

When is it a Firm Offer of Credit?

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Creditors often ask when the Fair Credit Reporting Act's (FCRA) rules relating to firm offers of credit apply. Do they apply when the creditor makes a prequalified offer? Does that change if the creditor makes a prescreened or preapproved offer? What is the difference between these terms?! The answer comes down to two words – permissible purpose.

Firm Offer: Creditor-Initiated

The [permissible purpose](#) analysis for pulling consumer credit information must focus on *why* and *how* the creditor obtains that information. No one may use or obtain a consumer report for any purpose except those expressly permitted by the FCRA. In most cases, the consumer initiates the transaction that will give the creditor its permissible purpose. However, a transaction that consists of a firm offer of credit, provides a key exception to the general rule that requires a consumer-initiated event. Under this provision, the FCRA allows a creditor to obtain limited consumer report information from a consumer reporting agency (CRA) in the form of a prescreened list for marketing purposes, so long as the creditor makes a firm offer of credit to each consumer on the list. Operationally, the creditor must establish certain consumer criteria in advance that it will require before the consumer can qualify for the creditor's "firm offer" of credit (for example, a minimum credit score of 640, no delinquent accounts, and a minimum income amount). The creditor can then ask a CRA for a prescreened list of consumers who appear to satisfy that criteria, based on information the CRA knows when it prepares the list (for example, credit scores and no reported delinquencies, but not the consumer's income).

Consumers who do not want to receive prescreened "firm offers" of credit or insurance are allowed to give opt-out instructions directly to the CRA. If the consumer has not exercised their right to be removed from prescreened lists, the CRA will provide the creditor with limited consumer report information by providing the name and contact information for each consumer who met some or all of the creditor's advance criteria. The FCRA then requires the creditor to make a firm offer of credit to each consumer on the prescreened list and, when they respond, apply the *same criteria* the creditor established before it obtained the prescreened list from the CRA. The creditor's firm offer solicitation must include specific disclosures and use specific formatting, to explain the consumer's right to opt-out of future prescreened offers through the CRA, and explain key conditions that apply to the creditor's firm offer. A creditor that receives the prescreened list but does not make a qualifying firm offer of credit to each consumer on the list will not have a permissible purpose for obtaining consumer report information, which violates the FCRA.

This is not to say the creditor has to approve and grant credit to every consumer who responds to the creditor's firm offer solicitation. The creditor is entitled to verify that the consumer continues to meet the specific criteria

the creditor established when it obtained the prescreened list. In our example, if a consumer's credit score has dropped below 640 by the time the consumer responds to the creditor's firm offer solicitation, the creditor may deny the consumer's credit application. If the creditor establishes specific credit criteria before it obtains the prescreened list, even about details the CRA cannot screen for in advance (for example, the consumer's income or adequate collateral), the creditor can use these other factors to evaluate the consumers who later respond to the creditor's "firm offer" of credit. The creditor's "firm offer" must disclose whether collateral is required for credit approval. As a best practice and to limit claims that the solicitation may violate state or federal Unfair, Deceptive, or Abusive Acts and Practice Act (UDAAP) statutes, the creditor should disclose information about how it will evaluate applications from consumers who respond to the offer (for example, by disclosing whether the creditor has minimum income requirements, debt-to-income requirements, or loan-to-value requirements). The creditor may not alter its advance credit criteria or add new criteria when underwriting an application from consumers who respond to the prescreened "firm offer" of credit. For example, the creditor cannot change its model after it obtains the prescreened list to require a 650 credit score to approve consumers who were prescreened by the CRA based on a 640 credit score. As a result, creditors should always establish and disclose to the consumer the date when the creditor's firm offer will expire. Applications that consumers submit after the creditor's stated expiration date are not subject to the "firm offer" requirements, and the creditor may apply updated or different credit criteria to these applications.

Prequalified Offer: Consumer-Initiated

Different provisions and rules apply when a creditor or other party obtains a consumer report based on "written instructions" from a consumer who has requested a prequalified offer of credit. If the creditor pulls credit (or does a "soft check" of credit) based on the consumer's written instructions, any prequalified or preapproved offer the creditor makes in response to the consumer-initiated request will not be subject to the firm offer of credit rules that apply to creditor-initiated solicitations. This is not to say that the terms the creditor uses for marketing to consumers are unimportant. Regardless of whether the creditor makes a prescreened "firm offer" of credit to consumers, or the creditor makes prequalified offers of credit based on the consumer's "written instructions" to the creditor, creditors are subject to UDAAP laws that prohibit unfair and deceptive acts and practices when they advertise, communicate with, and respond to consumers. Creditors should track approval rates coming out of prequalified or preapproved offers and track consumer complaints as part of a comprehensive compliance management system. Artificially low approval rates and/or high levels of consumer complaints may present a red flag that the creditor should further investigate.

When creditors develop a marketing campaign, they must focus on which permissible purpose will apply to the campaign and confirm that they have included a certification of that permissible purpose in the user agreement with the CRA. If the creditor obtains consumer report information without the consumer's knowledge or authorization (for example, by purchasing a prescreened list from a CRA), the creditor must make a firm offer of credit to each consumer on the list and carefully adhere to the rules related to firm offers. However, if the creditor obtains the consumer report based on the consumer's written instructions or application for credit, the rules that apply to prescreened firm offers of credit will not apply. In any case, creditors should be thoughtful when determining what terminology they will use to communicate offers to consumers.

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