## Summary Contents

Top Reasons to Use Your Digital Library Access ........................................ iii

NCLC Digital Library: The Leading Resource for All Consumer Law ........ iv

Contents ........................................................................................................ ix

Chapter 1  Introduction and First Considerations ........................................ 1

Chapter 2  Scope ......................................................................................... 17

Chapter 3  Prohibited Bases for Discrimination ......................................... 47

Chapter 4  Proving Credit Discrimination ................................................. 67

Chapter 5  Discrimination in Pre-Application and Application Procedures .... 97

Chapter 6  Discrimination in Credit Evaluation ......................................... 129

Chapter 7  Redlining ................................................................................ 155

Chapter 8  Discrimination Law Challenges to Predatory Lending and Unfair Pricing .... 169

Chapter 9  Discrimination Subsequent to the Granting of Credit .......... 183

Chapter 10 ECOA Procedural Requirements ........................................... 193

Chapter 11 Litigating a Credit Discrimination Case .................................. 221

Chapter 12 Government Enforcement ..................................................... 275

Appendix A Federal Credit Discrimination Statutes .................................. 287

Appendix B Regulation B (Equal Credit Opportunity) ............................. 307
<table>
<thead>
<tr>
<th>Appendix</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appendix C</td>
<td>Official Interpretations of Regulation B</td>
<td>335</td>
</tr>
<tr>
<td>Appendix D</td>
<td>Fair Housing Act Regulations</td>
<td>353</td>
</tr>
<tr>
<td>Appendix E</td>
<td>Home Mortgage Disclosure Act and Regulation C</td>
<td>363</td>
</tr>
<tr>
<td>Appendix F</td>
<td>State Credit Discrimination Laws</td>
<td>407</td>
</tr>
<tr>
<td>Appendix G</td>
<td>Sample Pleadings</td>
<td>431</td>
</tr>
<tr>
<td>Appendix H</td>
<td>Sample Discovery</td>
<td>465</td>
</tr>
<tr>
<td>Appendix I</td>
<td>Consumer’s Guide to Credit Discrimination Laws (Appropriate for Distribution to Clients)</td>
<td>471</td>
</tr>
<tr>
<td>Appendix J</td>
<td>Bibliography of Social Science Research on Credit Discrimination Issues</td>
<td>475</td>
</tr>
<tr>
<td>Appendix K</td>
<td>Useful Credit Discrimination Weblinks</td>
<td>479</td>
</tr>
</tbody>
</table>

Index: 481
Contents

Top Reasons to Use Your Digital Library Access ........................................... iii

NCLC Digital Library: The Leading Resource for All Consumer Law .............. iv

Chapter 1 Introduction and First Considerations

1.1 Credit Discrimination Laws—A Powerful Answer to a Pervasive Problem ...... 1
  1.1.1 Credit Discrimination Is a Widespread Problem .......................... 1
  1.1.2 Laws Against Credit Discrimination Provide Far-Reaching Remedies ... 2
  1.1.3 Growth in the Utilization of Credit Discrimination Laws ............... 2
  1.1.4 Effective Uses of Credit Discrimination Statutes ......................... 3

1.2 How to Use This Treatise ........................................................................... 4
  1.2.1 Abbreviations ............................................................................. 4
  1.2.2 Digital and Print Versions .......................................................... 4
  1.2.3 Overview of the Chapters ............................................................ 5
  1.2.4 Violation of the General Prohibition Against Discrimination Versus
  Violation of Specific ECOA Rules ...................................................... 5
  1.2.5 This Treatise Analyzes Several Different Statutes ....................... 5
  1.2.6 Source Materials Found in This Treatise ..................................... 6

1.3 The ECOA ............................................................................................... 7
  1.3.1 Overview .................................................................................... 7
  1.3.2 History ....................................................................................... 7
    1.3.2.1 1974 ECOA Version Targeted Sex and Marital Status
    Discrimination ................................................................................ 7
    1.3.2.2 1976 Amendments Broaden ECOA’s Scope ......................... 8
    1.3.2.3 1985 Revision of Regulation B and Issuance of
    FRB Commentary ........................................................................... 8
    1.3.2.4 Women’s Business Ownership Act of 1988 ......................... 8
    1.3.2.5 1991 Amendments .............................................................. 9
    1.3.2.6 1996 Amendments .............................................................. 9
    1.3.2.7 2003 Revision of Regulation B and Official
    Staff Commentary .......................................................................... 9
    1.3.2.8 CFPB Now Issues Regulation B and Its Official
    Interpretations ............................................................................... 9

  1.3.3 Sources of ECOA Precedent and Authority .................................... 9
    1.3.3.1 The Statute, Regulation, and Official Interpretations ............. 9
    1.3.3.2 Legislative History ................................................................ 10
    1.3.3.3 Other Sources of Authority ................................................. 10
    1.3.3.4 The ECOA Should Be Liberally Construed .......................... 10

1.4 The Fair Housing Act .............................................................................. 11
  1.4.1 Overview .................................................................................... 11
  1.4.2 History ....................................................................................... 11

1.5 The Federal Civil Rights Acts: Sections 1981 and 1982 .......................... 12
  1.6 The Americans with Disabilities Act ................................................... 13
  1.7 State Credit Discrimination Laws ........................................................ 13
Chapter 2

Scope

2.1 Introduction ........................................ 17

2.2 Scope of the ECOA .................................... 17

2.2.1 Introduction ...................................... 17

2.2.2 The ECOA Applies to “Credit” Transactions .......... 17

2.2.2.1 Definition of Credit ............................... 17

2.2.2.1.1 General ....................................... 17

2.2.2.1.2 Is “debt” required to meet the ECOA definition of credit? ............... 18

2.2.2.2 Do Leases Involve Credit? ......................... 18

2.2.2.2.1 Overview ....................................... 18

2.2.2.2.2 Disguised credit sales ......................... 18

2.2.2.2.3 Personal property leases covered by the Consumer Leasing Act ........... 18

2.2.2.2.4 Residential leases ................................. 19

2.2.2.2.5 Rent-to-own and other terminable leases .......... 20

2.2.2.3 Utility Service ..................................... 21

2.2.2.4 Check-Cashing and ATM Cards ................... 21

2.2.2.5 “Pay as You Go” Is Not Credit .................... 21

2.2.2.6 Medical Treatment ............................... 21

2.2.2.7 ECOA Coverage by Agreement of the Parties .......... 22

2.2.3 The ECOA Applies to All Stages of a Credit Transaction .......... 22

2.2.4 The ECOA Prohibits Discrimination Against “Applicants” .......... 22

2.2.4.1 Definition of Applicant ......................... 22

2.2.4.2 Guarantors, Sureties, and Similar Parties .......... 23

2.2.4.3 Applicant Need Not Make a Complete Application .......... 24

2.2.4.4 Applicant Need Not Be Seeking New Credit ........... 25

2.2.5 Creditors and Related Parties Subject to the ECOA ........... 25

2.2.5.1 General ............................................. 25

2.2.5.2 “Regularly” Extends, Renews, or Continues Credit .......... 26

2.2.5.3 Arrangers of Credit ............................... 26

2.2.5.4 Participants in the Credit Decision, Including Assignees .......... 29

2.2.5.5 Exclusions and Partial Exclusions from Definition of Creditor .......... 30

2.2.5.6 The Government As Creditor ....................... 31

2.2.6 Transactions Partially Exempted from the ECOA ........... 32

2.2.6.1 General ............................................. 32

2.2.6.2 Public Utility Credit ............................... 32

2.2.6.3 Incidental Consumer Credit ....................... 33

2.2.6.3.1 Definition of incidental consumer credit .......... 33

2.2.6.3.2 Exemptions applicable to incidental credit .......... 33

2.2.6.4 Business Credit ...................................... 34

2.2.6.5 Securities Credit ..................................... 34

2.2.6.6 Credit Extended to the Government ............... 35

2.3 Scope of the Fair Housing Act .......................... 35

2.3.1 Overview ............................................. 35

2.3.2 Residential Real Estate-Related Transactions: Scope of Section 3605 .. 35
Chapter 3  Prohibited Bases for Discrimination

3.1  Introduction ..............................................47
3.2  When Is Discrimination Made on a Prohibited Basis? ....47
3.3  Prohibited Bases Under Both the ECOA and the FHA ....47
   3.3.1  Race and Color .......................................47
   3.3.2  Religion, Creed, and Political Affiliation ..........48
   3.3.3  National Origin .......................................48
      3.3.3.1  General ...........................................48
      3.3.3.2  Ancestry or Country of Birth .................48
      3.3.3.3  English Language Ability .....................48
      3.3.3.4  Immigration Status ............................49
         3.3.3.4.1  Discrimination against immigrants ....49
         3.3.3.4.2  The ECOA standard ........................50
         3.3.3.4.3  The Fair Housing Act standard ........50
   3.3.4  Sex and Sexual Orientation ........................51
      3.3.4.1  General ...........................................51
      3.3.4.2  Special ECOA Protections ......................51
      3.3.4.3  Sexual Orientation ............................51
   3.4  Prohibited Bases Under the ECOA But Not the FHA ....52
      3.4.1  Marital Status .....................................52
      3.4.2  Age ..................................................53
      3.4.3  Public Assistance Status ........................54
      3.4.4  Good Faith Exercise of Consumer Credit Protection Act or Other Legal Rights ....54
         3.4.4.1  General ...........................................54
         3.4.4.2  Exercise of Rights Under the Federal Consumer Credit Protection Act or a Substituted State Statute ....55
Credit Discrimination

3.4.4.3 “Good Faith” Exercise of Rights .............. 55
3.4.4.4 “Applicant” Must Exercise the Rights .......... 56
3.5 Prohibited Bases Under the FHA, But Not the ECOA ...... 56
3.5.1 Familial Status ........................................ 56
3.5.2 Disability or Handicap .................................. 57
3.5.2.1 General .............................................. 57
3.5.2.2 Definition of Handicap or Disability ............ 57
3.5.2.3 Application of the Americans with Disabilities Act to Credit Transactions ......................... 57
3.5.2.4 Reasonable Accommodation ....................... 58
3.6 Prohibited Bases Under the Federal Civil Rights Acts .... 60
3.6.1 Race and Ethnicity ...................................... 60
3.6.2 Citizenship Status ...................................... 60
3.7 Other Prohibited Bases ..................................... 60
3.7.1 General ................................................. 60
3.7.2 Discrimination and the Digital Divide ................ 61
3.8 ECOA Prohibited Bases Do Not Apply to Special Purpose Credit Programs .... 62
3.8.1 General ................................................. 62
3.8.2 Qualifying As a Special Purpose Credit Program .... 63
3.8.3 Special Purpose Credit Programs Must Still Comply with Most ECOA Requirements ............... 64
3.9 Injury Flowing from Discrimination Against Those Associated with Credit Applicant ... 64
3.9.1 The General Rule Under the ECOA ................. 64
3.9.2 Application of ECOA Rule to Public Assistance and to the Exercise of CCPA Rights .......... 65
3.9.3 The Associational Rule Under the Fair Housing and Civil Rights Acts .... 65

Chapter 4 Proving Credit Discrimination

4.1 Introduction .............................................. 67
4.1.1 Overview .............................................. 67
4.1.2 Pleading Requirements ................................ 67
4.2 Proving Disparate Treatment ............................ 68
4.2.1 Introduction ........................................... 68
4.2.2 Direct Evidence of Disparate Treatment ............. 69
4.2.3 Circumstantial Evidence .............................. 70
4.2.3.1 The McDonnell Douglas Burden Shifting Analysis ...... 70
4.2.3.2 Is the McDonnell Douglas Test Applicable in Credit Discrimination Cases? ......................... 71
4.2.3.3 The McDonnell Douglas Standard in Predatory Lending/Reverse Redlining Cases .......... 73
4.3 Proving Disparate Impact ............................... 74
4.3.1 The Disparate Impact Claim ......................... 74
4.3.1.1 Disparate Impact Cognizable Under Both ECOA and FHA .... 74
4.3.1.2 History of Disparate Impact Prior to Supreme Court Ruling .... 74
4.3.1.3 Advantages of the Disparate Impact Approach .......... 76
4.3.2 Burdens of Proof .................................... 76
4.3.2.1 General ............................................ 76
4.3.2.2 ECOA Burden of Proof ............................ 76
4.3.2.3 FHA Burden of Proof ......................... 77
4.3.2.4 Prima Facie Case for ECOA and FHA Claims .... 78
4.3.2.4.1 Introduction .................................... 78
4.3.2.4.2 Identification of a specific policy
4.3.2.4.3 Disparate impact on a protected group
4.3.2.4.4 Causation
4.3.2.5 Business Justification
4.3.2.6 Are There Alternative Practices with Less Disparate Impact?

4.4 Sources of Evidence
4.4.1 The Consumer’s Own Records
4.4.2 The Creditor’s Own Files
4.4.3 Credit Reporting Agency Files
4.4.4 Testers
4.4.5 Home Mortgage Disclosure Act (HMDA) Data
  4.4.5.1 General
  4.4.5.2 Scope of HMDA
    4.4.5.2.1 Covered lenders
    4.4.5.2.2 Required data collection
  4.4.5.3 Access to HMDA Data
  4.4.5.4 Limitations of HMDA Data
  4.4.5.5 HMDA Analysis
  4.4.5.6 Policy Responses to HMDA Data
4.4.6 Other Sources of Mortgage Data
  4.4.6.1 General
  4.4.6.2 Government-Sponsored Enterprise (Freddie Mac and Fannie Mae) Data
4.4.7 Monitoring Data Required by the ECOA
4.4.8 Non-Mortgage Data
4.4.9 Non-Mortgage Creditors’ Self-Testing Data

Chapter 5
Discrimination in Pre-Application and Application Procedures
5.1 Introduction
  5.1.1 The Special ECOA Requirements
  5.1.2 Discussion of the Stages of a Credit Transaction in This Treatise
5.2 General Rule Against Discrimination
  5.2.1 Introduction
  5.2.2 What Is “Discrimination” Under the General Rule?
  5.2.3 The General Rule Applies to All Aspects of a Credit Transaction
5.3 Discrimination in the Pre-Application Stage of a Credit Transaction
  5.3.1 Overview
  5.3.2 Marketing Discrimination
    5.3.2.1 The ECOA Standard
    5.3.2.2 The Fair Housing Act Standard
    5.3.2.3 Other Guidance
    5.3.2.4 Marketing Discrimination As a Force in Predatory Lending
    5.3.2.5 How Discrimination in Marketing Happens
    5.3.2.6 Market Segmentation and Pre-Screened Marketing
  5.3.3 Discrimination in Treatment of Prospective Applicants
    5.3.3.1 Steering
    5.3.3.2 Testing
5.4 Application Procedures
  5.4.1 General
  5.4.2 Oral Applications for Credit
    5.4.2.1 General
Credit Discrimination

5.4.2.2 The Home Mortgage Exception ................................................. 107
5.4.3 Providing Disparate Levels of Assistance in the Application Process ... 108
5.4.4 Requesting More Information About Applicants from Protected Groups ............................................. 108

5.5 Prohibited Requests for Information .................................................. 110
5.5.1 General Considerations ................................................................. 110
5.5.1.1 Introduction ........................................................................... 110
5.5.1.2 ECOA Restricts Creditor from “Requesting” Information About an “Applicant” ........................................ 110
5.5.1.3 Information Legally Obtained Sometimes May Not Be Utilized by Creditor ..................................................... 111
5.5.1.4 Should Regulation B Permit or Require Creditors to Request Information About Prohibited Bases? ........ 111

5.5.2 Types of Information That Creditors Cannot Seek .......................... 112
5.5.2.1 Race, Color, Religion, and National Origin ................................. 112
5.5.2.2 Sex; Optional Use of Courtesy Titles ........................................ 113
5.5.2.2.1 Inquiries about applicant’s gender ...................................... 113
5.5.2.2.2 Courtesy titles .................................................................. 113
5.5.2.2.3 Birth control, childbearing, or childrearing ........................ 113
5.5.2.3 Marital Status .......................................................................... 113
5.5.2.3.1 When marital status information may be requested .......... 113
5.5.2.3.2 Types of marital status information which may be requested .......................................................... 114
5.5.2.3.3 Creditors may also seek information that indirectly discloses marital status ........................................ 114
5.5.2.4 Information About Spouse or Former Spouse ............................ 115
5.5.2.5 Public Assistance Status .............................................................. 116

5.5.3 Exceptions to Restrictions on Requested Information ...................... 116
5.5.3.1 The Home Mortgage Monitoring Requirements ....................... 116
5.5.3.2 Scope of the Home Mortgage Monitoring Requirements .......... 117
5.5.3.3 Information Required by Any Other Federal or State Statute or by Court Order for Monitoring Purposes 117
5.5.3.4 Special Purpose Credit Programs .............................................. 117
5.5.3.5 Self-Test Exception .................................................................. 118

5.6 Co-Signature of Spouse or Other Person ............................................. 118
5.6.1 General ......................................................................................... 118
5.6.2 Individual Credit When No Joint Property Is Involved .................... 120
5.6.3 Reliance on Jointly Owned Property to Establish Creditworthiness .... 121
5.6.4 Reliance on Community Property to Establish Creditworthiness .... 122
5.6.5 Individual Credit When Jointly Owned Property Is Taken As Security 123
5.6.6 When Do Applicants Voluntarily Enter into a Joint Account? ........ 124
5.6.7 Authorized Users ......................................................................... 125
5.6.8 Signature of Guarantor’s Spouse .................................................... 125

5.7 Designation of Name on Account ....................................................... 126
5.8 Collateral, Security Deposits, Sureties, Other Forms of Creditor Protection .................................................. 126
5.8.1 Discriminatory Practices ................................................................. 126
5.8.2 Injury Caused by Such Discrimination ............................................ 127

Chapter 6 Discrimination in Credit Evaluation

6.1 Introduction ..................................................................................... 129
### Contents

6.2 Credit Evaluation Practices That Violate the General Rule Against Discrimination .......................................................... 129
  6.2.1 The ECOA and FHA Standards .......................................................... 129
  6.2.2 Examples of Credit Evaluation Practices That Violate the General Rule .......................................................... 129
    6.2.2.1 Applying Different Standards on a Prohibited Basis .................. 129
    6.2.2.2 Using Different Investigation Procedures on a Prohibited Basis .... 130
    6.2.2.3 Appraisal Practices That Violate the General Rule Against Discrimination .................................................. 130
    6.2.2.4 Failure to Combine Joint Applicant Income on the Basis of Marital Status ................................................. 131
    6.2.2.5 Requirements for Immediate Payment ........................................ 131
    6.2.2.6 Discrimination in Credit Limits .................................................. 131
    6.2.2.7 Denial of Credit for Exercise of Rights Under the Consumer Credit Protection Act ........................................... 132

6.3 Understanding Credit Evaluation Systems .............................................. 132
  6.3.1 Introduction to the Three Types of Credit Evaluation Systems .............. 132
  6.3.2 Credit Scoring Systems ................................................................. 132
    6.3.2.1 Description of Credit Scoring .................................................... 132
    6.3.2.2 Regulation B Definition of Credit Scoring .................................... 133
  6.3.3 Judgmental Systems ................................................................. 134
  6.3.4 Combination Systems ................................................................. 134
  6.3.5 Different Requirements for Credit Scoring and Judgmental Systems .......... 134

6.4 Discrimination Issues Raised by Credit Scoring ................................... 135
  6.4.1 Data Indicating That Minority and Other Protected Groups Are
      Disadvantaged by Credit Scoring .......................................................... 135
    6.4.1.1 Studies Showing that Minorities Have Lower Credit Scores As a Group .................................................. 135
    6.4.1.2 Minorities Are More Likely to Be “Credit Invisible” ......................... 136
  6.4.2 Factors in a Credit Scoring System May Disfavor Minorities and
      Other Protected Groups ................................................................. 137
    6.4.2.1 Overview ...................................................................................... 137
    6.4.2.2 Discrimination’s Legacy ............................................................... 137
    6.4.2.3 Other Factors That May Disfavor Protected Classes ......................... 138
    6.4.2.4 Industry’s Response ................................................................. 138
  6.4.3 The Disparate Impact Analysis for Credit Scoring ................................ 139
  6.4.4 Disparate Impact Litigation Challenging Credit Scoring ....................... 140
  6.4.5 Discriminatory Uses of Credit Scoring ............................................. 140
    6.4.5.1 Overview ...................................................................................... 140
    6.4.5.2 Discriminatory Score Thresholds .................................................... 140
    6.4.5.3 Overrides ...................................................................................... 141
    6.4.5.4 “Coaching” ................................................................................... 141
    6.4.5.5 Credit Tier Markups ...................................................................... 141
    6.4.5.6 Use of Different Systems or Scoring Models for Different Populations .................................................. 141
    6.4.5.7 Setting Up Credit Scoring Models Differently and Manipulating Data .................................................. 142
  6.4.6 Discriminatory Impact of Other Uses of Credit Scores ........................ 142
    6.4.6.1 General ...................................................................................... 142
    6.4.6.2 Insurance Credit Scores ............................................................... 142
Contents

7.3.4.2 The Fair Housing Act ......................................................... 163
  7.3.4.2.1 The FHA applies to insurance ............................. 163
  7.3.4.2.2 Preemption and the McCarran-Ferguson Act .......... 164
7.3.4.3 The Federal Civil Rights Acts ........................................ 165
7.3.4.4 State Laws ................................................................. 166

Chapter 8 Discrimination Law Challenges to Predatory Lending and Unfair Pricing
  8.1 Introduction ................................................................. 169
  8.2 Advantages of a Discrimination Law Challenge .................. 169
  8.3 Discrimination Laws Reach Discriminatory Credit Terms,
      Not Just Credit Denials .................................................. 170
  8.4 Class Action Claims ........................................................ 171
  8.5 Reverse Redlining ............................................................ 172
    8.5.1 General ................................................................. 172
    8.5.2 Showing That a Lender Targets a Protected Class ....... 173
    8.5.3 Unfair Credit Terms Sufficient to Show Reverse Redlining 174
    8.5.4 Borrowers Should Not Need to Demonstrate Qualification for a Loan 175
  8.6 Discriminatory Credit Mark-Up Policies ............................ 175
    8.6.1 The Practice Described ............................................. 175
    8.6.2 Private and Government Litigation of Discretionary Pricing Cases 176
    8.6.3 Elements of the Discrimination Claim: Disparate Impact
         Versus Disparate Treatment ........................................... 177
    8.6.4 Identification of a Specific Policy and Causation .......... 178
    8.6.5 Statistical Proof of the Discriminatory Impact ............. 179
    8.6.6 Business Necessity and a Less Discriminatory Alternative 180
  8.7 Discrimination in Pricing of Property, Services ................. 180
    8.7.1 Discrimination Laws Apply to Pricing of Property, Services 180
    8.7.2 Types of Price Discrimination .................................... 180

Chapter 9 Discrimination Subsequent to the Granting of Credit
  9.1 Introduction ................................................................. 183
  9.2 Types of Discrimination Subsequent to the Granting of Credit
    9.2.1 Loan Servicing ........................................................ 183
    9.2.2 Compliance with Warranties, Other Post-Sale Service .... 183
    9.2.3 Changes in Account Status ......................................... 184
    9.2.4 Treatment upon Default ............................................. 184
  9.3 Collection Against Non-Obligated Spouse Under Necessaries,
      Family Expense Laws ..................................................... 187
  9.4 Credit Reporting ............................................................ 188
    9.4.1 Credit Reporting Requirements of Regulation B .............. 188
      9.4.1.1 Introduction ..................................................... 188
      9.4.1.2 Scope and Exemptions ......................................... 188
      9.4.1.3 Creditors Must Furnish Information About
              Joint Account Holders and Authorized User Spouses .... 188
      9.4.1.4 Interaction with the Fair Credit Reporting Act ....... 189
      9.4.1.5 “Piggybacking” ................................................ 190
    9.4.2 Other Credit Reporting Issues ..................................... 190
  9.5 Creditor Actions Triggered by Borrower’s Increased Age or
      Change in Name or Marital Status ...................................... 190
    9.5.1 Rules Limiting Creditor Actions ................................ 190
    9.5.2 Scope of the Rules Limiting Creditor Actions ................ 191
Credit Discrimination

9.5.2.1 Rules Apply Only to Open-End Accounts .................................................. 191
9.5.2.2 Rules Protect Only Applicants Who Are Contractually Liable .......................... 191
9.5.3 Status of Account During Reapplication ..................................................... 191
9.5.4 When Creditor Can Request Updated Information from Account Holders .................. 191
9.6 Continuing Requirement of Co-Signer on Credit Renewal .................................. 191

Chapter 10 ECOA Procedural Requirements

10.1 Introduction ........................................................................................................ 193
10.2 Overview of ECOA Notice Requirements .......................................................... 193
10.3 Notification Requirement for Approved Applications ......................................... 194
10.4 Notification Requirement If Creditor Makes a Counteroffer ................................ 194
10.4.1 Overview ......................................................................................................... 194
10.4.2 Is a Counteroffer an Adverse Action? ............................................................... 194
10.4.3 Notice Requirements If Counteroffer Is Not an Adverse Action ...................... 195
10.4.4 Written Application Requirement .................................................................... 197
10.5 Notification Requirement for Adverse Actions ................................................... 197
10.5.1 Adverse Actions Involving New Credit Accounts ........................................... 197
10.5.2 Adverse Actions Involving Existing Accounts ................................................ 198
10.5.3 Adverse Actions Involving Counteroffers ....................................................... 201
10.5.4 Content of Adverse Action Notices ................................................................. 201
10.5.4.1 General ........................................................................................................ 201
10.5.4.2 The Reasons for Adverse Action ................................................................. 202
10.5.4.2.1 Reasons must be specific ........................................................................ 202
10.5.4.2.2 Reasons must be accurate ....................................................................... 203
10.5.4.2.3 Reasons that must be disclosed when a credit scoring system is used .... 204
10.5.4.2.4 When creditor discloses only the applicant’s right to a statement of reasons . 204
10.6 General Notice Requirements ........................................................................... 205
10.6.1 Timing of Notices ........................................................................................... 205
10.6.2 Form of the Notification .................................................................................. 205
10.6.2.1 General ........................................................................................................ 205
10.6.2.2 Electronic Notifications ............................................................................... 206
10.6.3 Who Must Receive Notice? ............................................................................. 206
10.6.3.1 Applicants .................................................................................................... 206
10.6.3.2 Notice to Multiple Applicants ..................................................................... 206
10.6.3.3 Is Actual Receipt Required? ...................................................................... 207
10.7 Additional Notice Requirements for New Accounts .......................................... 207
10.7.1 Application Required ..................................................................................... 207
10.7.2 Notice Requirements for Completed Applications ........................................ 208
10.7.3 Notice Requirements for Incomplete Applications ......................................... 209
10.7.4 Withdrawn Applications for Credit .................................................................. 210
10.8 Who Must Comply with Notice Requirements? ................................................. 210
10.8.1 Creditors, But Not Arrangers of Credit, Are Required to Comply with Notice Provisions ...................................................................................................................... 210
10.8.2 Notice By Multiple Creditors .......................................................................... 211
10.9 Exceptions to Notice Requirements ..................................................................... 212
10.9.1 Incidental Consumer Credit ............................................................................. 212
10.9.2 Business Credit ............................................................................................... 212
10.9.2.1 General ........................................................................................................ 212
Contents

10.9.2.2 Rules for Small Business Applicants ........................................ 212
10.9.2.3 Rules for Other Business Applicants ..................................... 213
10.9.3 Creditor's Inadvertent Error May Excuse Notice Violations ............ 213
10.10 Relationship of ECOA Notices to Fair Credit Reporting Act
      Adverse Action Notices .................................................. 213
10.12 ECOA Record Retention Requirements .......................................... 216
  10.12.1 Preservation of Records ................................................. 216
  10.12.2 Preservation of Records in Case of an Investigation,
      Enforcement Proceeding, or Civil Action ................................ 217
  10.12.3 Retention of Prohibited Information .................................... 217
  10.12.4 Transactions Exempt from Record Retention Requirements
      or Subject to More Limited Requirements ................................ 218
  10.12.5 Inadvertent Error ..................................................... 218
10.13 Collection of Monitoring Information ......................................... 218
10.14 Self-Testing ............................................................................. 219

Chapter 11

Litigating a Credit Discrimination Case

11.1 Introduction .............................................................................. 221
11.2 The Defendant—Who Is Liable? ................................................ 221
  11.2.1 Direct Creditor Liability .................................................... 221
  11.2.2 Finding Deep Pockets: Extending Liability Beyond
      Direct Creditors ................................................................ 221
  11.2.2.1 General .................................................................. 221
  11.2.2.2 Individual Liability ................................................... 222
11.3 Does the Plaintiff Have Standing? ............................................. 223
  11.3.1 General ......................................................................... 223
  11.3.2 Do Testers, Non-Profit Organizations and Municipalities
      Have Standing? .................................................................. 226
    11.3.2.1 General ................................................................. 226
    11.3.2.2 FHA Standing for Testers ......................................... 226
    11.3.2.3 FHA Standing for Organizational Plaintiffs ................. 227
  11.3.3 Associational Standing ....................................................... 228
11.4 Class Actions ............................................................................ 229
11.5 Selecting the Forum .................................................................. 232
  11.5.1 Federal or State Court ......................................................... 232
    11.5.1.1 Reasons to Choose One Forum or the Other ................. 232
    11.5.1.2 Forum Considerations .............................................. 232
      11.5.1.2.1 General ............................................................ 232
      11.5.1.2.2 Removal and remand ....................................... 232
      11.5.1.2.3 Counterclaims and parallel actions ...................... 233
      11.5.1.2.4 The Rooker-Feldman doctrine .......................... 234
      11.5.1.2.5 Abstention ..................................................... 235
  11.5.2 Deciding Whether to Select an Administrative Determination in
      FHA Cases ...................................................................... 235
    11.5.2.1 Administrative Option May Be Pursued Simultaneously
          with Court Action ....................................................... 235
    11.5.2.2 Reasons to Choose Administrative or Judicial Option ....... 236
    11.5.2.3 How the Administrative Procedure Works ................. 236
  11.5.3 Mandatory Arbitration ....................................................... 237
    11.5.3.1 Introduction .......................................................... 237
    11.5.3.2 Federal Law Limiting Mandatory Arbitration .............. 237
11.5.3.2.1 No arbitration of home mortgage or manufactured home loans ........................................ 237
11.5.3.2.2 Limits on arbitration where credit extended to active duty military or their dependents ...... 238
11.5.3.2.3 Congress overrides CFPB limits on mandatory arbitration .............................................. 239
11.5.3.3 No Arbitration Requirement Unless Arbitration Agreement Is Produced .......................... 239
11.5.3.4 Arbitration Agreements Are Subject to All Standard Contract Defenses .......................... 239
11.5.3.5 Unconscionability and Limits on Federal Statutory Rights .................................................. 240
  11.5.3.5.1 General ......................................................................................................................... 240
  11.5.3.5.2 Arbitration clause cannot limit punitive damages ......................................................... 240
  11.5.3.5.3 Limits on consumer’s recovery of attorney fees and costs; high arbitration fees ............... 241
  11.5.3.5.4 Waiver of right to class relief generally enforceable .................................................... 242
11.5.3.6 Who Decides a Challenge to the Arbitration Requirements Enforceability? ....................... 242
  11.5.3.7 Classwide Arbitration ....................................................................................................... 242
  11.5.3.8 Recovering Punitve Damages in Arbitration ...................................................................... 243
11.6 Selecting Causes of Action ....................................................................................................... 243
  11.6.1 Advantages of Various Claims ............................................................................................. 243
    11.6.1.1 General .......................................................................................................................... 243
    11.6.1.2 Remedies, Forum, and Defenses .................................................................................... 244
    11.6.1.3 State Laws Generally Not Preempted .............................................................................. 244
  11.6.2 What Causes of Action May Be Brought in the Same Lawsuit? ............................................. 245
11.7 Discovery Issues ....................................................................................................................... 246
11.8 Private Remedies ...................................................................................................................... 246
  11.8.1 Overview .............................................................................................................................. 246
  11.8.2 Actual Damages ................................................................................................................... 246
    11.8.2.1 General .......................................................................................................................... 246
    11.8.2.2 Tangible Injury ............................................................................................................... 247
    11.8.2.3 Intangible Damages ...................................................................................................... 247
  11.8.3 Statutory Damages Under State Statutes ............................................................................. 248
  11.8.4 Punitive Damages ................................................................................................................ 249
    11.8.4.1 General .......................................................................................................................... 249
    11.8.4.2 Punitive Damages in FHA and Federal Civil Rights Cases ............................................. 249
    11.8.4.3 ECOA and Punitive Damages ....................................................................................... 251
      11.8.4.3.1 Generally ................................................................................................................... 251
      11.8.4.3.2 Limits on the size of ECOA punitive damage awards .............................................. 252
      11.8.4.3.3 Factors in determining the size of ECOA punitive damages awards ........................ 252
        11.8.4.3.3.1 General ............................................................................................................... 252
        11.8.4.3.3.2 Amount of actual damages awarded .................................................................. 252
        11.8.4.3.3.3 Frequency and persistence of creditor’s non-compliance ................................ 252
Credit Discrimination

12.2.1 The United States Attorney General ......................................................... 275
12.2.2 Consumer Financial Protection Bureau ...................................................... 275
12.2.3 Federal Trade Commission ........................................................................... 275
12.2.4 The Federal Reserve Board ........................................................................... 276
12.2.5 Other Federal Agencies ................................................................................. 276
12.2.6 Agency Enforcement Policies and Statements ................................................. 276

12.3 Fair Housing Act Enforcement ........................................................................ 277
12.3.1 HUD Administrative Enforcement ................................................................. 277
12.3.2 Civil Enforcement of the FHA by the United States Attorney General .............. 278

12.4 Enforcement Activities at the State and Local Levels ..................................... 278
12.4.1 State and Local Enforcement of Federal Credit Discrimination Statutes .......... 278
12.4.1.1 Introduction ............................................................................................... 278
12.4.1.2 Dodd-Frank Act May Authorize State ECOA Enforcement ..................... 279
12.4.1.3 State Enforcement of Credit Discrimination As Unfair, Deceptive, and Abusive 279

12.4.1.4 Parens Patriae .............................................................................................. 279
12.4.1.5 Action Based on Damage to the State or Locality ...................................... 280
12.4.2 National Bank Preemption of State Enforcement of Credit Discrimination Law .............................................................................................................. 282
12.4.2.1 Introduction ............................................................................................... 282
12.4.2.2 National Bank Act and OCC Preemption of State Credit Discrimination Statutes .............................................................................................................. 282
12.4.2.3 Visitorial Powers Under the National Bank Act and State Agency Investigation and Enforcement ................................................................................................ 283
12.4.2.3.1 Introduction .............................................................................................. 283
12.4.2.3.2 Supreme Court’s Clearing House decision ............................................. 283
12.4.2.3.3 Dodd-Frank Act codifies Clearing House and extends it to savings and loans ................................................................. 283
12.4.2.3.4 States regain visitorial powers as to national bank subsidiaries and affiliates ................................................................. 284
12.4.2.3.5 Implications of Clearing House and Dodd-Frank Act codification .............. 284
12.4.2.3.6 The OCC’s regulations implementing the Dodd-Frank Act and the Clearing House decision ................................................................. 284
12.4.2.3.7 State investigatory authority upon referral from HUD ............................. 285

12.4.3 Examples of State and Local Enforcement ..................................................... 285

Appendix A Federal Credit Discrimination Statutes
A.2 Fair Housing Act, 42 U.S.C. §§ 3601–3631 ........................................................... 293

Appendix B Regulation B (Equal Credit Opportunity) .................................................. 307

Appendix C Official Interpretations of Regulation B .................................................... 335
<table>
<thead>
<tr>
<th>Appendix</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appendix D</td>
<td>Fair Housing Act Regulations</td>
<td>353</td>
</tr>
<tr>
<td>Appendix E</td>
<td>Home Mortgage Disclosure Act and Regulation C</td>
<td></td>
</tr>
<tr>
<td>E.2</td>
<td>Regulation C</td>
<td>368</td>
</tr>
<tr>
<td>E.3</td>
<td>Official Interpretation of Regulation C</td>
<td>380</td>
</tr>
<tr>
<td>Appendix F</td>
<td>State Credit Discrimination Laws</td>
<td>407</td>
</tr>
<tr>
<td>Appendix G</td>
<td>Sample Pleadings</td>
<td></td>
</tr>
<tr>
<td>G.1</td>
<td>Sample Complaint Alleging Denial of Home Mortgage and Discriminatory Appraisal Practices as ECOA, Fair Housing, and Civil Rights Acts Violations</td>
<td>431</td>
</tr>
<tr>
<td>G.2</td>
<td>Sample Municipal Complaint Alleging Discriminatory Mortgage Lending Practices under the Federal Fair Housing Act</td>
<td>433</td>
</tr>
<tr>
<td>G.3</td>
<td>Sample Individual Complaint Alleging ECOA Co-Signer Violation</td>
<td>445</td>
</tr>
<tr>
<td>G.4</td>
<td>Sample Class Action Complaint Alleging ECOA Co-Signer Violation</td>
<td>446</td>
</tr>
<tr>
<td>G.5</td>
<td>Complaint Alleging Federal ECOA and State ECOA Notice Violations</td>
<td>447</td>
</tr>
<tr>
<td>G.6</td>
<td>First Amended Complaint Alleging ECOA Notice and State Fair Housing Violations</td>
<td>448</td>
</tr>
<tr>
<td>G.7</td>
<td>Complaint Alleging ECOA Notice Violations Against Servicer for Cancellation or Revocation of Final Loan Modification</td>
<td>452</td>
</tr>
<tr>
<td>G.8</td>
<td>Agreed Pre-Trial Order Including Jury Instructions in ECOA Notice Case</td>
<td>457</td>
</tr>
<tr>
<td>G.9</td>
<td>Proposed Jury Instructions in ECOA Notice Case</td>
<td>459</td>
</tr>
<tr>
<td>G.10</td>
<td>Plaintiffs’ Proposed Jury Instructions in Fair Housing and ECOA Notice Case</td>
<td>461</td>
</tr>
<tr>
<td>Appendix H</td>
<td>Sample Discovery</td>
<td></td>
</tr>
<tr>
<td>H.1</td>
<td>Plaintiff’s Interrogatories and Request for Production of Documents in ECOA Notice Case</td>
<td>465</td>
</tr>
<tr>
<td>H.2</td>
<td>Interrogatories for ECOA Cosigner Violation</td>
<td>467</td>
</tr>
<tr>
<td>H.3</td>
<td>Interrogatories for ECOA “Zip Code Redlining”</td>
<td>467</td>
</tr>
<tr>
<td>H.4</td>
<td>Plaintiffs’ Interrogatories in a Fair Housing Case</td>
<td>468</td>
</tr>
<tr>
<td>H.5</td>
<td>Request for Production of Documents in Fair Housing Case</td>
<td>470</td>
</tr>
<tr>
<td>Appendix I</td>
<td>Consumer’s Guide to Credit Discrimination Laws (Appropriate for Distribution to Clients)</td>
<td></td>
</tr>
<tr>
<td>I.1</td>
<td>Introduction</td>
<td>471</td>
</tr>
<tr>
<td>I.2</td>
<td>Equal Credit Opportunity</td>
<td>471</td>
</tr>
<tr>
<td>I.3</td>
<td>Home Mortgages: Understanding Your Rights to Fair Lending</td>
<td>472</td>
</tr>
<tr>
<td>Appendix J</td>
<td>Bibliography of Social Science Research on Credit Discrimination Issues</td>
<td>475</td>
</tr>
<tr>
<td>Appendix K</td>
<td>Useful Credit Discrimination Weblinks</td>
<td>479</td>
</tr>
<tr>
<td>Index</td>
<td></td>
<td>481</td>
</tr>
</tbody>
</table>