

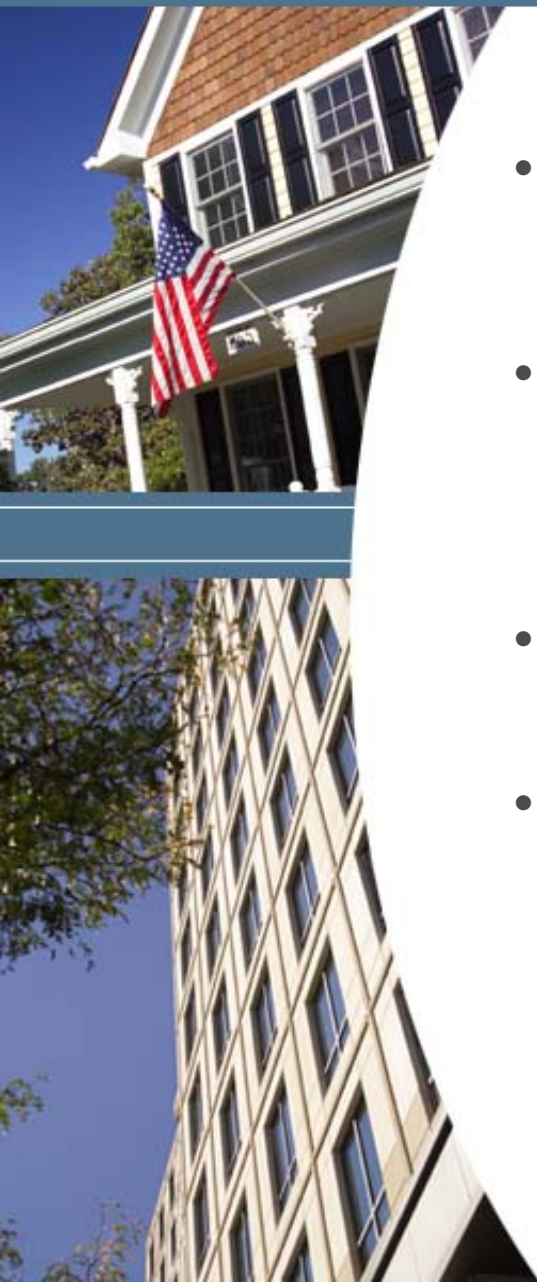
# Selected FCRA and Privacy Developments



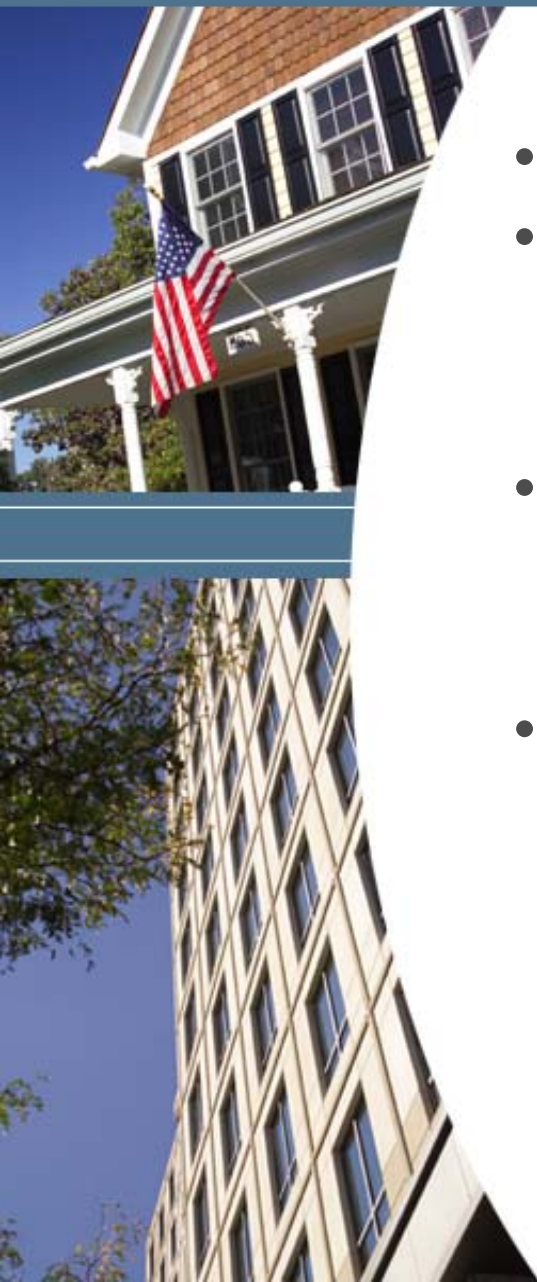
## MBA Legal Issues Conference May 5, 2010

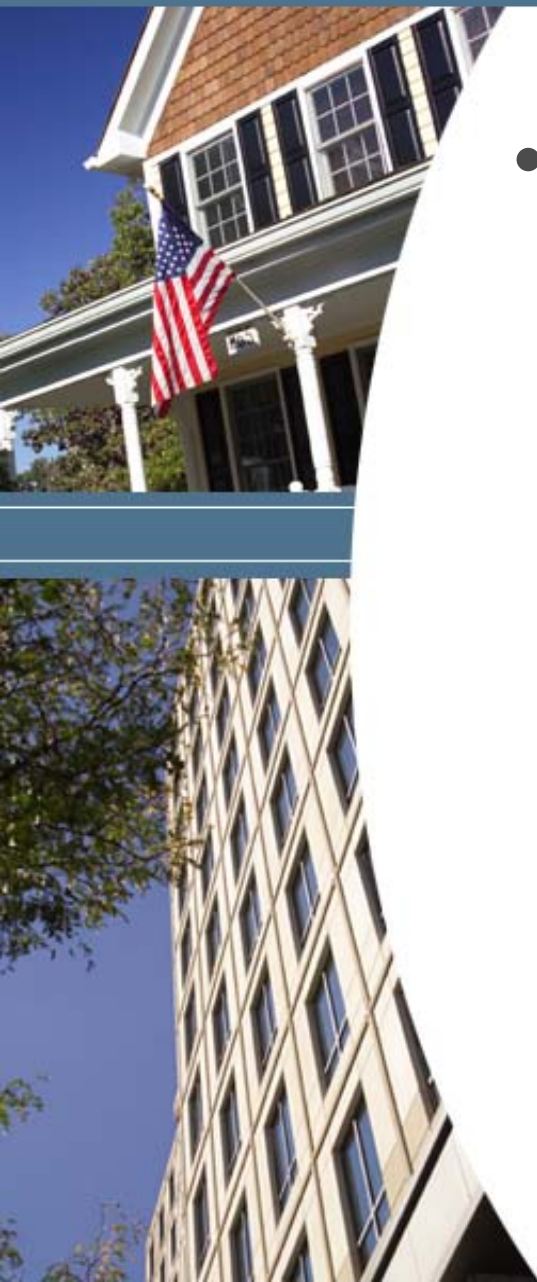
**Andrew Smith  
Morrison & Foerster, LLP**

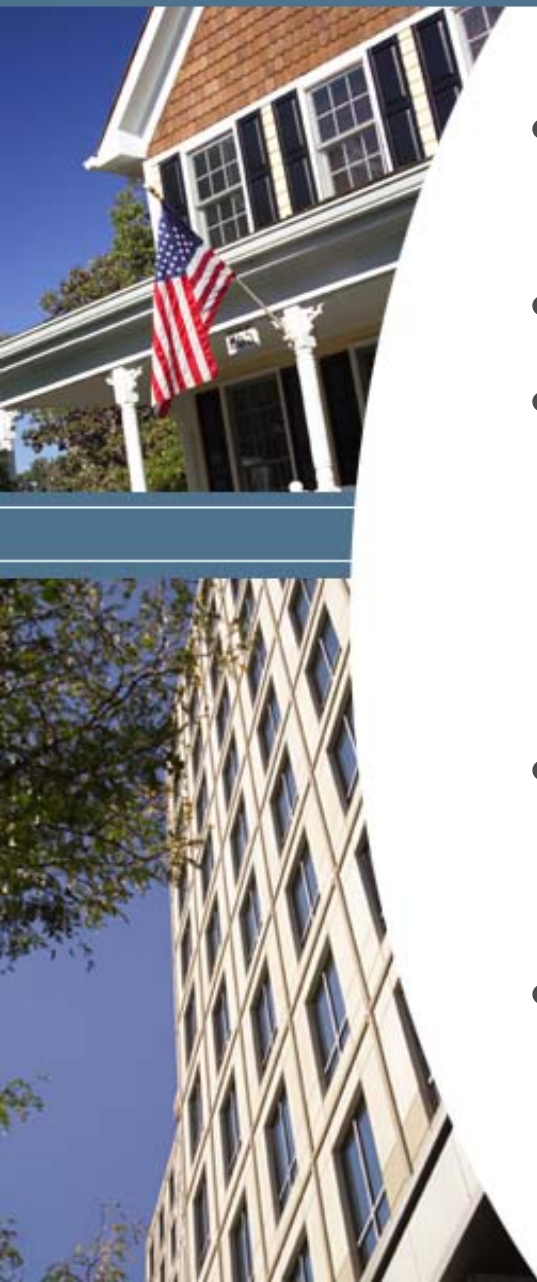
# Overview

- 
- Risk-Based Pricing Notice Rule, effective Jan 1, 2011
    - » requires lenders to provide applicants with a new notice when they've been "priced up" based on a credit report or score
  - FCRA Furnisher Accuracy and Integrity Rule, effective June 1, 2010
    - » requires lenders, servicers and others that furnish information to credit bureaus to develop procedures to ensure that the information is accurate and has "integrity"
  - FCRA Consumer Dispute Rule, effective June 1, 2010
    - » requires lenders, servicers, and other furnishers to investigate and respond to consumer disputes
  - Proposed FCC TCPA rule that would effectively prohibit the making of collection and servicing calls to consumers' cell phones
    - » would undo a compromise struck with the lending and collections industry in 2007

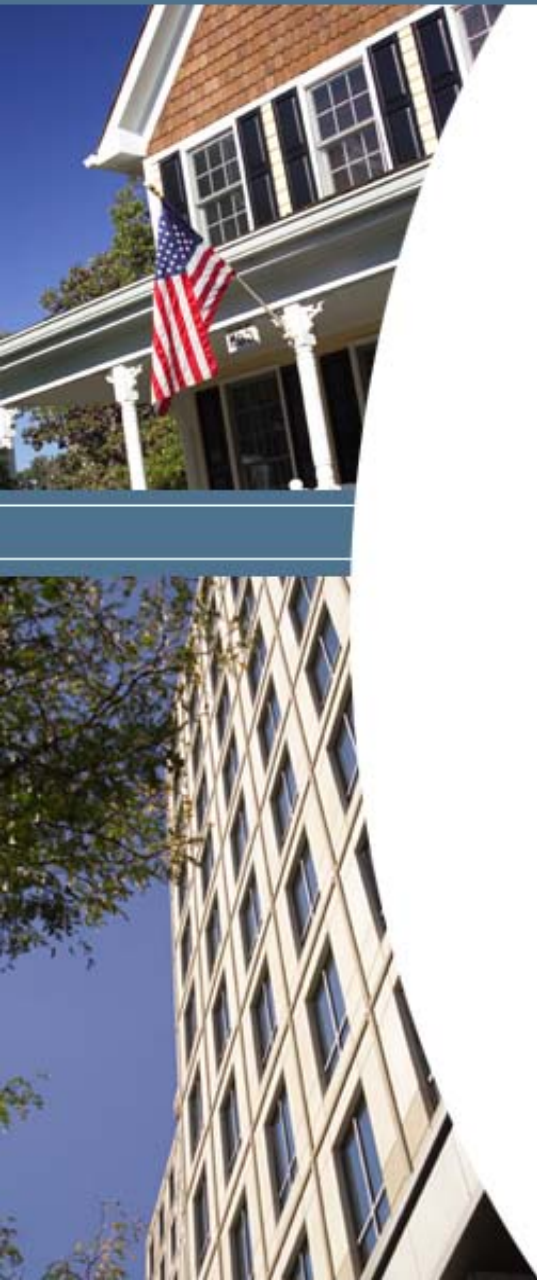
# FACT Act Risk-Based Pricing Notice

- 
- Compliance required by January 1, 2011
  - Applies to lenders who use credit report information to set credit terms
    - » Does not apply to insurers, landlords or other non-lender users of credit reports
  - Personal, family, household credit only
    - » Business credit excluded
    - » Guarantors, co-signers, endorsers, sureties are excluded
  - Person to whom the obligation is initially payable must provide the notice
    - » Does not include mortgage brokers, arrangers or other intermediaries
    - » Does not include guarantors, co-signers, endorsers, sureties
    - » Does not include purchasers and assignees

- 
- You must provide a Risk-Based Pricing Notice if
    - » You use a credit report or credit score in connection with a credit transaction, and
    - » Based on the report/score, you provide credit to the consumer
    - » On *material terms*
    - » That are *materially less favorable* than the most favorable terms
    - » Available to a *substantial proportion* of consumers from or through you

- 
- Different rules for closed-end, open-end, mortgage, HELOC
  - “Material Terms” = APR
  - “Materially Less Favorable” & “Substantial Proportion”
    - » Direct Comparison Method
    - » Credit Score Proxy Method (40/60)
    - » Tiered Pricing Method (not > 70% or < 60%)
  - General Notice
    - » Must be targeted
    - » “You may have paid more . . .”
  - Credit Score Disclosure Exception Notice
    - » Must be sent to everyone
    - » Notice for No Score

# Risk-Based Pricing Model Notice



**[Name of Entity Providing the Notice]  
Your Credit Report[s] and the Price You Pay for Credit**

<b>What is a credit report?</b>	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
<b>How did we use your credit report[s]?</b>	<p>We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment].</p> <p>The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.</p>
<b>What if there are mistakes in your credit report[s]?</b>	<p>You have a right to dispute any inaccurate information in your credit report[s].</p> <p>If you find mistakes on your credit report[s], contact <b>[insert name of CRA(s)]</b>, which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s].</p> <p>It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.</p>
<b>How can you obtain a copy of your credit report[s]?</b>	<p>Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact <b>[insert name of CRA(s)]</b>:</p> <p><i>By telephone:</i> _____ Call toll-free: 1-877-xxx-xxxx</p> <p><i>By mail:</i> _____ Mail your written request to: <b>[Insert address]</b></p> <p><i>On the web:</i> _____ Visit <b>[insert web site address]</b></p>
<b>How can you get more information about credit reports?</b>	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at <a href="http://www.federalreserve.gov">www.federalreserve.gov</a> , or the Federal Trade Commission's web site at <a href="http://www.ftc.gov">www.ftc.gov</a> .

# Credit Score Disclosure Exception Notice

- Exception applies to credit secured by 1 to 4 units of residential real property
  - » Rule also includes a similar exception for non-mortgage credit
- Lender is not required to provide Risk-Based Pricing Notice if lender provides to *all* consumers
  - » FCRA § 609(g) Notice to Home Loan Applicant (includes credit score), *and*
  - » Exception Notice
- Timing
  - » At the same time as the Notice to Home Loan Applicant (“as soon as reasonably practicable”), but not later than the consummation of a closed-end loan or the first transaction under an open-end credit plan
- Which credit score do you provide?

# Credit Score Disclosure Exception Model Notice



[Name of Entity Providing the Notice]  
Your Credit Score and the Price You Pay for Credit

## Your Credit Score

<b>Your credit score</b>	[Insert credit score]	
	Source: [Insert source]	Date: [Insert date score was created]

## Understanding Your Credit Score

<b>What you should know about credit scores</b>	<p>Your credit score is a number that reflects the information in your credit report.</p> <p>Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.</p> <p>Your credit score can change, depending on how your credit history changes.</p>														
<b>How we use your credit score</b>	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.														
<b>The range of scores</b>	<p>Scores range from a low of [Insert bottom number in the range] to a high of [Insert top number in the range].</p> <p>Generally, the higher your score, the more likely you are to be offered better credit terms.</p>														
<b>How your score compares to the scores of other consumers</b>	<table border="1"> <caption>% of Consumers with Scores in a Particular Range</caption> <thead> <tr> <th>Score Range</th> <th>% of Consumers</th> </tr> </thead> <tbody> <tr> <td>[0-100]</td> <td>10%</td> </tr> <tr> <td>[101-200]</td> <td>15%</td> </tr> <tr> <td>[201-300]</td> <td>20%</td> </tr> <tr> <td>[301-400]</td> <td>30%</td> </tr> <tr> <td>[401-500]</td> <td>15%</td> </tr> <tr> <td>[501-600]</td> <td>10%</td> </tr> </tbody> </table> <p>[or] [Your credit score ranks higher than [X] percent of U.S. consumers.]</p>	Score Range	% of Consumers	[0-100]	10%	[101-200]	15%	[201-300]	20%	[301-400]	30%	[401-500]	15%	[501-600]	10%
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[301-400]	30%														
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[501-600]	10%														

## Understanding Your Credit Score (continued)

<b>Key factors that adversely affected your credit score</b>	<p>[Insert first factor]</p> <p>[Insert second factor]</p> <p>[Insert third factor]</p> <p>[Insert fourth factor]</p> <p>[Insert fifth factor, if applicable]</p>
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## Checking Your Credit Report

<b>What if there are mistakes in your credit report?</b>	<p>You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency.</p> <p>It is a good idea to check your credit report to make sure the information it contains is accurate.</p>
<b>How can you obtain a copy of your credit report?</b>	<p>Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year.</p> <p>To order your free annual credit report—</p> <p><i>By telephone:</i> Call toll-free: 1-877-322-8228</p> <p><i>On the web:</i> Visit <a href="http://www.annualcreditreport.com">www.annualcreditreport.com</a></p> <p><i>By mail:</i> Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at <a href="http://www.ftc.gov/bcp/online/include/requestformfinal.pdf">http://www.ftc.gov/bcp/online/include/requestformfinal.pdf</a>) to:</p> <p>Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281</p>
<b>How can you get more information?</b>	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at <a href="http://www.federalreserve.gov">www.federalreserve.gov</a> , or the Federal Trade Commission's web site at <a href="http://www.ftc.gov">www.ftc.gov</a> .

# Notice to the Home Loan Applicant

## Notice to the Home Loan Applicant

In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

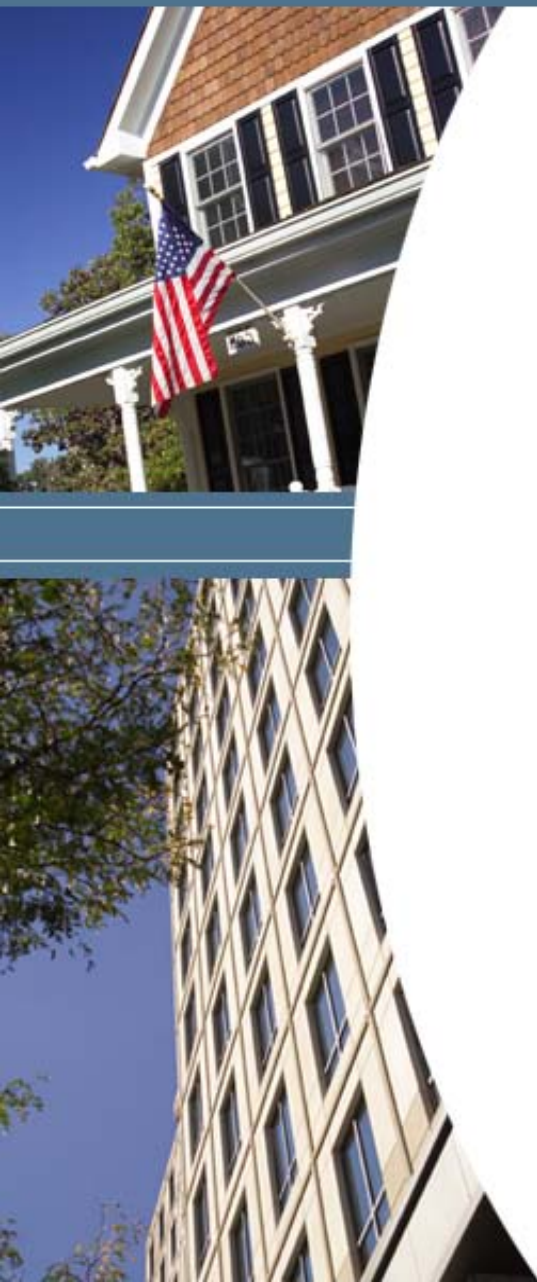
The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

If you have questions concerning the terms of the loan, contact the lender.

# No Score Available Model Notice

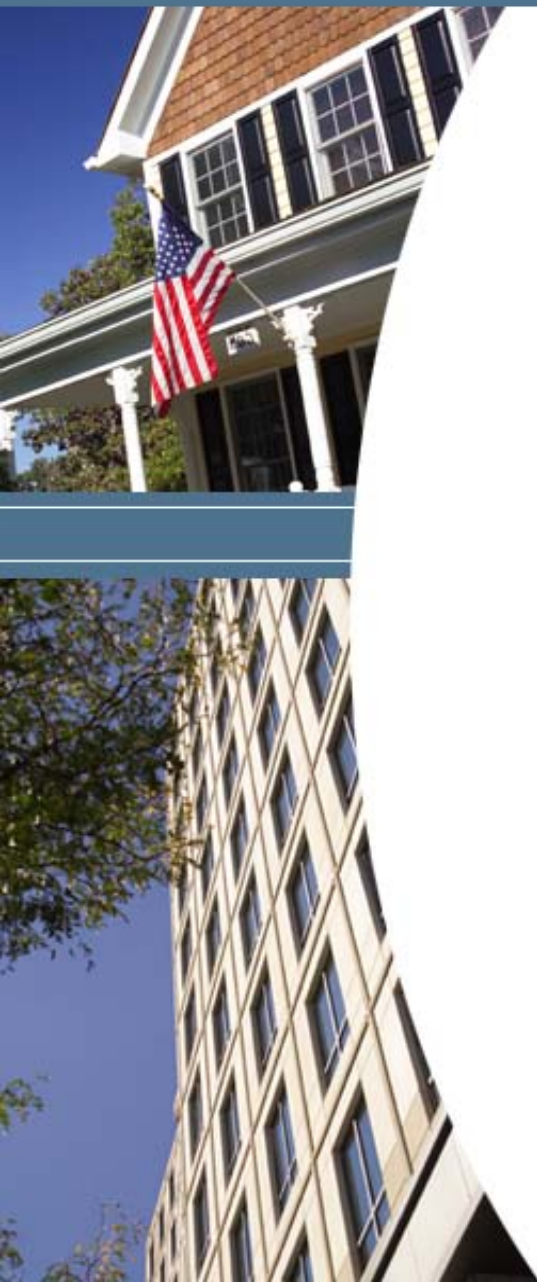


[Name of Entity Providing the Notice]  
Credit Scores and the Price You Pay for Credit

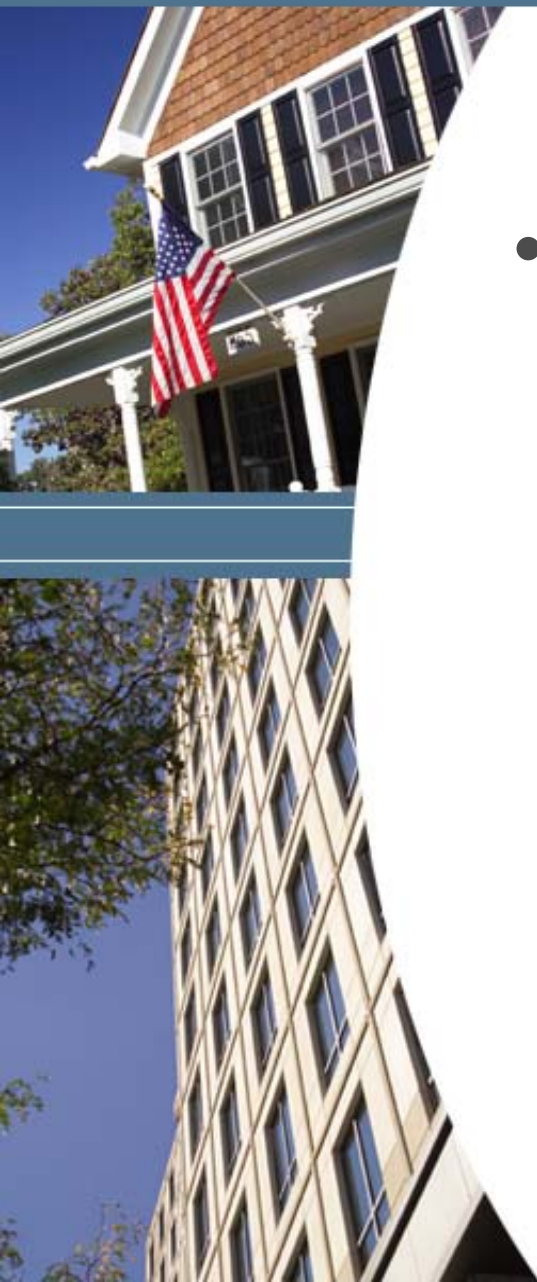
Your Credit Score	
<b>Your credit score</b>	Your credit score is not available from [Insert name of CRA], which is a consumer reporting agency, because they may not have enough information about your credit history to calculate a score.
<b>What you should know about credit scores</b>	<p>A credit score is a number that reflects the information in a credit report.</p> <p>A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.</p> <p>A credit score can change, depending on how a consumer's credit history changes.</p>
<b>Why credit scores are important</b>	<p>Credit scores are important because consumers who have higher credit scores generally will get more favorable credit terms.</p> <p>Not having a credit score can affect whether you can get a loan and how much you will have to pay for that loan.</p>
Checking Your Credit Report	
<b>What if there are mistakes in your credit report?</b>	<p>You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency.</p> <p>It is a good idea to check your credit report to make sure the information it contains is accurate.</p>
<b>How can you obtain a copy of your credit report?</b>	<p>Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year.</p> <p>To order your free annual credit report—</p> <p><i>By telephone:</i> Call toll-free: 1-877-322-8228</p> <p><i>On the web:</i> Visit <a href="http://www.annualcreditreport.com">www.annualcreditreport.com</a></p> <p><i>By mail:</i> Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at <a href="http://www.ftc.gov/bcp/online/include/requestformfinal.pdf">http://www.ftc.gov/bcp/online/include/requestformfinal.pdf</a>) to:</p> <p>Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281</p>
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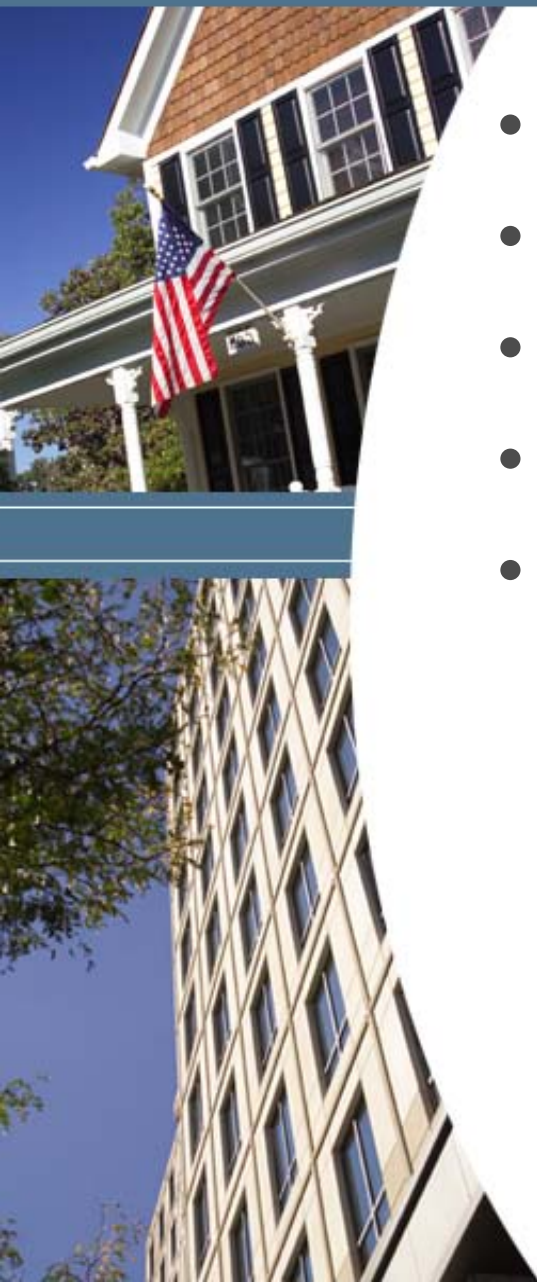


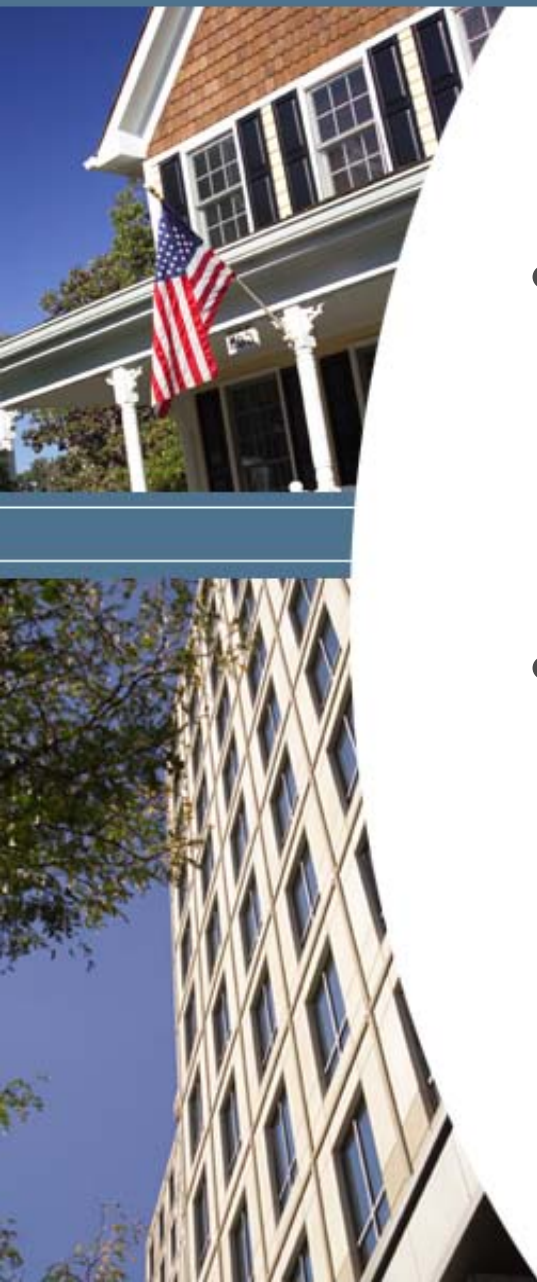
# FCRA Furnisher Rules

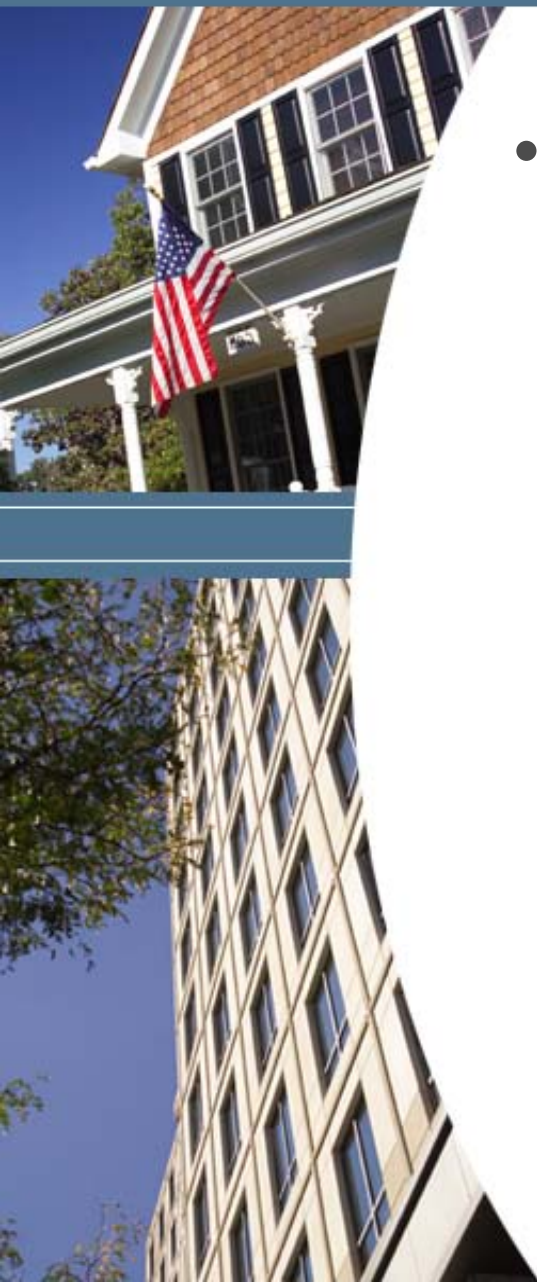


- 1970: qualified immunity from state tort law
- 1996: first imposition of duties
  - » Limited private liability and broad preemption of state laws
  - » Accuracy duty; duty to correct and update
  - » If you furnish, you must report certain information
  - » Duty to investigate disputes received from credit bureaus

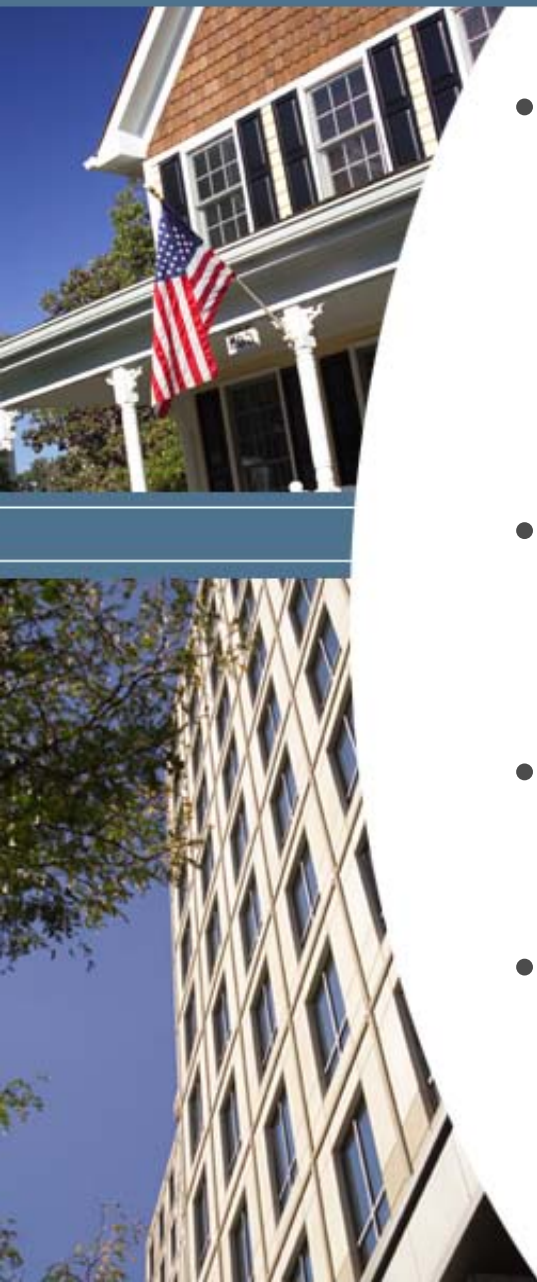
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- 2003: expansion of responsibilities
    - » Accuracy: “reasonable cause to believe” rather than “know”
    - » Identity theft tradeline blocking
    - » Negative information notice
    - » Address Discrepancy Rule
    - » “Medical” furnisher provisions
    - » Must update file following reinvestigation
    - » ***Accuracy and Integrity Rule***
    - » ***Furnisher Direct Dispute Rule***

- 
- Accuracy and Integrity Rule and Guidelines
  - Furnisher Direct Dispute Rule
  - Issued July 1, 2009, 74 Fed. Reg. 31484
  - Effective July 1, 2010
  - Located at
    - » 12 CFR pt. 41 (OCC)
    - » 12 CFR pt. 571 (OTS)
    - » 12 CFR pt. 222 (FRB)
    - » 12 CFR pt. 334 (FDIC)
    - » 12 CFR pt. 717 (NCUA)
    - » 16 CFR pt. 660 (FTC)

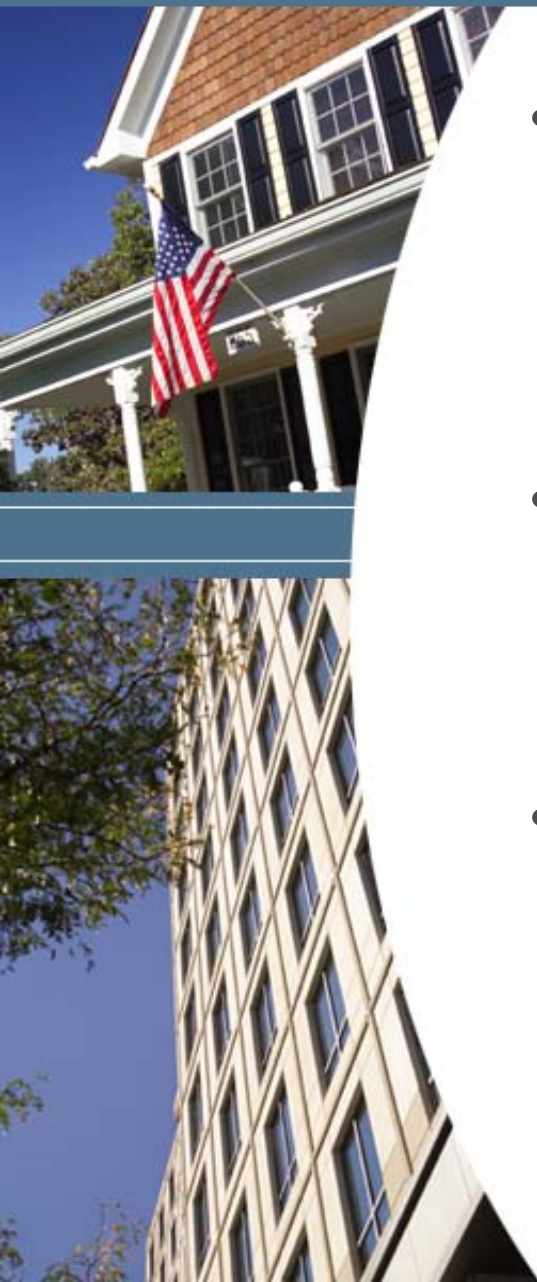
- 
- Furnisher
    - » Furnishes information to CRAs for “inclusion in” consumer reports
  - Accuracy
    - » Terms and liability for the account
    - » Consumer’s performance on the account
    - » The right consumer

- 
- Integrity
    - » Must be substantiated by records when furnished
    - » Must be furnished in a form and manner to minimize the likelihood that information will be incorrectly reflected in a credit report
      - Should include appropriate identifying information
      - Should be furnished in a standardized and clearly understandable form and manner
      - Should include a date specifying the time period to which the information pertains
    - » Must include information that the furnisher's regulator has identified must be furnished
      - Only credit limit now
      - But see ANPR: should also include account-opening date?
        - › Comments closed Aug. 31, 2009

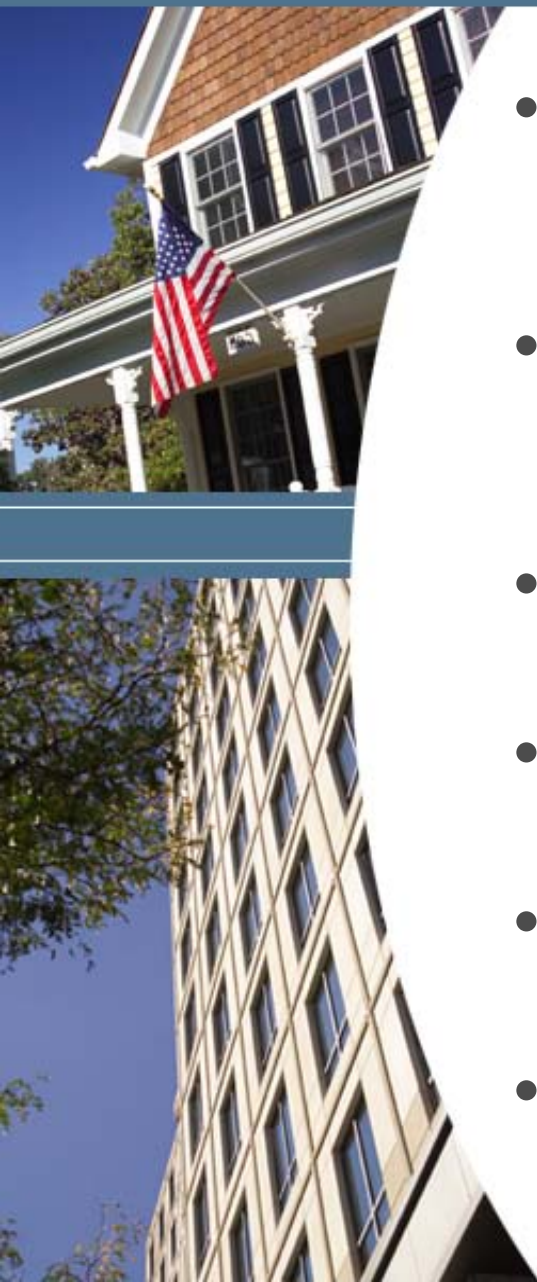
# Accuracy and Integrity Rule

- 
- Must develop reasonable policies and procedures to promote
    - » The furnishing of information that is accurate and has integrity
    - » Conducting reasonable investigations
    - » Updating information to reflect current status
  - Must be in writing
    - » Appropriate to nature, size, complexity and scope of the furnisher's activities
  - Must consider the accuracy and integrity guidelines
    - » Include those guidelines that are appropriate
  - Must review policies and procedures periodically
    - » Update as part of the review

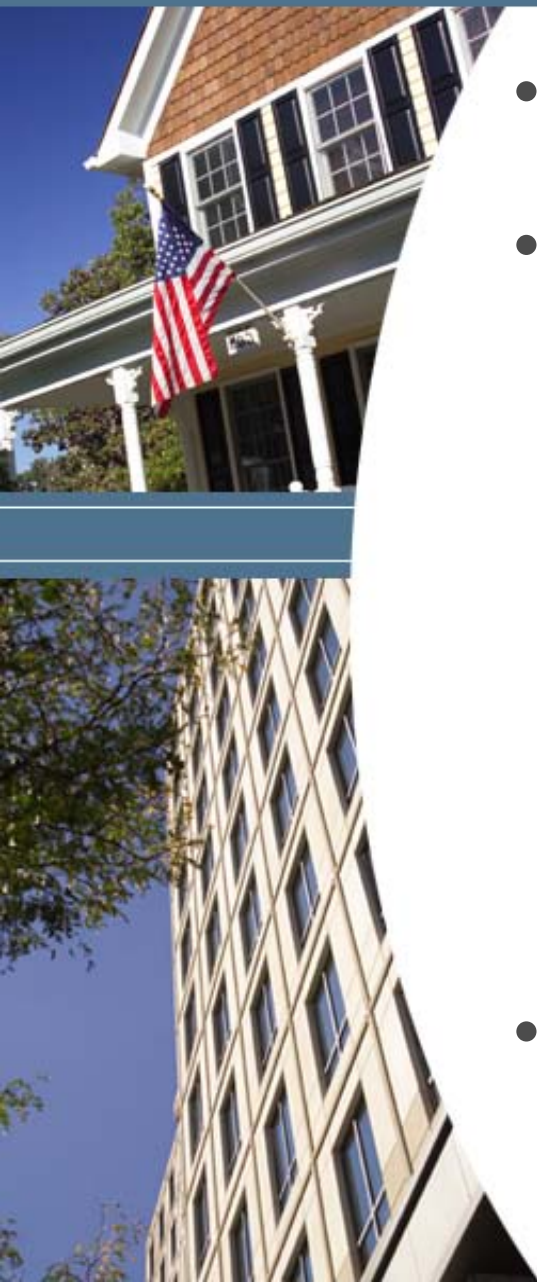
# Guidelines: Risk Assessment

- 
- Should identify practices or activities that can compromise accuracy and integrity, by reviewing
    - » current practices and technology,
    - » historic records,
    - » consumer, credit bureau and staff feedback
  - Should evaluate the effectiveness of existing policies and procedures and current methods used to furnish
    - » how do they affect accuracy and integrity?
    - » should new or different methods used?
  - Should consider whether
    - » new or different policies and procedures are necessary, and
    - » whether existing policies and procedures should be modified

# Specific Practices to Consider

- 
- Providing enough customer ID to avoid mixed and split files
  - Duplicative reporting and re-aging, especially following sale/acquisition
  - Overseeing service providers
  - Timely updating of account information
  - Use of standardized reporting formats
  - Conducting reasonable investigations

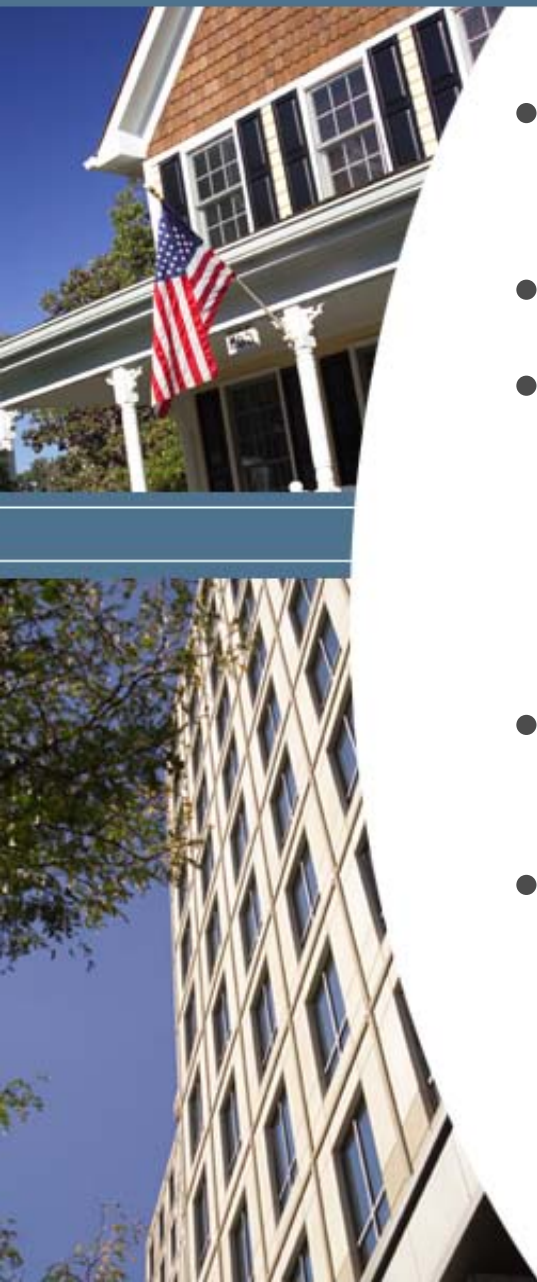
# Direct Dispute Rule

- 
- Must investigate information disputed by a consumer and respond within 30 days
  - Not required to investigate if the dispute is
    - » Not a “direct dispute” (not about accuracy, not about an account)
    - » Not submitted to the appropriate address
    - » Not concerning liability, terms, performance on account
    - » ***Frivolous or Irrelevant***
      - Insufficient information
      - Relates to ID, fraud alerts, inquiries, public record
      - Already investigated and no new information submitted
      - Reasonably believe submitted by credit repair
  - Must notify of frivolous or irrelevant determination within five business days

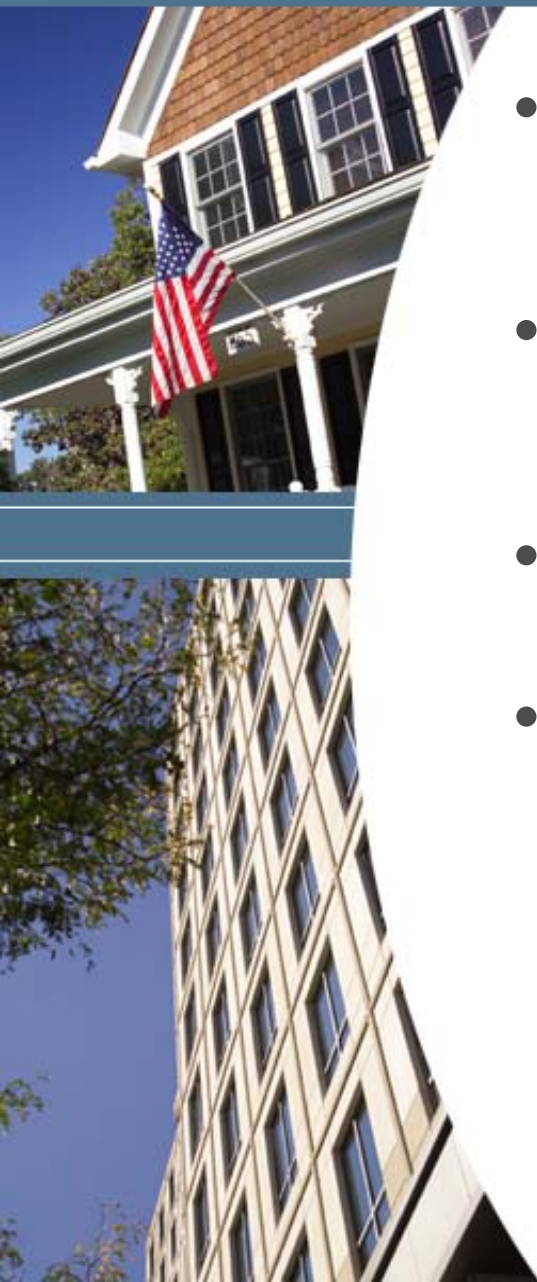


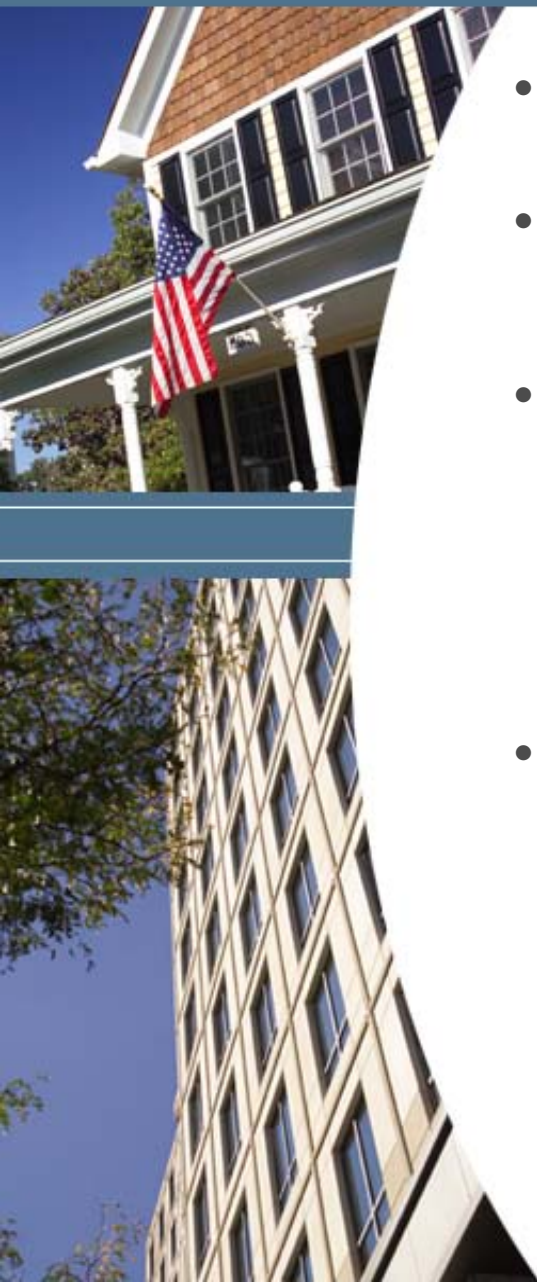
# TSR and TCPA Developments

# Telemarketing Sales Rule (TSR)

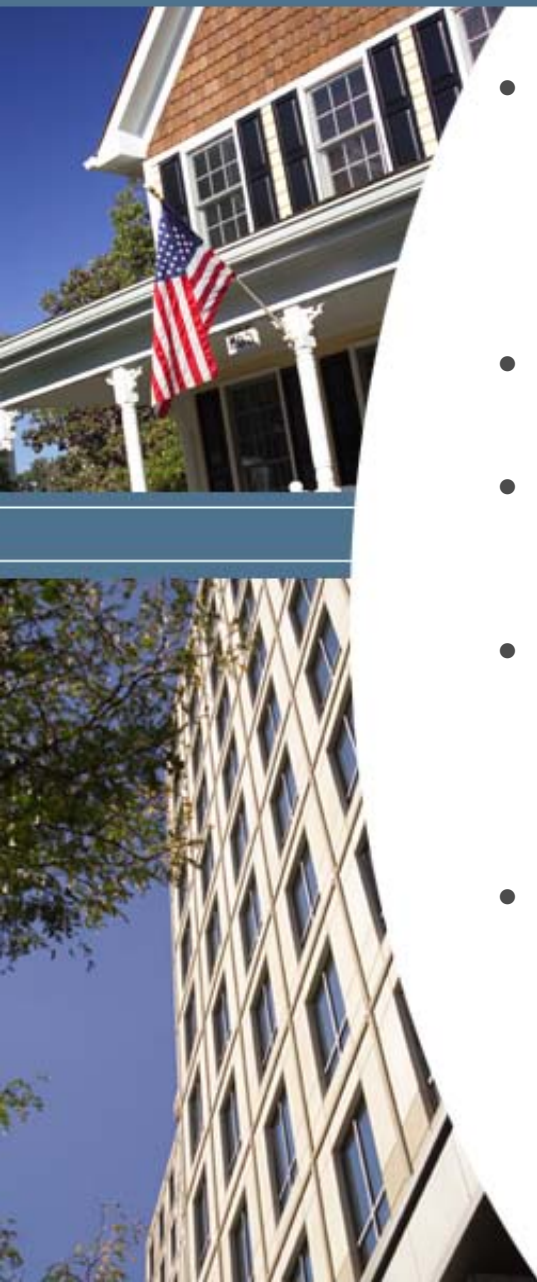
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- Telephone Consumer Fraud and Abuse Prevention Act
  - Only covers marketing calls
  - FTC has implemented with TSR
    - » Calling time restrictions; abusive practices
    - » National Do-Not-Call Registry
      - Established business relationship
      - Company-specific do-not-call list
  - Jurisdiction
    - » No banks or common carriers
  - Enforcement
    - » FTC with civil penalties
    - » State AGs
    - » Very limited private actions

# Telephone Consumer Protection Act (TCPA)

- 
- Regulates all telephone contact
    - Not just marketing
    - Including fax, text message, cell phone
  - FCC has implemented by rule
    - » Includes special marketing provisions: DNC, EBR
  - Jurisdiction
    - » Applies to everyone, including banks
  - Enforcement
    - » FCC
      - if not regulated entity, then warning required
    - » Private right of action
      - Statutory damages: \$500, \$1500
      - State court



- Cannot make prerecorded calls (“robocalls”) to cell phones or landlines
- FTC/TSR – only applies to seller and telemarketers
  - » Caller must have consumer's express written consent
  - » FTC rule made final Sept 2009
- FCC/TCPA: caller must have prior express consent, **except** when calling a landline
  - » For "commercial" calls that "do not include or introduce an unsolicited advertisement or constitute a telephone solicitation; or
  - » Where the caller has an established business relationship with the called party
- FCC Notice of Proposed Rulemaking (March 2010)
  - » Would remove EBR exception for robocalls to landlines
    - Would make TCPA Rule consistent with TSR
  - » Would also add new provisions defining “**prior express consent**”
    - Must be in writing and signed
    - Cannot condition product or service on consent
    - Must clearly evidence authorization, and must include telephone number



- Cannot call *cell phone* using an autodialer (“ATDS”) without *prior express consent*
  - » ATDS is very broadly defined by FCC
  - » Archaic: based on idea that cellphone must pay for inbound calls
- Applies to text messages
  - » *Satterfield v. Simon & Schuster* (9<sup>th</sup> Cir 2009)
- Even applies to service calls and collection calls
  - » New class actions challenging ATDS calls to cellphones for collections
- FCC Order re: collection calls (Jan 2008):
  - » “The provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt”
- FCC Notice of Proposed Rulemaking (comments due 5/21/10)
  - » Would add new provisions defining “**prior express consent**”
  - » Same as Robocall NPRM



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