

## **Just What You Wanted To Hear...Prescreening is Legal**

Prescreening is a tool used by your competitors to make unsolicited offers of credit or insurance to your consumers. Based on lists purchased from the three major credit bureaus (i.e., Equifax, Experian, or Trans Union), within 24 hours your competitors increase their market share by soliciting clients you pulled credit reports on the previous day.

Here's how it works. At 9:00 AM on Monday you pull a client's credit report to process his or her mortgage application. By 9:00 AM on Tuesday, the credit bureaus compile a list of consumers who are interested in obtaining a mortgage and have a certain credit score, and sell the list to your competitors. At 10:00 AM that same day, your competitors are using this prescreened list to contact your client and make them a competitive offer. Outraged? Wait, it gets better. Under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, prescreening is permissible.

Recent headlines have drawn attention to the practice and use of prescreening both on a competitive front as well as in the context of identity theft. In this article we will clarify the prescreening issue and what it means for the mortgage industry, provide a synopsis of recent court decisions addressing the permissibility of prescreening, and suggest practices you can implement to aid your client in protecting his or her private information.

### *What Prescreening Means:*

Capitalism is premised on choice – give consumers the opportunity to be aware of other offers and decide for themselves where they can get the best deal. This illustrates one of the principal reasons FCRA permits prescreening – it provides consumers with more options of credit. Unfortunately, along with the increase in credit options prescreening also increases a consumer's risk of identity theft and exposure to unscrupulous competitors running bait and switch schemes. These risks hurt consumers and the mortgage industry by hindering competition and tilting the playing field in a manner that could force small business owners out of business.

For consumers, in an age where identity theft is a serious concern, prescreening means their personal information is being sold and distributed, often without their knowledge. In some cases a third party is involved and consumer's personal information is not sold directly to a lender. In these instances, the information is first sold to a third party who packages the "leads" and then sells these "leads" to your competitor. The increased handling of a customer's private information increases the potential for a consumer's personal information to be breached.

Consumers also face challenges due to the changing market. With interest rates rising and credit options becoming more diverse, it will become increasingly difficult for consumers to determine which offers are from deceitful lenders running bait and switch schemes and which ones are legitimate "firm offers." Consumers may be hooked by "too good to be true" advertisements offering low interest rates with hidden terms and conditions. When consumers are inundated with offers, how are they going to know the difference between a reputable and a disreputable lender?

For mortgage brokers, prescreening creates an un-level playing field. Large businesses can afford to purchase prescreened lists and solicit the customers of small business owners, who do not have the means to carry out the same practices. Therefore, as a small business owner, you are at a competitive disadvantage – your competitors have the means to solicit your client after you have expended capital and started work on the mortgage application.

So, you may be asking right now – how exactly does prescreening work? Well, there are restrictions on when and how prescreening can be used. As stated above, prescreening is permissible under FCRA but certain conditions must be satisfied.

First, to obtain a consumer's private information an institution must have consent from the consumer or present a "firm offer of credit or insurance" in their solicitation (15 U.S.C. § 1681b(c)). Under FCRA, a "firm offer of credit or insurance" is defined as "any offer of credit or insurance to a consumer that will be honored if, on the basis of information in the consumer's credit record, the consumer meets the specific criteria used to select him or her for the offer, except that the offer may be further conditioned in certain circumstances" (15 U.S.C. § 1681a(l)). Without a "firm offer of credit" the solicitation is merely a form of advertisement, which under FCRA would not justify the intrusion into a consumer's private information. Second, there must be a "clear and conspicuous" notice to consumers notifying them that they have the right to opt-out of prescreened offers (15 U.S.C. § 1681b(e)).

#### *Background and Court Cases:*

In recent years, Courts have seen a rise in the number of cases brought by consumers concerning prescreened solicitations and "firm offers of credit." While prescreening has been found to be permissible under FCRA, several courts have ruled in favor of consumers that were sent offers of credit that did not meet the threshold of a "firm offer of credit" under FCRA.

In *Cole v. U.S. Capital, Inc.*, No 03-3331 (N.D. Ill. Nov. 19, 2004), a 2004 case that set the precedent with respect to prescreening, the Seventh Circuit held that a firm offer of credit must have significant value for the customer in order to justify the intrusion into the consumer's privacy, *i.e.* the amount of the offer and terms matter. Furthermore, in *Cole* the Court held that the "entire offer and the effect of all the material conditions that comprise the credit product in question" must be considered in determining if the "'offer' was a guise for solicitation rather than a legitimate credit product."

In *Kudlicki v. Farragut Financial Corp.*, No. 05-C-2459 (N.D. Ill. Jan. 20, 2006), which upheld *Cole*, the Court found that the mailer sent to the plaintiff did not provide a firm offer of credit when describing the interest rate as being "as low as 5.5% APR" and stating "rates and terms subject to change at any time."

Also of interest, in *Murray v. GMAC Mortgage Corp.*, No. 05-8035 (N.D. Ill. Jan. 17, 2006), the Seventh Circuit has taken on the issue of whether a class action suit can be brought against institutions for alleged violations of FCRA and their use of prescreening. In *Murray*, the lower courts had previously denied the plaintiff's motion for class certification, 2005 WL 3019412, as well as her motion for reconsideration, 2005 WL 3088435. However, in the plaintiff's appeal to

the Seventh Circuit the court held that the lower court erred in its denial of class treatment and the case was remanded. As a result of the *Murray* decision consumers are now able to certify as a class and seek statutory damages from lenders.

*How to keep your clients off your competitor's list:*

Perhaps the easiest part to understand in the prescreening issue is how to help your client protect their information and keep their names off the prescreened list of competitors through the opt-out. While this is not the ideal solution we are all looking for, it is the best solution at this time.

Before you pull a clients credit report explain to them that they have the opportunity to stop unsolicited, prescreened offers, including the junk mail credit card offers that come to their home daily. By calling toll-free, 1-888-5-OPTOUT (1-888-567-8688) or visiting [www.optoutprescreen.com](http://www.optoutprescreen.com), your client can opt-out of prescreened offers for five years or permanently, and can opt back in when necessary.

When discussing the opt-out right, be sure to inform your client that they will have to provide personal information, including their name, home phone number, and social security number. But, reassure your client that the process is completely confidential and the information is only used for the opt-out process. Also, remind them that if they have joint accounts both persons need to exercise their right to opt-out. Educate your clients and consider providing them with more information by giving them a copy of the Federal Trade Commission's prescreening pamphlet found at <http://www.ftc.gov/bcp/online/pubs/credit/prescreen.pdf>.

After your client calls the toll free number or visits the website, you have to *wait approximately ten days* to ensure the paperwork has been processed. Then, pull their credit report and finish the mortgage process. While waiting ten days isn't always a viable option, right now it is your best solution to keeping your clients name off the prescreened lists being purchased by your competitor.

Unfortunately, we are leaving you with a less than satisfactory solution to a serious problem facing you and your consumers. Rest assured that we recognize the severity of this issue and are working on legislative and regulatory strategies to protect consumers and the mortgage industry. However, in the mean time we ask you to protect your business and your clients by educating them about the loan product you are offering and their right to opt-out of prescreened offers.

For more information on prescreening visit the Federal Reserve Board at <http://www.federalreserve.gov/boarddocs/rptcongress/UnsolicitedCreditOffers2004.pdf>, the FTC at <http://www.ftc.gov/bcp/online/pubs/credit/prescreen.pdf>, or the FDIC at <http://www.fdic.gov/regulations/laws/rules/5000-2900.html>.

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