation of the ECOA or Regulation B or the Fair Housing Act. In addition, a self-test previously conducted will not become privileged on the regulation's effective date if any part of the report or results has already been voluntarily disclosed by the creditor.

III. Section-by-Section Analysis

Section 202.12 -- Record Retention

12(b)(6) Self-tests

Paragraph 12(b)(6) contains provisions on record retention that were designated as Paragraph 15(e) of the proposed rule. There are no substantive changes to the provision as proposed. The redesignation allows all of the regulation's record retention requirements to be listed together in one section. Paragraph 12(b)(6) states that a creditor has a duty to retain self-testing records for 25 months, which is the general standard for retaining other records required under the regulation.

Several commenters opposed any retention requirement for self-testing records. Some commenters suggested that retention of self-testing records should only be required if the creditor claims the self-testing privilege. Under the approach suggested by these commenters, a creditor that did not intend to claim privilege for the self-testing results could discard all related records even if the self-test identified violations; the creditor could decide whether or not to take corrective action, and the creditor could be required to provide oral testimony about the self-test results.

The provision requiring record retention has been adopted as proposed. The Board believes that retention of self-testing records is warranted whether or not the creditor ultimately decides to assert a privilege for the results. If the privilege is asserted, the self-test results may be needed to determine whether the creditor's claim of privilege is consistent with the corrective action requirement and other prerequisites. But in any event, allowing creditors to choose between claiming the privilege and discarding the self-testing records would be inconsistent with

the intent of the legislation. The statute encourages testing, but its ultimate goal is to provide incentive for creditors to use the results to take appropriate corrective actions that increase compliance with the law. This goal is not furthered if creditors elect to destroy evidence of self-test results as one alternative to taking corrective action. The Board intends for the record retention requirement to encourage creditors to take the full measure of corrective action that is warranted in light of the self-test results.

Section 202.15 -- Incentives for Self-Testing and Self-Correction

15(a) General Rules

15(a)(1) Voluntary Self-testing and Correction

Paragraph 15(a)(1) states the general rule that the report or results of a creditor's voluntary self-test are privileged if the conditions specified in this rule are satisfied. The language has been modified slightly for clarification. Data collection that is required by law or any government authority is not a voluntary self-test and does not qualify for the privilege.

15(a)(2) Corrective Action Required

Paragraph 15(a)(2) implements the requirement imposed by the 1996 Act that a creditor must take appropriate corrective action in order for the privilege to apply. A self-test is also privileged when it identifies no violations. The Board believes this is necessary to avoid the anomaly of requiring creditors to disclose self-test results when no violations are identified, which would make a creditor's claim of privilege tantamount to an admission that violations were found.

In some cases, the issue of whether certain information is privileged may arise before the self-test is complete or corrective actions are fully under way. This would not necessarily prevent a creditor from asserting the privilege. In situations where the self-test is not complete, for the

privilege to apply the lender must satisfy the regulation's requirements within a reasonable period of time. To assert the privilege where the self-test shows a likely violation, the rule requires, at a minimum, that the creditor establish a plan for corrective action and a method to demonstrate progress in implementing the plan. Creditors must take corrective action on a timely basis after the results of the self-test are known. An adjudicator's final decision on whether the privilege applies should be withheld until the creditor has taken the appropriate corrective action.

A creditor's determination about the type of corrective action needed, or a finding that no corrective action is required, is not conclusive in determining whether the requirements of this paragraph have been satisfied. If a creditor's claim of privilege is challenged, an assessment of the need for corrective action or the type of corrective action that is appropriate must be based on a review of the self-testing results, which may require an in camera inspection of the privileged documents by a court or administrative law judge.

15(a)(3) Other Privileges

Several commenters requested that the Board clarify the effect of the self-testing rule on other privileges that may also apply, such as the attorney-client privilege or the privilege for attorney work product. Paragraph 15(a)(3) has been added to clarify that the self-testing privilege may be asserted in addition to any other privilege.

15(b) Self-test Defined

15(b)(1) Definition

Paragraph 15(b)(1) states what constitutes a "self-test" for purposes of the ECOA. The 1996 Act does not define "self-test" and authorizes the Board to define by regulation the practices covered by the privilege. In the proposed rule, the privilege was limited to self-tests that create

data or factual information about a creditor's compliance that is not available and cannot be derived from the creditor's loan or application files or other records related to credit transactions. The Board solicited views on whether a broader definition should be considered, for example, a definition that would also include creditors' analyses of their loan and application files. Comments were sought on whether a broader definition might adversely affect the ability of enforcement agencies and private parties to obtain needed information or whether it would provide needed incentives for creditor monitoring and self-correction.

Most of the comments received, from creditors and their representatives, favored a broad definition of "self-test." The Board has carefully considered all the comments along with the views of the agencies charged with enforcement of the act and regulation. For the reasons explained below, the scope of the definition as proposed has been retained in the final rule, although the language has been revised somewhat for clarity.

Under the final rule, the principal attribute of self-testing is that it constitutes a voluntary undertaking by the creditor to produce new data or factual information that otherwise would not be available and could not be derived from loan or application files or other records related to credit transactions. The privilege does not protect a creditor's analysis performed as part of processing or underwriting a credit application. Self-testing includes, but is not limited to, the practice of using fictitious applicants for credit (testers), either with or without the use of matched pairs. A creditor may elect to test a defined segment of its business, for example, loan applications handled by a particular loan officer or processed by a specific branch, or applications made for a particular type of credit or loan program. A creditor also may use other methods of generating information that is not available in loan and application files, for example, by surveying

mortgage loan applicants to assess whether applications were processed appropriately. To the extent permitted by law, creditors might also develop methods that go beyond traditional pre-application testing, such as arranging for testers to submit fictitious loan applications for processing.

A creditor's evaluation or analysis of credit applications, loan files, Home Mortgage Disclosure Act data or similar types of records (such as broker or loan officer compensation records), does not produce new factual information about a creditor's compliance and is not a self-test for purposes of this section. Information derived from such records, even if it has been aggregated or reorganized to facilitate the creditor's analysis, also would not be privileged. Similarly, a statistical analysis of data derived from existing loan files is not privileged.

As some commenters pointed out, the proposed rule focused only on testing for compliance with the prohibitions on discrimination contained in sections 202.4 and 202.5(a) of Regulation B. The statute refers, however, to self-testing for compliance with the ECOA generally. Accordingly, the language of the final rule has been modified to apply to self-testing for compliance with any requirement of the ECOA as implemented by Regulation B. To qualify for the privilege, a self-test must be sufficient to constitute a determination of the extent or effectiveness of the creditor's compliance with the act and Regulation B. Accordingly, a self-test is only privileged if it was designed and used for that purpose. A self-test that is designed and used to determine compliance with other laws or regulations or for other purposes, is not privileged under this rule. For example, a self-test designed to evaluate employee efficiency or customers' satisfaction with the level of service provided by the creditor is not privileged even if evidence of discrimination is uncovered incidentally. If a self-test is designed for multiple

purposes, only the portion designed to determine compliance with the ECOA is eligible for the privilege.

Most creditors that commented believed that the proposed definition of "self-test" was too narrow because it would not provide incentives for creditors to review their existing loan files, either with or without a statistical analysis. These commenters asserted that the proposed definition would effectively be limited to testing for a narrow range of discriminatory practices--tests for illegal discouragement of loan applicants during the pre-application process. They believed there should be incentives to analyze a creditor's policies and evaluate its underwriting or other lending practices after an application is made, and that an audit and review of actual credit transactions are the most effective ways of monitoring compliance with the ECOA. These activities were generally characterized as "self-audits" or "self-examinations." In addition, some commenters suggested using an even broader definition, one that would privilege any critical self-analysis performed by a creditor.

A few commenters believed that a narrow definition of "self-test" only encourages the use of "testers," and will effectively limit the privilege to certain creditors and loan products. They cited wholesale lenders and secondary market purchasers as parties that do not have retail operations and cannot use testers. Also, testers generally are not used for credit cards, automobile loans, or other loan programs that do not typically involve personal contacts. Some commenters noted that "mystery shopper" tests are relatively expensive and are not used as frequently among smaller institutions, which are more likely to rely on paper audits.

Civil rights and community organizations favored a narrow definition of "self-test." Some claimed that creditors already have adequate incentives to monitor their loan and application files

because they are subject to review by regulatory and enforcement agencies. They asserted that the risks and costs of litigation and creditors' potential liability are also sufficient incentives for creditors to audit their loan files. These commenters believed that the Board should maximize the amount of information available to private litigants by reading the privilege narrowly. In addition, one commenter believed that a broad definition would encourage creditors to shield as much information as possible and would force plaintiffs alleging discrimination to engage in lengthy and expensive litigation to challenge creditors' claims of privilege.

As directed by the statute, the Board consulted with the other federal bank regulatory agencies, and with the Federal Trade Commission and Department of Justice, all of which share some responsibility for enforcement of the ECOA. As a general matter, the agencies expressed support for implementing the privilege in a manner that encourages creditors to self-test and take voluntary corrective action, but does not hinder appropriate enforcement efforts that are undertaken through compliance examinations and, when necessary, the filing of legal actions. All of the agencies favored the narrow definition used in the proposed rule.

The bank regulatory agencies consulted by the Board believed that a broad privilege would make compliance examinations less efficient and more burdensome for financial institutions without necessarily increasing the level of self-testing. They noted that most large depository institutions already conduct some type of audit or self-evaluation, frequently involving the review or evaluation of actual loan files, even though the results of such evaluations currently are not privileged. As a matter of policy, the Office of the Comptroller of the Currency does not require national banks to disclose the results of self-evaluations, although banks that do so voluntarily may be eligible for more streamlined examinations. Generally, banks could be expected to

continue their audit programs if the Board adopts a broader privilege, however, they probably would be less likely to share the results with their supervisory agencies because, if they did, they would lose any privilege to withhold the results from private litigants.

The bank regulatory agencies also expressed concern that a broader privilege is likely to result in more disputes over what information lenders may withhold from examiners, thereby making the examination process more adversarial. The enforcement agencies noted that a broader privilege is likely to require the commitment of greater resources to the adjudication of privilege claims.

The Department of Justice preferred the implementation of a narrow privilege so that the rule's benefits, risks, and overall effect could be studied before considering a broader rule with potentially greater impact on the government's and private litigants' access to creditor records.

The Board also consulted extensively with HUD in connection with that agency's mandate to implement the self-testing privilege under the Fair Housing Act. As noted in its notice of final rulemaking, HUD too favored the narrower rule.

The Board believes that adoption of either the broad or narrow definition of "self-test" would be within the Board's rulemaking authority under the statute, which does not define the term "self-test." There is some evidence in the legislative history that the congressional sponsors intended a narrow definition. The statute itself, however, defers to the agencies by expressly delegating to the Board and HUD the task of defining the term under the ECOA and the FHA.

The statutory language does not mandate a privilege that covers every method that a creditor might use to evaluate its performance. The only statutory guidance is language stating that the regulation should specify that a self-test must be sufficient to determine the level and

effectiveness of the creditor's compliance with the law. That language has been incorporated into the final rule.

The Board believes that the Congress intended the agencies to weigh the competing interests of creditors, private litigants, and the regulatory and enforcement agencies in developing a definition that furthers compliance with the antidiscrimination policies of the ECOA and Fair Housing Act, as well as the purpose of the self-testing privilege, which is to increase creditor self-correction efforts. Balancing these interests to derive a definition calls for the agencies to make a prediction about future events that is necessarily imprecise--which definition and which enforcement methods are likely to produce the greatest increase in compliance with the two statutes.

The narrow definition of "self-test" provides added incentive for creditors to look beyond their ordinary business records and develop new factual evidence about the level and effectiveness of their compliance. In particular, it creates an incentive for creditors to use self-testing to monitor the pre-application process, a stage which typically does not produce the type of documentation that lends itself to traditional compliance reviews. But even under a narrow definition of "self-test," principles of sound lending dictate that a creditor have appropriate audit and control systems. These may take the form of compliance reviews, file analyses, the use of second-review committees, or other methods that examine loan and application files that are subject to examination by the regulatory and enforcement agencies and may be obtained by a private litigant alleging a violation. Creditors have incentives to conduct routine compliance reviews and file analyses as good business practices and to avoid or minimize potential liability for violations.

A broad definition of "self-test" might give some creditors greater incentive to evaluate their performance. To the extent they conduct such evaluations, a broad definition would also provide less information to government agencies or private litigants seeking to enforce the ECOA. It is difficult to know whether a broad definition would significantly increase creditor self-monitoring, or merely prevent or deter disclosure of audit results by creditors that routinely undertake such audits as a prudent business practice.

In the proposed rule, the Board also noted that extending the self-testing privilege to audits of existing business records could have an unintended negative effect on the levels of cooperation between creditors and the regulatory agencies. The agencies consulted by the Board agreed with that view. In addition to the Board, these agencies possess considerable expertise in supervising and regulating financial institutions and in enforcing the fair lending laws. In view of the concerns about the uncertain benefits and potential impact of a broader rule on government enforcement and the legal rights of private litigants, the Board is adopting the narrower definition as proposed. In reaching this decision, the Board has also given some weight to the argument that a broadly defined privilege would result in more disputed claims of privilege that must be adjudicated.

The Board expects creditors to continue conducting routine compliance reviews as a good business practice to eliminate discrimination and avoid or minimize their potential liability for violations, even without the self-testing privilege. After several years' experience, it may be appropriate to review the rule to determine if the incentives for self-testing and self-correction can be strengthened without impairing other enforcement mechanisms.

15(b)(2) Types of Information Privileged

Paragraph 15(b)(2) of the final rule was designated as paragraph 15(b)(3) of the proposed rule. The paragraph clarifies what information generated by a self-test is privileged. The examples of self-tests that had been listed in paragraph 15(b)(2) of the proposed rule are discussed in the Official Staff Commentary.

15(b)(3) Types of Information Not Privileged

Paragraph 15(b)(3) of the final rule had been designated as paragraph 15(b)(4) of the proposed rule. Paragraph 15(b)(3)(i) clarifies that information about the existence of a self-test, its scope, or the methodology used in conducting the test, is not privileged. Such information may be necessary to determine whether the prerequisites for a claim of privilege have been satisfied.

Paragraph 15(b)(3)(ii) clarifies that the underlying loan and application files or other business records related to actual credit transactions are not privileged. Information derived from such records also is not privileged, even if it has been aggregated, summarized, or reorganized to facilitate analysis. Examples of the types of records that are not privileged include property appraisal reports, loan policies or procedures, underwriting standards, employee or broker compensation records, and minutes of loan committee meetings or other documents reflecting the basis for a decision to approve or deny an application. If a creditor arranges for testers to submit loan applications for processing, the records are not related to actual credit transactions for purposes of this paragraph and may be privileged self-testing records.

15(c) Appropriate Corrective Action

Paragraph 15(c) has been revised in response to commenters' concerns. To give creditors more specific guidance, the final rule lists certain situations that will not require remedial relief to individual applicants in order for the privilege to apply.

The rule only addresses what corrective actions are required for a creditor to take advantage of the privilege in this section. A creditor may still be required to take other actions or provide additional relief if a formal finding of discrimination is made.

15(c)(1) General Requirement

The final rule has been revised to clarify that corrective action is required when the results of a self-test show that it is more likely than not that one or more violations occurred. The proposed rule used the language of the 1996 Act, stating that corrective action would be required when a creditor identified a "possible" violation. The final rule has been revised in light of commenters' concerns that this language was capable of differing interpretations. For example, some commenters feared that the rule might be construed to require corrective action if a violation was "possible" even if unlikely. The Board believes the statute was intended to require corrective action only if a violation is more likely than not, and that the reference to "possible" violations merely recognizes that corrective action is required even though no violation has been formally adjudicated or admitted. The language of the final rule has been modified accordingly.

In determining whether it is more likely than not that a violation occurred, a creditor must treat testers as if they are actual applicants for credit. A creditor may not refuse to take appropriate corrective action under this section because the self-test used fictitious loan applicants. The fact that a tester's agreement with the creditor waives the tester's legal right to

assert a violation does not eliminate the requirement for the creditor to take appropriate corrective action, although no remedial relief for the tester is required under paragraph 15(c)(3).

15(c)(2) Determining the Scope of Appropriate Corrective Action

Paragraph 15(c)(2) provides that a creditor must take corrective actions that are reasonably likely to remedy both the cause and effects of the violation; this requires identification of the practice or policy that is the likely cause and an assessment of the extent and scope of the violation. This determination must be made on a case-by-case basis. The rule is not intended to suggest that in each case there is a single, most appropriate response. To provide additional guidance, a list of sample corrective actions, including both prospective and remedial relief, is included in the Official Staff Commentary.

Many commenters believed that creditors will be less likely to self-test if the availability of the privilege cannot be determined until after their corrective action has been determined to be sufficient. A number of them suggested adopting a good-faith standard, so that creditors using reasonable business judgment about how to correct potential violations would be deemed to satisfy the corrective action requirement.

The Board recognizes that creditors' incentive to self-test may be affected by the fact that creditors' claims that the self-test report and results are privileged are subject to challenge. This is inherent in the statutory framework established by the 1996 Act, which allows parties who are denied access to self-test data an opportunity to contest the creditor's assertion of the privilege in a formal adjudication. The application of a good-faith or business judgment rule would significantly limit the right and ability of these parties to do so, by allowing creditors' own business judgment to serve as the ultimate guide on the corrective action requirement. The Board

believes a good-faith or business judgment rule would be inconsistent with the legislative intent. Accordingly, as proposed, the rule continues to recognize that determining whether a creditor has taken appropriate corrective action must be made on a case-by-case basis and that the applicable standard is whether the corrective action is reasonably likely to remedy both the cause and effect of the violation.

Paragraph 15(c)(2) also provides that in determining the appropriate corrective action, creditors should identify the practice or policy that is the likely cause of the violation and assess the extent and scope of the violation. For example, a creditor might identify inadequate or improper lending policies, failure to implement established policies, employee conduct, or other causes. The extent and scope of a likely violation may be assessed by determining which areas of operations are likely to be affected by those policies and practices--for example, by determining the types of loans and stages of the application process involved and the branches or offices where the violations may have occurred.

15(c)(3) Types of Relief

Paragraph 15(c)(3) has been added in response to commenters' concerns. It is intended to give creditors more specific guidance, and lists certain situations that do not require remedial relief to individual applicants in order for the privilege to apply.

The proposed rule stated that corrective action includes both prospective and retroactive relief, as may be appropriate. Some commenters believed that this was too broad, especially in light of the narrow definition of "self-test." They expressed the view that the use of pre-application testers to identify policies and practices that illegally discriminate should not require

creditors to review existing loan files to identify and compensate applicants who might have been adversely affected.

The final rule has been revised. For the privilege to apply, a creditor must take corrective action that is appropriate for the type of self-test and the scope of the likely violation. A creditor is required to provide remedial relief to an applicant identified by the self-test as one whose rights were more likely than not violated, but is not required to identify other persons who might have been adversely affected. The use of pre-application testers to identify policies and practices that illegally discriminate does not require creditors to review existing loan files for the purpose of identifying and compensating applicants who might have been adversely affected. Because this rule only addresses the types of relief required in order to assert the self-testing privilege, creditors should make efforts to identify other potential victims, however, as a good business practice and to avoid or minimize potential liability.

Some commenters asserted that creditors' incentive to self-test would be weakened if the rule is interpreted to require remedial relief equal to or beyond what applicants could obtain in a legal action. The final rule clarifies that a creditor is not required to provide remedial relief to an applicant if the statute of limitations expired before the results of the self-test were obtained or if the applicant is otherwise ineligible for such relief. For example, the creditor need not offer credit to a denied applicant who no longer qualifies for the credit due to a change in financial circumstances, although some other type of relief might be appropriate.

15(c)(4) No Admission of Violation

This paragraph has been added in response to commenters' requests for clarification that a creditor's corrective actions not be deemed an admission that a violation occurred. The provision

is intended to provide additional incentive for creditors to take preventive measures that may address potential problems even though a violation has not yet occurred.

15(d)(1) Scope of Privilege

Paragraph 15(d)(1) describes the scope of the privilege for covered self-tests. Privileged documents may not be obtained by a government agency for use in an examination or investigation relating to compliance with the ECOA, or by a government agency or applicant (including prospective applicants alleging they were discouraged from pursuing an application on a prohibited basis) in any civil proceeding in which a violation of the ECOA or Regulation B is alleged. This paragraph applies to federal, state, and local government agencies. Accordingly, in a case brought under the ECOA, the privilege established under this section would preempt inconsistent laws or court rules to the extent they might require disclosure of privileged self-testing data.

Some commenters believed that the privilege should also apply in cases filed under state law if the information would be privileged in a case filed under the ECOA. They argued that creditors would be unable to rely on the privilege as an incentive to self-test if parties can obtain the information by filing state law claims. The 1996 Act, however, establishes only a limited privilege, that protects self-testing data from disclosure or use in examinations and investigations conducted under the ECOA and Fair Housing Act, and in proceedings alleging a violation of those laws.

In proceedings where the self-testing privilege does not apply (for example, litigation that is filed only under a state's fair lending statute), if the court orders a creditor to disclose self-test results, that disclosure would not be a voluntary waiver of the privilege for purposes of the

ECOA. But the privilege could be undermined for purposes of the ECOA if the privileged self-testing data are made public. Creditors could seek a protective order to limit the availability and use of the self-testing data and prevent its dissemination beyond what is necessary in that particular case. In any event, as long as the self-testing privilege is not forfeited by the creditor, paragraph 15(d)(1) precludes a party who has obtained privileged information from using it in a case brought under the ECOA.

15(d)(2) Loss of Privilege

Paragraph 15(d)(2) describes the circumstances that would result in the loss of privileged status. This paragraph is adopted substantially as proposed with only minor modifications for clarification.

Paragraph 15(d)(2)(i) provides that the results or report of a self-test, including any data generated by the self-test, will no longer be privileged under this section once the creditor voluntarily discloses all or part of the contents to any government agency, loan applicant, or the general public. This paragraph has been revised to clarify that the privilege is lost if the creditor discloses privileged information, such as the results of the self-test, but that the privilege is not lost if the creditor merely reveals or refers to the existence of the self-test.

Comment was solicited on a possible exception to the general rule in paragraph 15(d)(2)(i), whereby creditors could voluntarily share privileged information with a regulatory or law enforcement agency without causing the information to lose its privileged status when it is subsequently sought by private litigants. Under such an exception, however, such disclosures would cause the documents or information to lose their privileged status with respect to all supervisory and enforcement agencies.

A significant number of commenters supported such an exception and believed it would be particularly useful in enabling creditors to seek guidance from the agencies in determining the appropriate corrective action that is a prerequisite for the privilege. It would also encourage financial institutions to voluntarily share self-testing data with examiners, to reduce the burden associated with compliance examinations performed by those agencies. A few commenters believed that mandatory sharing of self-test results with regulatory and enforcement agencies was appropriate.

Some commenters opposed any exception that would allow creditors to voluntarily share privileged information with government agencies while maintaining the privilege as to private litigants. They also questioned whether such an exception would be consistent with the law.

The Board believes that such an exception would be useful and could be adopted pursuant to the Board's statutory authority to create regulatory exceptions under the ECOA. The 1996 Act, however, directs the Board and HUD to enact substantially similar regulations under the ECOA and Fair Housing Act. For the reasons stated in its notice of final rulemaking under the Fair Housing Act, HUD does not believe that there is statutory authority for such an exception, and also does not believe it is advisable. Accordingly, the Board has adopted the rule as initially proposed.

As provided in the 1996 Act, the proposed rule stated that self-testing data loses its privileged status if it is disclosed by a person with "lawful access" to the self-test report or results. Some commenters suggested the privilege should be lost only if the person with access to the privileged information is also authorized to make such a disclosure. However, if a creditor has no formal method for authorizing individual employees to disclose privileged information, that

approach would impose the added burden of determining the nature and scope of particular employees' duties and authority. Several commenters also requested that the rule expressly state that the privilege is not lost through an inadvertent or accidental disclosure.

The statutory language does not specifically address these issues. It may have been the legislative intent to allow such matters to be resolved under the substantial body of judicial law that has already developed regarding privileges generally. For example, some courts have held that a privilege is lost even if the disclosure was unintentional or inadvertent. Other courts have declined to adopt a strict rule and opt instead for an approach that takes account of the facts surrounding the particular disclosure before deciding whether or not the privilege should be deemed to be lost. In the absence of any clear legislative intent, the Board believes these issues are best resolved under the existing law concerning privileges and the rules of evidence as administered by the courts. Thus, the final rule has been adopted as proposed.

Several commenters sought additional clarification because they believed the rule regarding loss of the privilege when information is disclosed by a person with "lawful access" might be interpreted to include any person lawfully on the creditor's premises. Whether a particular individual has "lawful access" for purposes of disclosing privileged information is a factual issue. Consideration should be given to whether the individual was an employee or agent of the creditor who reasonably should be expected to have access to or knowledge of the privileged information. The Board believes such matters should be resolved by a court or administrative law judge under the existing law relating to privileges generally. Accordingly, the proposed rule has been adopted without change.

A few commenters requested clarification that the privilege is not lost if the creditor discloses self-testing results to independent contractors acting as auditors or consultants on compliance matters. The Official Staff Commentary is being revised to reflect this interpretation.

Some commenters expressed concern that if a creditor notified applicants or loan customers that they were eligible for remedial relief, that would be viewed as a disclosure of the self-test results, causing the privilege to be lost. A provision has been added to the Official Staff Commentary clarifying that a creditor's corrective actions alone will not be considered a voluntary disclosure of the self-test report or results. For example, a creditor does not disclose the results of a self-test merely by offering to extend credit to a denied applicant or by inviting the applicant to reapply for credit. A voluntary disclosure could occur, however, if the creditor disclosed the self-test results in connection with a new offer of credit.

Under paragraph 15(d)(2)(ii), if a creditor elects to rely on the self-testing results as a defense to alleged violations of the ECOA in court or administrative proceedings, the privilege will not apply if the documents are sought in connection with those proceedings. This paragraph has been revised to clarify that the privilege is lost if the creditor discloses privileged information, such as the results of the self-test, but that the privilege is not lost if the creditor merely reveals or refers to the existence of the self-test.

15(d)(3) Limited Use of Privileged Information

Paragraph 15(d)(3) is adopted as proposed, and implements the statutory provision that allows for a limited use of privileged documents for the purpose of determining a penalty or remedy after a violation of the ECOA or Regulation B has been formally adjudicated or admitted.

A creditor's compliance with this requirement does not evidence the creditor's intent to give up the privilege.

Supplement I to Part 202 -- Official Staff Interpretations

The Official Staff Commentary is being revised to reflect the amendments to Regulation B and incorporate the interpretations provided above.

IV. Regulatory Flexibility Analysis

In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603), the Board's Office of the Secretary has reviewed the amendments to Regulation B. Overall, the amendments are not expected to have any significant impact on small entities. The amendments implement the legal privilege created by the 1996 Act for certain information that creditors may voluntarily develop about their compliance with the fair lending laws through self-testing. The regulation does not impose any significant regulatory requirements on creditors. Consequently, the amendments are not likely to have a significant impact on institutions' costs, including the costs to small institutions.

V. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), the Board has reviewed the rule under the authority delegated to the Board by the Office of Management and Budget (OMB). 5 CFR 1320 Appendix A.1.

Regulation B applies to individuals and businesses that regularly extend credit or participate in the decision to extend credit. This includes all types of creditors. Under the Paperwork Reduction Act, however, the Board accounts for the paperwork burden associated with Regulation B only for state member banks. Any estimates of paperwork burden for other

financial institutions would be provided by the federal agency or agencies supervising those lenders.

The collection of information relating to self-tests and corrective actions is mandatory under this final rule. These requirements are located in 12 CFR 202.12(b)(6). The recordkeepers are for-profit financial institutions, including small businesses that voluntarily conduct self-tests as defined in the rule. Records relating to self-tests must be retained for at least twenty-five months and may be stored electronically. The purpose of the recordkeeping is to facilitate a determination about whether the results or report of a creditor's self-test are privileged under the rule, in the event of a challenge. The recordkeeping requirement also encourages creditors to take appropriate corrective action if the self-testing results demonstrate that violations are likely. The recordkeeping burden consists of the additional effort necessary to retain self-testing records; it does not include the effort necessary to conduct and document the self-test.

There are 1,005 state member banks that are potential recordkeepers under this rule. In connection with the proposed rule, the Board estimated the recordkeeping burden based on each state member bank conducting one self-testing program per year. This was done in order to estimate the potential burden under the broad definition of "self-test" on which the Board was soliciting comment. Although the Board anticipates that all institutions will conduct audits of their performance under the fair lending laws, compliance programs that are covered by the final rule's narrow definition of self-test, which requires the production of new data, are most likely to be adopted by large institutions. The Board believes that the banks most likely to use compliance programs that also meet the rule's definition of "self-test" are those having assets of over $250 million, which is about 18 percent of the state member banks. The Board estimates that about

half of these banks (approximately 90) will conduct such tests about once every 24 months, which is approximately once during each examination cycle. This is the equivalent of self-tests being conducted by approximately 45 state member banks during any one calendar year.

The Board previously estimated between one and eight hours (or an average of two hours) as the burden for retaining the relevant records of a self-test conducted by a state member bank. One comment was received from a bank holding company that believed the Board's estimate was too low. This commenter did not provide an explanation or provide any other estimate of the burden on state member banks or its organization. The Board is retaining its initial estimate.

The Board estimates that 25 percent of the state member banks that conduct self-tests will improve their compliance programs or take other actions in response to the self-test results, even if no likely violations are found. The improvements or corrective action taken will depend on self-test findings, and the nature and scope of any possible violation. The amount of time needed to document the creditors' actions will also vary. The Board estimates that at a typical state member bank the effort to retain records associated with corrective action would take an additional two to 20 hours, with an average of eight recordkeeping burden hours per year.

The total annual burden that this rule adds to the burden of Regulation B on a combined basis for all state member banks is estimated to be 178 hours. There is estimated to be no annual cost burden over the annual hour burden, and no capital or start up costs.

Because the records would be maintained at state member banks, no issue of confidentiality under the Freedom of Information Act normally will arise. If information does come into the Board's possession, it will be protected from disclosure by exemptions 4 and 6 of the Freedom of Information Act (FOIA). 5 U.S.C. § 552(b)(4) and (6). In addition, if such

information is in the workpapers of Board examiners or extracted in Board reports of examination, the information would also be protected by exemption 8 of the FOIA. 5 U.S.C. § 552(b)(8).

An agency may not collect or sponsor the collection or disclosure of information, and an organization is not required to collect or disclose information unless a currently valid OMB control number is displayed. The OMB control number for Regulation B is 7100-0201.

The Board has a continuing interest in the public's opinions about the collection of information under the Board's rules. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0201), Washington, DC 20503.

List of Subjects in 12 CFR Part 202

Aged, Banks, banking, Civil rights, Credit, Federal Reserve System, Marital status discrimination, Penalties, Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination.

For the reasons set forth in the preamble, 12 CFR part 202 is amended as follows:

PART 202 -- EQUAL CREDIT OPPORTUNITY (REGULATION B)

1. The authority citation for Part 202 continues to read as follows:

Authority: 15 U.S.C. 1691-1691f.

2. Section 202.12 is amended by adding a new paragraph (b)(6) to read as follows:

§ 202.12 Record retention

* * * * *

(b) Preservation of records. * * *

(6) Self-tests. For 25 months after a self-test (as defined in § 202.15) has been completed, the creditor shall retain all written or recorded information about the self-test. A creditor shall retain information beyond 25 months if it has actual notice that it is under investigation or is subject to an enforcement proceeding for an alleged violation, or if it has been served with notice of a civil action. In such cases, the creditor shall retain the information until final disposition of the matter, unless an earlier time is allowed by the appropriate agency or court order.

3. Section 202.15 is added to read as follows:

§ 202.15 Incentives for self-testing and self-correction.

(a) General rules -- (1) Voluntary self-testing and correction. The report or results of the self-test that a creditor voluntarily conducts (or authorizes) are privileged as provided in this section. Data collection required by law or by any governmental authority is not a voluntary self-test.

(2) Corrective action required. The privilege in this section applies only if the creditor has taken or is taking appropriate corrective action.

(3) Other privileges. The privilege created by this section does not preclude the assertion of any other privilege that may also apply.

(b) Self-test defined -- (1) Definition. A self-test is any program, practice, or study that:

(i) Is designed and used specifically to determine the extent or effectiveness of a creditor's compliance with the act or Regulation B; and

(ii) Creates data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions.

(2) Types of information privileged. The privilege under this section applies to the report or results of the self-test, data or factual information created by the self-test, and any analysis, opinions, and conclusions pertaining to the self-test report or results. The privilege covers workpapers or draft documents as well as final documents.

(3) Types of information not privileged. The privilege under this section does not apply to:

(i) Information about whether a creditor conducted a self-test, the methodology used or the scope of the self-test, the time period covered by the self-test, or the dates it was conducted; or

(ii) Loan and application files or other business records related to credit transactions, and information derived from such files and records, even if it has been aggregated, summarized, or reorganized to facilitate analysis.

(c) Appropriate corrective action -- (1) General requirement. For the privilege in this section to apply, appropriate corrective action is required when the self-test shows that it is more likely than not that a violation occurred, even though no violation has been formally adjudicated.

(2) Determining the scope of appropriate corrective action. A creditor must take corrective action that is reasonably likely to remedy the cause and effect of a likely violation by:

(i) Identifying the policies or practices that are the likely cause of the violation; and

(ii) Assessing the extent and scope of any violation.

(3) Types of relief. Appropriate corrective action may include both prospective and remedial relief, except that to establish a privilege under this section:

(i) A creditor is not required to provide remedial relief to a tester used in a self-test;

(ii) A creditor is only required to provide remedial relief to an applicant identified by the self-test as one whose rights were more likely than not violated; and

(iii) A creditor is not required to provide remedial relief to a particular applicant if the statute of limitations applicable to the violation expired before the creditor obtained the results of the self-test or the applicant is otherwise ineligible for such relief.

(4) No admission of violation. Taking corrective action is not an admission that a violation occurred.

(d)(1) Scope of privilege. The report or results of a privileged self-test may not be obtained or used:

(i) By a government agency in any examination or investigation relating to compliance with the act or this regulation; or

(ii) By a government agency or an applicant (including a prospective applicant who alleges a violation of § 202.5(a)) in any proceeding or civil action in which a violation of the act or Regulation B is alleged.

(2) Loss of privilege. The report or results of a self-test are not privileged under paragraph (d)(1) of this section if the creditor or a person with lawful access to the report or results):

(i) Voluntarily discloses any part of the report or results, or any other information privileged under this section, to an applicant or government agency or to the public;

(ii) Discloses any part of the report or results, or any other information privileged under this section, as a defense to charges that the creditor has violated the act or regulation; or

(iii) Fails or is unable to produce written or recorded information about the self-test that is required to be retained under § 202.12(b)(6) when the information is needed to determine whether the privilege applies. This paragraph does not limit any other penalty or remedy that may be available for a violation of § 202.12.

(3) Limited use of privileged information. Notwithstanding paragraph (d)(1) of this section, the self-test report or results and any other information privileged under this section may be obtained and used by an applicant or government agency solely to determine a penalty or remedy after a violation of the act or this regulation has been adjudicated or admitted. Disclosures for this limited purpose may be used only for the particular proceeding in which the

adjudication or admission was made. Information disclosed under (d)(3) remains privileged under paragraph (d)(1) of this section.

4. In Supplement I to Part 202, under Section 202.12--Record Retention, a new paragraph 12(b)(6) is added to read as follows:

Supplement I To Part 202--Official Staff Interpretations

* * * * *

Section 202.12--Record Retention

* * * * *

12(b) Preservation of records

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12(b)(6) Self-tests.

1. The rule requires all written or recorded information about a self-test to be retained for 25 months after a self-test has been completed. For this purpose, a self-test is completed after the creditor has obtained the results and made a determination about what corrective action, if any, is appropriate. Creditors are required to retain information about the scope of the self-test, the methodology used and time period covered by the self-test, the report or results of the self-test including any analysis or conclusions, and any corrective action taken in response to the self-test.

* * * * *

5. Supplement I to Part 202 is amended by adding Section 202.15--Incentives for Self-testing and Self-correction, to read as follows:

* * * * *

Section 202.15--Incentives for Self-testing and Self-correction

15(a) General rules

15(a)(1) Voluntary self-testing and correction

1. Activities required by any governmental authority are not voluntary self-tests. A governmental authority includes both administrative and judicial authorities for federal, state, and local governments.

15(a)(2) Corrective action required

1. To qualify for the privilege, appropriate corrective action is required when the results of a self-test show that it is more likely than not that there has been a violation of the ECOA or this regulation. A self-test is also privileged when it identifies no violations.

2. In some cases, the issue of whether certain information is privileged may arise before the self-test is complete or corrective actions are fully under way. This would not necessarily prevent a creditor from asserting the privilege. In situations where the self-test is not complete, for the privilege to apply the lender must satisfy the regulation's requirements within a reasonable period of time. To assert the privilege where the self-test shows a likely violation, the rule requires, at a minimum, that the creditor establish a plan for corrective action and a method to demonstrate progress in implementing the plan. Creditors must take appropriate corrective action on a timely basis after the results of the self-test are known.

3. A creditor's determination about the type of corrective action needed, or a finding that no corrective action is required, is not conclusive in determining whether the requirements of this paragraph have been satisfied. If a creditor's claim of privilege is challenged, an assessment of the need for corrective action or the type of corrective action that is appropriate must be based on a

review of the self-testing results, which may require an in camera inspection of the privileged documents.

15(a)(3) Other privileges

1. A creditor may assert the privilege established under this section in addition to asserting any other privilege that may apply, such as the attorney-client privilege or the work product privilege. Self-testing data may still be privileged under this section, whether or not the creditor's assertion of another privilege is upheld.

15(b) Self-test defined

15(b)(1) Definition

Paragraph 15(b)(1)(i)

1. To qualify for the privilege, a self-test must be sufficient to constitute a determination of the extent or effectiveness of the creditor's compliance with the act and Regulation B. Accordingly, a self-test is only privileged if it was designed and used for that purpose. A self-test that is designed or used to determine compliance with other laws or regulations or for other purposes is not privileged under this rule. For example, a self-test designed to evaluate employee efficiency or customers' satisfaction with the level of service provided by the creditor is not privileged even if evidence of discrimination is uncovered incidentally. If a self-test is designed for multiple purposes, only the portion designed to determine compliance with the ECOA is eligible for the privilege.

Paragraph 15(b)(1)(ii)

1. The principal attribute of self-testing is that it constitutes a voluntary undertaking by the creditor to produce new data or factual information that otherwise would not be available and

could not be derived from loan or application files or other records related to credit transactions. Self-testing includes, but is not limited to, the practice of using fictitious applicants for credit (testers), either with or without the use of matched pairs. A creditor may elect to test a defined segment of its business, for example, loan applications processed by a specific branch or loan officer, or applications made for a particular type of credit or loan program. A creditor also may use other methods of generating information that is not available in loan and application files, such as surveying mortgage loan applicants. To the extent permitted by law, creditors might also develop new methods that go beyond traditional pre-application testing, such as hiring testers to submit fictitious loan applications for processing.

2. The privilege does not protect a creditor's analysis performed as part of processing or underwriting a credit application. A creditor's evaluation or analysis of its loan files, Home Mortgage Disclosure Act data, or similar types of records (such as broker or loan officer compensation records) does not produce new information about a creditor's compliance and is not a self-test for purposes of this section. Similarly, a statistical analysis of data derived from existing loan files is not privileged.

15(b)(3) Types of information not privileged

Paragraph 15(b)(3)(i)

1. The information listed in this paragraph is not privileged and may be used to determine whether the prerequisites for the privilege have been satisfied. Accordingly, a creditor might be asked to identify the self-testing method, for example, whether pre-application testers were used or data were compiled by surveying loan applicants. Information about the scope of the self test

(such as the types of credit transactions examined, or the geographic area covered by the test) also is not privileged.

Paragraph 15(b)(3)(ii)

1. Property appraisal reports, minutes of loan committee meetings or other documents reflecting the basis for a decision to approve or deny an application, loan policies or procedures, underwriting standards, and broker compensation records are examples of the types of records that are not privileged. If a creditor arranges for testers to submit loan applications for processing, the records are not related to actual credit transactions for purposes of this paragraph and may be privileged self-testing records.

15(c) Appropriate corrective action

1. The rule only addresses what corrective actions are required for a creditor to take advantage of the privilege in this section. A creditor may still be required to take other actions or provide additional relief if a formal finding of discrimination is made.

15(c)(1) General requirement

1. Appropriate corrective action is required even though no violation has been formally adjudicated or admitted by the creditor. In determining whether it is more likely than not that a violation occurred, a creditor must treat testers as if they are actual applicants for credit. A creditor may not refuse to take appropriate corrective action under this section because the self-test used fictitious loan applicants. The fact that a tester's agreement with the creditor waives the tester's legal right to assert a violation does not eliminate the requirement for the creditor to take corrective action, although no remedial relief for the tester is required under paragraph 15(c)(3).

15(c)(2) Determining the scope of appropriate corrective action

1. Whether a creditor has taken or is taking corrective action that is appropriate will be determined on a case-by-case basis. Generally, the scope of the corrective action that is needed to preserve the privilege is governed by the scope of the self-test. For example, a creditor that self-tests mortgage loans and discovers evidence of discrimination may focus its corrective actions on mortgage loans, and is not required to expand its testing to other types of loans.

2. In identifying the policies or practices that are the likely cause of the violation, a creditor might identify inadequate or improper lending policies, failure to implement established policies, employee conduct, or other causes. The extent and scope of a likely violation may be assessed by determining which areas of operations are likely to be affected by those policies and practices, for example, by determining the types of loans and stages of the application process involved and the branches or offices where the violations may have occurred.

3. Depending on the method and scope of the self-test and the results of the test, appropriate corrective action may include one or more of the following:

i. If the self-test identifies individuals whose applications were inappropriately processed, offering to extend credit if the application was improperly denied and compensating such persons for out-of-pocket costs and other compensatory damages;

ii. Correcting institutional polices or procedures that may have contributed to the likely violation, and adopting new policies as appropriate;

iii. Identifying and then training and/or disciplining the employees involved;

iv. Developing outreach programs, marketing strategies, or loan products to serve more effectively segments of the lender's markets that may have been affected by the likely discrimination; and

v. Improving audit and oversight systems to avoid a recurrence of the likely violations.

15(c)(3) Types of relief

Paragraph 15(c)(3)(ii)

1. The use of pre-application testers to identify policies and practices that illegally discriminate does not require creditors to review existing loan files for the purpose of identifying and compensating applicants who might have been adversely affected.

2. If a self-test identifies a specific applicant that was subject to discrimination on a prohibited basis, in order to qualify for the privilege in this section the creditor must provide appropriate remedial relief to that applicant; the creditor would not be required under this paragraph to identify other applicants who might also have been adversely affected.

Paragraph 15(c)(3)(iii)

1. A creditor is not required to provide remedial relief to an applicant that would not be available by law. An applicant might also be ineligible from obtaining certain types of relief due to changed circumstances. For example, a creditor is not required to offer credit to a denied applicant if the applicant no longer qualifies for the credit due to a change in financial circumstances, although some other type of relief might be appropriate.

15(d)(1) Scope of privilege

1. The privilege applies with respect to any examination, investigation or proceeding by federal, state, or local government agencies relating to compliance with the Act or this regulation.

Accordingly, in a case brought under the ECOA, the privilege established under this section preempts any inconsistent laws or court rules to the extent they might require disclosure of privileged self-testing data. The privilege does not apply in other cases, for example, litigation filed solely under a state's fair lending statute. In such cases, if a court orders a creditor to disclose self-test results, the disclosure is not a voluntary disclosure or waiver of the privilege for purposes of paragraph 15(d)(2); creditors may protect the information by seeking a protective order to limit availability and use of the self-testing data and prevent dissemination beyond what is necessary in that case. Paragraph 15(d)(1) precludes a party who has obtained privileged information from using it in a case brought under the ECOA, provided the creditor has not lost the privilege through voluntarily disclosure under paragraph 15(d)(2).

15(d)(2) Loss of privilege

Paragraph 15(d)(2)(i)

1. Corrective action taken by a creditor, by itself, is not considered a voluntary disclosure of the self-test report or results. For example, a creditor does not disclose the results of a self-test merely by offering to extend credit to a denied applicant or by inviting the applicant to reapply for credit. Voluntary disclosure could occur under this paragraph, however, if the creditor disclosed the self-test results in connection with a new offer of credit.

2. Disclosure of self-testing results to an independent contractor acting as an auditor or consultant for the creditor on compliance matters does not result in loss of the privilege.

Paragraph 15(d)(2)(ii)

1. The privilege is lost if the creditor discloses privileged information, such as the results of the self-test. The privilege is not lost if the creditor merely reveals or refers to the existence of the self-test.

Paragraph 15(d)(2)(iii)

1. A creditor's claim of privilege may be challenged in a court or administrative law proceeding with appropriate jurisdiction. In resolving the issue, the presiding officer may require the creditor to produce privileged information about the self-test.

Paragraph 15(d)(3) Limited use of privileged information

1. A creditor may be required to produce privileged documents for the purpose of determining a penalty or remedy after a violation of the ECOA or Regulation B has been formally adjudicated or admitted. A creditor's compliance with this requirement does not evidence the creditor's intent to forfeit the privilege.

* * * * *

By order of the Board of Governors of the Federal Reserve System, December 10, 1997.
/signed/

William W. Wiles
Secretary of the Board