

# COMMENT

## “CONGRATS! YOU’VE BEEN PRE-APPROVED!”: DETERMINING THE CORRECT APPROACH TO A FIRM OFFER OF CREDIT\*

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## I. INTRODUCTION

Each day, millions of Americans receive offers for credit cards, home equity loans, and auto loans. The language is now commonplace to most Americans. You have been pre-approved for a new credit card! “Just transfer a balance now and you’ll pay no interest on purchases—0% APR—until June 1, 2009 with NO balance transfer fee. Plus, you’ll appreciate a credit limit of up to \$30,000! No annual fee!”<sup>1</sup>

Such mailings allow businesses “to promote their products to customers and prospects in the most productive manner.”<sup>2</sup> In addition to direct mail, businesses target customers through various other channels of communication such as broadcast television, the Internet, magazines, and telemarketing.<sup>3</sup> Even with the increased popularity of these alternate channels, however, direct mail continues to have a significant impact as an advertising medium.<sup>4</sup> In 2007, U.S. households were expected to receive approximately 5.3 billion mailings pertaining to offers for new credit cards alone.<sup>5</sup> The 2007 projection represents a *decrease* from the previous two years.<sup>6</sup>

Numerous books have been published discussing the various strategies and merits of direct mail as a marketing tool.<sup>7</sup> One

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1. See, e.g., Mailing from Craig Schmeizer, Senior Vice President, Wash. Mut. (Fall 2007) (on file with the Houston Law Review).

2. ROSE HARPER, MAILING LIST STRATEGIES: A GUIDE TO DIRECT MAIL SUCCESS 8 (William Sabin & Marci Nugent eds., 1986).

3. *Id.*

4. EDWARD NASH, DIRECT MARKETING: STRATEGY, PLANNING, EXECUTION 337 (4th ed. 2000) (“Direct mail is the world’s largest advertising medium.”).

5. See Press Release, Synovate, US Credit Card Mail Offers Expected to Reach 5.3 Billion in 2007 (Oct. 12, 2007), <http://www.synovate.com/news/article/2007/10/us-credit-card-mail-offers-expected-to-reach-5-3-billion-in-2007.html>.

6. *Id.* U.S. households received 5.76 billion credit card offers in 2006 and 6.05 billion credit card offers in 2005, an all time high. *Id.* While the mailing volume has decreased, research analysts predict the response rate will increase, representing approximately 32 million applications for new credit cards. *Id.*

7. Direct marketing, primarily direct mail, has been the subject of voluminous literature. See generally DAVID SHEPARD ASSOCS., INC. ET AL., THE NEW DIRECT MARKETING: HOW TO IMPLEMENT A PROFIT-DRIVEN DATABASE MARKETING STRATEGY 3–4

effective strategy is prescreening, whereby businesses obtain a list of customers who satisfy certain predetermined criteria from a consumer reporting agency.<sup>8</sup> For businesses—mainly creditors and lenders—consumer information from the reporting agencies, including a consumer's credit score, is vital to the process of evaluating recipients.<sup>9</sup> However, credit reporting agencies may only provide consumer credit reports to businesses for certain “permissible purposes” mandated by the Fair Credit Reporting Act (FCRA).<sup>10</sup>

The FCRA allows access to consumer credit reports even without a consumer's prior authorization as long as the inquiry is associated with a mailing that constitutes a “firm offer of credit.”<sup>11</sup> Failure to comply with this or any other provision within the FCRA may result in statutory damages.<sup>12</sup> The FCRA provides a lengthy definition of a firm offer of credit.<sup>13</sup> However, federal courts' interpretations of the FCRA definition have taken two distinct paths: the restrictive approach and the strict constructionist approach. The restrictive approach requires each mailing contain specific information to enable the consumer to determine whether the offer is of sufficient value in itself or is merely a solicitation. If an offer does not contain sufficient value, the mailing is not a firm offer of credit and is in violation of the

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(3d ed. 1999) (labeling new direct marketing as an “information-driven marketing process . . . that enables marketers to develop, test, implement, measure, and appropriately modify customized marketing programs and strategies,” and discussing steps to implement a new direct marketing strategy); HARPER, *supra* note 2, at 1–3 (analyzing the importance of new customers as it relates to direct mailing strategies as well as discussing strategies for obtaining a meaningful list of potential customers depending on the type of business); NASH, *supra* note 4, at 1–3 (recognizing the influence the Internet and globalization have had on direct marketing); ROBERT STONE, PROFITABLE DIRECT MAIL METHODS 172–76 (1947) (emphasizing the importance of securing a proper mailing list).

8. See Richard E. Gottlieb, *Firm Offers of Credit: Recent Developments*, 60 CONSUMER FIN. L.Q. REP. 596, 596 (2006) (“Much of the mail received by Americans is the result of prescreening.”); see also discussion *infra* Part II (discussing the prescreening process as well as the benefits and burdens of prescreening). The primary national consumer reporting agencies are Equifax, Experian, and TransUnion Corporation. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE 1 n.1 (2004), available at <http://www.federalreserve.gov/boarddocs/rptcongress/UnsolicitedCreditOffers2004.pdf>.

9. See HANDBOOK OF CREDIT SCORING 61 (Elizabeth Mays ed., 2001) (discussing how credit scores can help predict certain consumer behavior).

10. Fair Credit Reporting Act, 15 U.S.C. § 1681b (2006); see also discussion *infra* Part III (detailing the Fair Credit Reporting Act).

11. 15 U.S.C. § 1681b(c)(1)(B)(i) (2006).

12. 15 U.S.C. § 1681n (2006) (including actual damages, attorney's fees, and punitive damages for willful noncompliance).

13. 15 U.S.C. § 1681a(l) (2006).

FCRA.<sup>14</sup> Alternatively, the strict constructionist approach does not look to whether the purported credit offer is of sufficient value to the consumer. Instead, the strict constructionist approach purports to follow the textual language and legislative intent of the FCRA.<sup>15</sup>

This Comment analyzes both the restrictive and strict constructionist approaches to determine whether a particular mailing constitutes a firm offer of credit under the FCRA. It asserts that federal courts should not follow the Seventh Circuit in championing the restrictive approach, but instead should adopt the strict constructionist approach. This Comment offers several reasons for the universal adoption of the strict constructionist approach. First, judicial interpretations are accurately aligned with the plain language of the statute and Congress's intent in enacting the FCRA. Second, the strict constructionist approach is more practical than the restrictive approach, which is difficult to analyze in the context of mortgage and auto loans. Third, while the restrictive approach protects privacy, there are other FCRA provisions and external mechanisms that provide a more cost-effective method of maintaining consumer privacy without sacrificing the benefits of prescreening. Finally, considering the Seventh Circuit's latest opinions on firm offers of credit, the court appears to have weakened the sufficient value analysis, resulting in future restrictive court holdings that will likely be closely aligned with the strict constructionist approach.

Part II of this Comment summarizes the prescreening process as well as the benefits and burdens of prescreening. Part III discusses the FCRA and details the permissible purposes for which a business may gain access to a consumer's credit report. For example, one permissible purpose is extending a firm offer of credit, which is specifically defined by the statute. Part IV discusses both courts' interpretations of a firm offer of credit and the various cases that have proven influential for each approach. Part IV.A, which covers the restrictive approach, focuses primarily on cases within the Seventh Circuit. Part IV.B summarizes the holdings and reasoning of federal district courts that have considered the strict constructionist approach. Part V analyzes the Seventh Circuit's rationale and explains how recent

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14. See discussion *infra* Part IV.A (discussing the restrictive approach and the case law requiring that an offer contain sufficient value).

15. See discussion *infra* Part IV.B (discussing the strict constructionist approach and the case law that has structured this approach).

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decisions are more aligned with the strict constructionist approach. Part VI concludes this Comment.

## II. PRESCREENING

Prescreening involves businesses accessing consumer credit reports to target particular consumers with direct mail solicitations.<sup>16</sup> The popularity of prescreened solicitations is undeniable. “[P]rescreened solicitations are now among the principal techniques creditors and insurers use to inform prospective customers of the availability of their products and to establish new or additional business relationships with them.”<sup>17</sup> In the prescreening process, creditors and insurers establish a list of specific criteria, such as minimum credit scores, lack of excess debt, and demographic characteristics.<sup>18</sup> The businesses then request from a consumer reporting agency a list of names, addresses, and other information of consumers who satisfy the specific criteria.<sup>19</sup> Businesses use these lists to send solicitations to potential customers, with an aim at establishing relationships for a variety of credit products, including auto loans, credit cards, home equity loans, and student loans.<sup>20</sup>

In light of the prevalence of prescreened solicitations in today's economy, the practice provides many benefits to businesses utilizing such a strategy. One benefit to businesses is a reduction in acquisition costs.<sup>21</sup> Acquisition costs are reduced because businesses send mailings to a limited group of potential customers identified through the prescreening process rather than a mass mailing to numerous U.S. households, many of which will not qualify. Moreover, businesses reduce the number

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16. See *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 146–47 (1991) (statement of the American Bankers Association); see also *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 335 (N.D. Ill. 2002).

17. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 1.

18. *Id.* at 7; see also *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 840–41 (5th Cir. 2004); H.R. REP. NO. 108-263, at 23 (2003) (describing credit bureaus and the information they collect).

19. See REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 7. The primary national consumer reporting agencies as well as other smaller consumer reporting agencies “collect and sell information concerning the credit histories and financial status of 90% of all Americans.” S. REP. NO. 103-209, at 1 (1993).

20. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 7–8.

21. INFO. POLICY INST., THE FAIR CREDIT REPORTING ACT: ACCESS, EFFICIENCY & OPPORTUNITY, THE ECONOMIC IMPORTANCE OF FAIR CREDIT REAUTHORIZATION 56–59 (2003), available at [http://www.infopolicy.org/pdf/fcra\\_report.pdf](http://www.infopolicy.org/pdf/fcra_report.pdf).

of responses that must be rejected as well as the corresponding costs.<sup>22</sup> Another benefit is an increase in the company's customer base. Customer response rates are significantly higher with prescreening compared to other modes of direct marketing.<sup>23</sup>

Prescreening also benefits consumers. Because prescreened offers reduce costs and increase revenue through a larger customer base, businesses are able to provide more favorable terms to the consumer—such as lower interest rates and fees.<sup>24</sup> Additionally, product affordability is enhanced through increased business competition.<sup>25</sup> The cost efficiency of prescreening allows smaller businesses to “compete with larger financial institutions in geographically diverse consumer credit markets.”<sup>26</sup> Because of the widespread availability of credit information, the market dictates that businesses offer consumers favorable terms in order to secure the consumer's response.<sup>27</sup>

Prescreening also enhances the consumer's welfare. By receiving prescreened offers, consumers spend less time and effort shopping for such products, thus reducing shopping costs.<sup>28</sup> Moreover, prescreened offers provide “an easy and efficient

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22. See REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 10.

23. See INFO. POLICY INST., *supra* note 21, at 56 (constructing a case study of credit card issuances, the institute found that prescreened offers resulted in almost 70% of all new customers); see also Prescreen Opt-Out Disclosure, 70 Fed. Reg. 5026 (Jan. 31, 2005) (codified at 16 C.F.R. pts. 642, 698) (“[A] substantial percentage of credit card enrollments result from prescreened offers.”).

24. See Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5026–27 (documenting a few consumer benefits of prescreening). However, “if prescreened offers became less viable, marketers may switch to direct mail solicitations, which may be more costly and carry less favorable terms.” *Id.*

25. See REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 28–29.

26. *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 281 (1991) (statement of Visa U.S.A. Inc. and MasterCard International Inc.).

27. See REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 28; see also Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5026 (acknowledging that “the growth in prescreened offers has coincided with a general trend towards lower initial interest rates and certain other more favorable terms”). Economic developments have also highlighted the “importance of information for the effective and efficient functioning of product markets and for enhancing competition.” REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 28.

28. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 28–29; see also George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 216 (1961) (noting that advertising reduces a buyer's search costs).

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means for consumers to learn of competing credit or insurance offers and to identify those that best suit their needs.”<sup>29</sup>

In addition to these benefits, however, there are many perceived burdens of prescreening. The primary concern of consumers is the right to privacy for those wishing not to participate in any unsolicited credit or insurance offers.<sup>30</sup> Such consumers worry that the information may be used for inappropriate purposes.<sup>31</sup> To mitigate this concern, the FCRA allows consumers the right to opt out of future prescreened solicitations.<sup>32</sup>

Another prescreening concern is inconvenience, which arises from consumers “receiving unwanted prescreened solicitations for insurance and credit.”<sup>33</sup> Yet, it is unclear whether eliminating prescreened offers would ease consumer inconvenience.<sup>34</sup> Furthermore, educational studies show that only a small percentage of Americans believe the government should prohibit solicitations.<sup>35</sup>

The potential for identity theft is also a concern regarding prescreening. Identity theft involves the theft of critical consumer information such as social security numbers, bank account information, and credit information.<sup>36</sup> This new type of crime has become a major issue for consumers in recent years,<sup>37</sup> and the legislature has taken measures to reduce such activity.<sup>38</sup>

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29. Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5026.

30. *See id.* at 5027. The privacy concern has escalated over the last few years given the security breakdowns of many large corporations in regards to maintaining safe and secure personal data, including credit information. *See, e.g.,* Joseph Pereira, *How Credit-Card Data Went Out Wireless Door*, WALL ST. J., May 4, 2007, at A1 (detailing the theft of over 45.7 million credit and debit card numbers from a giant retail chain).

31. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 43.

32. *Id.* at 44; *see also* discussion *infra* Part V.C (explaining the FCRA opt-out provisions as well as other external mechanisms in place to maintain consumer privacy).

33. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 37.

34. *See id.* The Federal Reserve Board notes that the number of mailings received by U.S. households might increase if prescreening were eliminated because businesses would have a reduced ability to target specific consumers. *Id.*

35. The University of Michigan conducted a survey in 2004 concerning consumer attitudes towards solicitations. About 65% of respondents indicated that the government should not prohibit prescreened solicitations. *Id.* at 37–38.

36. *See* REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 39–40 (giving various definitions of identity theft used by law enforcement officials and financial institutions).

37. *See, e.g.,* *Data Security Breaches Reach a Record in 2007*, WALL ST. J., Dec. 31, 2007, at B5 (stating that almost 80 million records, such as credit card and Social Security numbers, were compromised in 2007).

38. *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159,

However, prescreened mailings account for only a small percentage of all identity theft crimes.<sup>39</sup> The main reason significant identity theft does not stem from prescreened mailings is that the solicitations do not contain the sensitive information sought by thieves.<sup>40</sup> Also, institutions like credit card companies have implemented effective controls that detect fraud prior to credit approval.<sup>41</sup>

The last prescreening concern is centered on the idea that prescreening will lead to overburdening consumers with debt.<sup>42</sup> Current market trends, however, show that lenders and creditors are trying to “take borrowers from other lenders rather than to add to debt levels.”<sup>43</sup> Thus, while consumers have expressed different concerns regarding prescreening, these concerns are mitigated in part by legislative measures and business decisions, as well as the benefits of prescreening.

### III. FAIR CREDIT REPORTING ACT

Congress recognized the benefits and burdens of prescreening when enacting the FCRA.<sup>44</sup> By passing the FCRA,

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§ 605A, 117 Stat. 1952, 1955–64 (codified at 15 U.S.C. § 1681) (implementing fraud and active duty alerts as well as providing summary of rights for fraud victims).

39. See REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 41.

40. *Id.*

41. *Id.* at 42. For instance, credit card companies automatically transfer change of address requests to fraud control. *Id.*

42. *Id.* at 44. Consumer debt is currently a hot topic given the vast number of U.S. mortgage foreclosures. See, e.g., Janet Elliott, *Lenders Urged to Help Avert Loss of Homes*, HOUSTON CHRON., Nov. 7, 2007, at B2 (documenting Texas legislature calls to fix the mortgage crises); Jack Guttentag, *The Mortgage Crisis is One of Confidence*, WASH. POST, Jan. 5, 2008, at F3 (“The current mortgage crisis will probably enter the U.S. record book as the second-worst in the past 100 years.”). The U.S. mortgage crisis is not the focus of this Comment.

43. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 45; cf. Press Release, Synovate, Credit Card Issuers Continue Mailing to High Risk Households (Nov. 29, 2007), <http://www.synovate.com/news/article/2007/11/credit-card-issuers-continue-mailing-to-high-risk-households.html> (calculating that consumers “utilizing more than 30% of their available credit” received over 363 million credit card offers during the third quarter of 2007). In fact, given the current credit environment, credit card companies are actually restricting credit to customers. See Ben Bernanke, Chairman, U.S. Fed. Reserve, Remarks to the Nat’l Assoc. for Bus. Econ. (Oct. 7, 2008) (transcript available at <http://blogs.wsj.com/economics/2008/10/07/bernanke-fed-needs-to-consider-rate-cut/>) (expressing concern about banks reducing credit card limits).

44. See Fair Credit Reporting Act, 15 U.S.C. § 1681(a)–(b) (2006) (outlining scope and purpose of the FCRA). Since the FCRA’s initial enactment, Congress has amended the Act through various legislative enactments. See, e.g., Fact and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of 15 U.S.C.); Consumer Reporting Reform Act of 1996, Pub. L. No. 104-

Congress sought to maintain a balance between the consumers' right of privacy and the benefits of prescreening.<sup>45</sup> To achieve this end, the FCRA allows businesses access to a consumer's credit report, but only in limited circumstances. A business can access a consumer's credit report only if it does so for a permissible purpose enunciated by the FCRA. Section 1681b lists all such permissible purposes.<sup>46</sup> For example, reporting agencies can provide a consumer report in response to a court order or a federal grand jury subpoena or in accordance with consumer instructions.<sup>47</sup> Businesses can access consumer reports if the consumer reporting agency believes the business will use the report in connection with credit transactions, insurance underwriting, or for employment purposes.<sup>48</sup>

A consumer reporting agency may furnish a consumer report in connection with a credit transaction even if the transaction is not initiated by the consumer.<sup>49</sup> These transactions, initiated by businesses as opposed to individual consumers, must constitute a "firm offer of credit or insurance" in order to meet the permissible purpose requirement under the FCRA.<sup>50</sup> The FCRA provides a lengthy definition for a firm offer of credit.<sup>51</sup>

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208, 110 Stat. 3009-426 (codified as amended in scattered sections of 15 U.S.C.).

45. See *Nasca v. J.P. Morgan Chase Bank, N.A.*, No. 06 Civ. 3472(SHS), 2007 WL 678407, at \*4 (S.D.N.Y. Mar. 5, 2007); see also discussion *infra* Part V.A (providing deeper analysis into Congress's intent regarding the FCRA).

46. 15 U.S.C. § 1681b (2006); see also *Villagran v. Freeway Ford, Ltd.*, 525 F. Supp. 2d 819, 821, 825 (S.D. Tex. 2007) (noting that a reporting agency may furnish a consumer's credit report "as long as the creditor uses that information within the statute's limits").

47. 15 U.S.C. § 1681b(a)(1)-(2) (2006).

48. 15 U.S.C. § 1681b(a)(3)(A)-(C) (2006). Credit reporting agencies may also furnish reports when the agency believes the report is needed to determine a consumer's eligibility for a license, if the recipient, as a potential investor or insurer, needs the report to determine a valuation or assessment of credit or prepayment risks, or for any other legitimate business need. 15 U.S.C. § 1681b(a)(3)(D)-(F) (2006). Another permissible purpose includes "[a] response to a request by the head of a State or local child support enforcement agency." 15 U.S.C. § 1681b(a)(4) (2006).

49. See 15 U.S.C. § 1681b(c) (2006).

50. 15 U.S.C. § 1681b(c)(1)(B)(i) (2006).

51. Section 1681a(l) provides as follows:

The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established—

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance

According to the FCRA, a firm offer of credit requires a prescreened mailing to be honored as long as the consumer satisfies specific criteria established by the business.<sup>52</sup> The criteria must be established prior to the business selecting the consumer for the offer and must relate to whether to extend credit.<sup>53</sup> The consumer must continue to meet the business's established criteria after the consumer has received the offer.<sup>54</sup> To determine whether the consumer still qualifies, the business may analyze the consumer's credit report, application data, or other relevant information.<sup>55</sup> In addition, the business may request that the consumer furnish collateral as a requirement for the extension of credit. Any collateral requirement must be established prior to selecting the consumer and must be disclosed in the prescreened offer.<sup>56</sup> If a business fails to comply with provisions of the FCRA, including accessing a credit report without a permissible purpose, it is potentially liable for actual and punitive damages as well as attorney's fees.<sup>57</sup>

#### IV. JUDICIAL INTERPRETATION OF A FIRM OFFER OF CREDIT

Considering the statutory damages available to consumers, businesses need a solid understanding of all permissible purposes prior to accessing a consumer's credit report. A business, thus,

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pursuant to the offer.

(2) Verification—

(A) that the consumer continues to meet the specified criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was—

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

15 U.S.C. § 1681a(l) (2006).

52. *Id.* Specific criteria may include past credit use, "recent delinquencies or bankruptcies," or "certain demographic characteristics." *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 101st Cong. 457 (1989) (statement of Visa U.S.A., Inc. and MasterCard International Inc.).

53. 15 U.S.C. § 1681a(l)(1)(A)–(B) (2006).

54. 15 U.S.C. § 1681a(l)(2)(A) (2006).

55. *Id.*

56. 15 U.S.C. § 1681a(l)(3)(A)–(B) (2006).

57. *See* 15 U.S.C. §§ 1681n–1681o (2006).

must be aware of and understand the FCRA's definition of a firm offer of credit.<sup>58</sup> Even with such an extensive definition expounded by Congress, federal courts have taken two distinct approaches in interpreting the term: the restrictive approach and the strict constructionist approach.<sup>59</sup> Under the restrictive approach, a mailing must provide sufficient value to the consumer to be considered a firm offer.<sup>60</sup> Alternatively, rather than requiring sufficient value, the strict constructionist approach requires only that a mailing meet the FCRA definition to be considered a firm offer.<sup>61</sup> This section discusses both interpretations of a firm offer and the various cases that have proven influential for each approach.

#### A. Restrictive Approach

The restrictive approach incorporates a sufficient value analysis into the FCRA's definition of a firm offer of credit. The Seventh Circuit<sup>62</sup> first required that a firm offer contain sufficient value in *Cole v. U.S. Capital, Inc.*<sup>63</sup> In *Cole*, the plaintiff was pre-approved by U.S. Capital and Jerry Gleason Chevrolet "to 'receive a Visa or MasterCard with limits up to \$2000 as well as up to \$19,500 in AUTOMOTIVE CREDIT!'"<sup>64</sup> The lenders conditioned the offer on three criteria: the recipient's car payment not exceeding 50% of her gross income; the recipient receiving an annual income of at least \$18,000; and the recipient having any and all bankruptcies discharged. The lenders

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58. See *supra* notes 49–51 and accompanying text (discussing a firm offer of credit as a permissible purpose and defining that term).

59. See discussion *infra* Part IV.A–B (discussing the case law under the restrictive and strict constructionist approaches). The term strict constructionist was first used within the FCRA context in *Villagran v. Freeway Ford, Ltd.*, 525 F. Supp. 2d 819, 828 (S.D. Tex. 2007).

60. See, e.g., *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 726–27 (7th Cir. 2004) ("A definition of 'firm offer of credit' that does not incorporate the concept of value to the consumer upsets the balance Congress carefully struck between a consumer's interest in privacy and the benefit of a firm offer of credit for all those chosen through the pre-screening process.").

61. See, e.g., *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053, 1060 (N.D. Cal. 2006) ("The text of the FCRA does not support plaintiffs' suggestion that a firm offer . . . must be of sufficient 'value' when judged by a later arbiter, as suggested by the Seventh Circuit in *Cole*.").

62. The Seventh Circuit is the only court of appeals that has addressed what constitutes a firm offer under the FCRA.

63. *Cole*, 389 F.3d at 726–28. For additional analysis on *Cole*, see April B. Chang, *Valuables in Your Mailbox? How the Concept of Value in Cole v. U.S. Capital, Inc. Enhances the FCRA's Guidelines Concerning Creditor Marketing*, 10 N.C. BANKING INST. 209, 223–28 (2006); and R. Scott Johnson, *Prescreened Offers—Useful But Are They Firm Offers of Credit?*, 60 CONSUMER FIN. L.Q. REP. 593, 594–95.

64. *Cole*, 389 F.3d at 722.

guaranteed the recipient a \$300 credit line for the purchase of a vehicle. The offer stated the loan's interest rates varied from 2.9% to 24.9%.<sup>65</sup> However, the offer did not include the precise interest rate, the method by which repayment would be compounded, or the repayment period.<sup>66</sup> The plaintiff argued that, given the small amount of credit guaranteed, the mailing did not constitute a firm offer under the FCRA. The defendants countered that the FCRA did not require a certain value threshold, but only that some dollar amount be guaranteed.<sup>67</sup>

The district court dismissed the plaintiff's original complaint, holding that the defendants obtained the credit report for a permissible purpose under the FCRA. The court explained the \$300 was "consistent with the FCRA" because the lender was allowed to condition a firm offer of credit on a consumer satisfying a predetermined set of criteria.<sup>68</sup>

On appeal, the Seventh Circuit reversed the district court, stating that an offer with little value violated the FCRA's primary purpose of protecting consumer privacy.<sup>69</sup> The court noted that an offer with little or no value was the equivalent of an "advertisement or solicitation."<sup>70</sup> Therefore, a firm offer must have "sufficient value for the consumer to justify the absence of the statutory protection of his privacy."<sup>71</sup> To determine whether an offer had sufficient value, the court concluded that "the *entire* offer and the effect of *all* the material conditions that comprise the credit product in question" must be considered.<sup>72</sup> The court listed several factors that should be evaluated such as the amount of credit extended, other key terms attached to the credit, and any limitations on the offer. Other key terms included "the rate of interest charged, the method of computing interest and the length of the repayment period."<sup>73</sup>

The Seventh Circuit considered the offer a "sham" because it was not clear whether the offer of credit would be honored. The

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65. *Id.* at 722–23.

66. *Id.* at 728.

67. *Id.* at 726.

68. *Id.* at 723; *see also* 15 U.S.C. § 1681a(l) (2006) (allowing prescreened offers of credit to be based on specific criteria effecting creditworthiness). The district court's reasoning resembled the strict constructionist approach to a firm offer of credit. *See* discussion *infra* Part IV.B (discussing the case law under the strict constructionist approach).

69. *Cole*, 389 F.3d at 726.

70. *Id.* at 727.

71. *Id.* at 726.

72. *Id.* at 727–28.

73. *Id.* at 728.

court also questioned whether the offer had value to the consumer. Given the small amount of credit offered, the known limitations on the offer, and the absence of several material terms, the court found the value to be indeterminable.<sup>74</sup>

The Seventh Circuit clarified the *Cole* holding in *Murray v. GMAC Mortgage Corp.*, a case arising out of an interlocutory appeal of a class certification denial.<sup>75</sup> In *Murray*, GMAC Mortgage offered recipients first-mortgage loans, which could be drawn against the equity in their homes.<sup>76</sup> The plaintiff filed a class action lawsuit arguing the mailing did not constitute a firm offer of credit, thus violating the FCRA.<sup>77</sup> Hoping to eliminate class action lawsuits under the FCRA, GMAC Mortgage argued that the *Cole* holding required each offer to be evaluated based upon the individual recipient.<sup>78</sup> The Seventh Circuit, however, stated that the *Cole* holding required an *objective* analysis, and that for an offer to have sufficient value, it must be “useful to the normal consumer.”<sup>79</sup> Further clarifying *Cole*, the court held that only the “four corners of the offer” had to be analyzed when determining whether a lender made a firm offer in compliance with the FCRA.<sup>80</sup> Consequently, if only the four corners of the offer are analyzed, the mailing must include specific credit terms for a court to find sufficient value.

Less than eight months later, the Seventh Circuit decided *Perry v. First National Bank*.<sup>81</sup> In *Perry*, the recipient received an offer for a pre-approved Visa credit card with a \$250 minimum line of credit, which could be used at any store where Visa was accepted.<sup>82</sup> The credit card had an interest rate of 18.9%. The credit solicitation required that the recipient pay a significant amount in fees upon acceptance.<sup>83</sup> Comparing the large amount of fees with the low amount of credit offered, the plaintiff claimed

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74. *Id.*

75. *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 951 (7th Cir. 2006).

76. *Id.* at 955.

77. *Id.* at 950–51.

78. *Id.* at 955.

79. *Id.* The court stated, “The statutory definition of ‘firm offer’ does not ask about how consumers *react*, however; it asks what the offeror has done—what terms have been extended, whether they are honored if a consumer accepts.” *Id.*

80. *Id.* at 956.

81. *Perry v. First Nat'l Bank*, 459 F.3d 816 (7th Cir. 2006).

82. *Id.* at 818, 825.

83. *Id.* at 825. According to the plaintiff, these fees included a \$9.00 processing fee, a \$119.00 “acceptance” fee, a \$50.00 annual membership fee, and a \$72.00 annual participation fee. *Id.* at 824.

the mailing violated the FCRA because “it was for such a small amount of credit that it was virtually worthless.”<sup>84</sup>

Unlike in *Cole*, however, the Seventh Circuit held the mailer did constitute a firm offer. The *Perry* court distilled three factors from *Cole* to determine whether the offer had value. First, the offer had to be guaranteed. Second, the specific rate of credit and other material terms had to be included in the mailing. And third, the amount of credit offered could not be subject to too many limitations. The *Perry* court found all three factors present.<sup>85</sup> In addition to the offer being plainly approved and disclosing a specific interest rate,<sup>86</sup> the offer could be used for any number of product purchases.<sup>87</sup> Moreover, although the Seventh Circuit recognized that the significant amount of fees made the offer unattractive to a majority of people, the court found the offer still had value.<sup>88</sup> The court reasoned that the offer had value to those individuals “trying to establish credit for the first time or to reestablish good credit.”<sup>89</sup> The court also stated the FCRA was not designed to “prevent consumers from making unwise financial choices.”<sup>90</sup> Thus, while the Seventh Circuit continued its emphasis on the sufficient value requirement, the court provided additional analysis for determining an offer’s value.

However, in 2008, the Seventh Circuit provided further FCRA guidance, substantially limiting *Cole* and its progeny. In

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84. *Id.* at 819.

85. *Id.* at 824–25.

86. While *Perry* acknowledged the offer had a set interest rate of 18.9%, the court opinion does not discuss whether other material credit terms were included in the offer, such as the method of compounded interest or the repayment period. *Id.* Such terms were of critical importance in *Cole*. See *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 728 (7th Cir. 2004) (“[T]he offer does not specify the method by which interest will be compounded nor the repayment period, although these factors are essential considerations in determining whether the offer has any value.”); see also Gottlieb, *supra* note 8, at 599 (noting that *Perry* only requires “that an initial mailer disclose enough information to demonstrate that the firm offer had sufficient value” given the *Perry* court’s failure to discuss important credit terms).

87. *Perry*, 459 F.3d at 825.

88. *Id.* But see *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 955 (7th Cir. 2006) (“An offer has value to ‘the consumer’ if it is useful to the *normal* consumer.”).

89. *Perry*, 459 F.3d at 825.

90. *Id.* at 825 n.2. The *Perry* decision included the only dissenting opinion among the three Seventh Circuit cases. See *id.* at 826 (Evans, J., dissenting). The dissenting judge wrote that the majority’s value-determining factors were only a portion of the analysis required under *Cole*. The dissent stated that the “terms of an offer . . . may be so onerous as to deprive the offer of any appreciable value.” *Id.* at 826 (quoting *Cole*, 389 F.3d at 728). The dissent found that a mere \$250 line of credit coupled with almost equal credit card fees did not constitute appreciable value. *Id.* Thus, the dissent concluded that “[d]efining a firm offer of credit as merely any offer that will be honored . . . deprives the FCRA ‘of all serious purpose.’” *Id.* at 827.

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*Murray v. New Cingular Wireless Services, Inc.*, the court addressed three separate appeals.<sup>91</sup> Two appeals centered on offers lacking material terms: an offer for a home-equity loan did not include the loan duration, specific fees, or the interest's compounding rate while a credit card offer failed to state the minimum amount of credit.<sup>92</sup> The appellants argued that because such terms were missing, the value of each offer was uncertain, thus not constituting a firm offer of credit and violating the FCRA.<sup>93</sup> Despite previous court holdings, the Seventh Circuit held such missing terms—and even the value proposition itself—were no longer relevant. Instead, in determining whether an offer satisfied the FCRA's definition of a firm offer of credit, the proper inquiry “is whether the offer is ‘firm’ rather than whether it is ‘valuable.’”<sup>94</sup>

In justifying its departure from precedent, the court distinguished between offers of *credit* and offers of *merchandise*.<sup>95</sup> The Seventh Circuit noted that *Cole* did not apply to pure offers of credit.<sup>96</sup> The court further explained that *Cole* actually involved a joint offer of credit *and* merchandise.<sup>97</sup> And, in order to detangle an offer of credit from an offer of merchandise, the *Cole* court had to determine “whether the offer of credit would be valuable standing alone in order to see whether the nonconsensual check of a person's credit history had been used to make an offer of merchandise, something the statute does not allow.”<sup>98</sup>

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91. *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 721 (7th Cir. 2008).

92. *Id.* at 721–23.

93. *See id.* at 721.

94. *Id.* at 722. The Seventh Circuit reiterated such an inquiry in *Cavin v. Home Loan Center, Inc.*, 531 F.3d 526 (7th Cir. 2008). In *Cavin*, the court emphasized that “the [FCRA] does not require the revelation of [all important terms] as part of a ‘firm offer.’” *Id.* at 530 (quoting *Sullivan v. Greenwood Credit Union*, 520 F.3d 70 (1st Cir. 2008)). The circuit's new inquiry is more aligned with the strict constructionist approach. *See infra* Part IV.B (emphasizing the strict constructionist approach does not require a mailing contain sufficient value); *see also infra* Part VI.

95. *Murray*, 523 F.3d at 722.

96. *Id.* at 721.

97. *Id.* at 722. The court, however, provides little guidance for determining when an offer of credit becomes entangled with an offer of merchandise. In commenting that the *Cole* mailing was a joint offer, the court highlights the fact that “the merchant was selling cars and offered to extend credit for a small fraction of the price.” *Id.* Yet, the court later holds that an offer for a “free phone” together with a service plan is an offer of credit, not merchandise. *Id.*

98. *Id.* Ironically, in detangling an offer of credit from an offer of merchandise, the Seventh Circuit returns to whether an offer of credit has “value.”

*B. Strict Constructionist Approach*

Under the strict constructionist approach, a firm offer of credit is not based upon whether the purported credit offer disclosed material terms or contained sufficient value. Instead, a firm offer must solely meet the requirements stated within the FCRA.<sup>99</sup>

The first—and most cited—case articulating the underlying theory of the strict constructionist approach is the Fifth Circuit case *Kennedy v. Chase Manhattan Bank*.<sup>100</sup> In *Kennedy*, the plaintiffs received prequalified offers for credit cards from Chase Manhattan and Bank of America. The plaintiffs subsequently accepted the initial credit card offer. However, after reviewing the plaintiff's credit reports and determining the plaintiffs did not meet the specified criteria used to select applicable consumers, the banks declined to open a credit card account for the plaintiffs.<sup>101</sup>

The plaintiffs argued the prescreened mailing did not constitute a firm offer of credit.<sup>102</sup> The plaintiffs contended that the banks, when reviewing their credit reports subsequent to their acceptance of the offer, used a different set of criteria to determine whether they were creditworthy, which is not a valid condition of declining a firm offer under the FCRA.<sup>103</sup> The district court granted the banks' motion to dismiss.<sup>104</sup>

On appeal, the Fifth Circuit affirmed the lower court's decision.<sup>105</sup> The court, analyzing solely the FCRA definition of a firm offer of credit, determined the FCRA "permits a creditor to make a 'conditional' firm offer of credit."<sup>106</sup> The court noted that the FCRA only allows a consumer reporting agency to furnish limited consumer information for credit transactions not initiated by the consumer, which occurred when the plaintiffs received the prequalified offer. The court also stated that more detailed consumer credit information is available if the consumer

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99. See *Nasca v. J.P. Morgan Chase Bank, N.A.*, No. 06 Civ. 3472(SHS), 2007 WL 678407, at \*3–4 (S.D.N.Y. Mar. 5, 2007) (emphasizing the FCRA definition of a firm offer does not require "definitive credit amounts" or sufficient value); see also *supra* notes 49–56 and accompanying text (detailing the FCRA requirements of a firm offer).

100. *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833 (5th Cir. 2004).

101. *Id.* at 837.

102. *Id.*

103. *Id.* at 838–40. The plaintiffs based their allegations on the fact that their credit history did not change between being selected for the offer and accepting the offer. *Id.* at 838.

104. *Id.*

105. *Id.* at 842–43.

106. *Id.* at 841.

authorizes the credit transaction, which happened once the plaintiffs responded to the banks' offer.<sup>107</sup> Thus, because the banks were allowed to condition the firm offer upon verification of credit information after the plaintiffs responded to the offer, the banks did not violate the FCRA. The court held that the banks had a permissible purpose for obtaining the plaintiff's initial consumer report.<sup>108</sup>

Another primary strict constructionist case is *Putkowski v. Irwin Home Equity Corp.*<sup>109</sup> In *Putkowski*, the plaintiffs received an offer for a revolving line of credit. The plaintiffs alleged that the offer was a "sales pitch" because it did not contain specific terms of a credit transaction. The plaintiffs contended that the mailing was not a firm offer of credit and violated the FCRA.<sup>110</sup> The defendant countered that the FCRA allowed a firm offer of credit to be conditional and that specific material terms were not required. In resolving the issue, the court recognized the *Cole* opinion, but held that, contrary to the suggestion in *Cole*, the text of the FCRA did not require that a firm offer of credit contain specific rates or sufficient value. Moreover, the court stated that the FCRA allowed for conditional offers of credit.<sup>111</sup>

Since *Kennedy* and *Putowski*, many district courts have defined a firm offer of credit using the strict constructionist approach.<sup>112</sup>

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107. *Id.* at 840–41; *see also* 15 U.S.C. § 1681b(a)(2) (2006) (containing no limits to consumer credit information available for consumer authorized transactions); 15 U.S.C. § 1681b(c)(2) (2006) (listing the limited information businesses may receive for sending firm offers of credit).

108. *Kennedy*, 369 F.3d at 842–43. The *Kennedy* opinion does not discuss whether a firm offer must be valuable to the consumer. *See Chang, supra* note 63, at 215–20 (merging the practical implications of *Kennedy* and *Cole*).

109. *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053 (N.D. Cal. 2006).

110. *Id.* at 1056–57; *see also* *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 727 (7th Cir. 2004) ("[A]n offer of credit without value is the equivalent of an advertisement or solicitation" and not permissible under the FCRA).

111. *Putkowski*, 423 F. Supp. 2d at 1058–60. The *Kennedy* opinion did not mention *Cole* because it was decided prior to the *Cole* opinion. *Compare Kennedy*, 369 F.3d at 833 (decided on May 6, 2004), *with Cole*, 389 F.3d at 719 (decided on Nov. 19, 2004).

112. *See, e.g., Villagran v. Freeway Ford, Ltd.*, 525 F. Supp. 2d 819, 835 (S.D. Tex. 2007) ("An offer of credit does not need to provide specific information of the material terms to be a 'firm offer.'"); *Nasca v. J.P. Morgan Chase Bank, N.A.*, No. 06 Civ. 3472(SHS), 2007 WL 678407, at \*3 (S.D.N.Y. Mar. 5, 2007) (noting that no FCRA provision "requires a creditor to disclose definitive credit amounts or interest rates to a recipient in the solicitation"); *Poehl v. Countrywide Home Loans, Inc.*, 464 F. Supp. 2d 882, 886 (E.D. Mo. 2006) (holding that a firm offer of credit does not have to contain specific credit terms to comply with the FCRA).

V. THE STRICT CONSTRUCTIONIST APPROACH:  
THE PRACTICAL APPROACH INTENDED BY CONGRESS

In spite of the Seventh Circuit's support for the restrictive approach, going forward, courts should apply only the strict constructionist approach. First, the approach is accurately aligned with the plain language of the statute and with Congress's intent in enacting the FCRA. Second, applying the restrictive approach is not practical in the context of mortgage and auto loans. Finally, FCRA provisions and other external mechanisms provide a cost-effective way to protect consumers' privacy, the overriding concern of the restrictive approach.

A. *Textual Interpretation and Congressional Intent*

1. *Legislative History.* Both the restrictive approach and the strict constructionist approach claim to follow Congress's intent in implementing the FCRA, particularly regarding a firm offer of credit.<sup>113</sup> Among the thousands of pages of congressional documents discussing the FCRA, however, no information was found concerning the concept of value and specific terms within a firm offer of credit. Initial hearings concerning enactment of the FCRA in 1970 contained no discussion about prescreening, not to mention firm offers of credit.<sup>114</sup> Yet, as technology advanced, consumer reports were "no longer filed in manila envelopes and then put into metal file cabinets."<sup>115</sup> Instead, credit reports were stored and generated electronically,<sup>116</sup> bringing forth a heated debate between creditors and consumers over prescreening.<sup>117</sup> After reviewing the prescreening process, the Federal Trade Commission (FTC) determined that prescreening served

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113. *Compare Cole*, 389 F.3d at 726–27 ("A definition of 'firm offer of credit' that does not incorporate the concept of value to the consumer upsets the balance Congress carefully struck between a consumer's interest in privacy and the benefit of a firm offer of credit for all those chosen through the pre-screening process."), *with Nasca*, 2007 WL 678407, at \*4 (stating that Congress did not intend to incorporate sufficient value in the definition of a firm offer of credit).

114. *See* S. REP. NO. 91-517, at 1 (1969) (enacting FCRA legislation to prevent inaccuracies in consumer reporting and to protect consumers' right to privacy with regard to credit information).

115. *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 1 (1991) (statement of Esteban Torres, Chairman, Subcomm. on Consumer Affairs and Coinage).

116. *Id.*

117. *See generally Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 101st Cong. (1989) (providing statements by creditors, consumer groups, and legislators concerning possible FCRA modifications with regard to prescreening).

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“legitimate business purposes and . . . result[ed] in no significant harm to consumers.”<sup>118</sup>

Congress greatly expanded the scope of the FCRA, specifically regarding prescreening, by enacting the Consumer Credit Reporting Reform Act of 1996.<sup>119</sup> The Act defined a firm offer of credit; a statutory definition still in effect today.<sup>120</sup> Congressional reports accompanying the Act provide no commentary concerning the requirement of value or specific credit terms within firm offers of credit.<sup>121</sup>

The latest major update to the FCRA occurred with the enactment of the Fair and Accurate Credit Transactions Act (FACT) in 2003.<sup>122</sup> The primary objectives of FACT are to prevent identity theft and to improve the accuracy of credit reports.<sup>123</sup> While FACT's primary focus is not specifically firm offers of credit, FACT contains a provision requesting that the Board of Governors of the Federal Reserve System analyze future restrictions on firm offers of credit.<sup>124</sup> The Board of Governors found additional restrictions would “result in a less competitive marketplace and thus relatively higher prices and reduced availability.”<sup>125</sup> Akin to the Consumer Credit Reporting Reform Act, neither the report nor FACT's statutory language discussed the issues of sufficient value and specific terms within a firm offer of credit. Thus, nothing in the direct history of firm offers of credit within the FCRA indicates the requirement of value or specific terms.

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118. Statements of General Policy or Interpretations, 38 Fed. Reg. 4945, 4947 (Feb. 23, 1973); see also *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 20–21 (1991) (statement of David Medine, Associate Director for Credit Practices, Federal Trade Commission) (summarizing the FTC's justification for prescreening under the FCRA).

119. Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-426 (codified as amended in scattered sections of 15 U.S.C.).

120. See Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-426, 3009-427 (codified at 15 U.S.C. § 1681a(l)); see also *supra* notes 62–63 and accompanying text (outlining the FCRA's definition of a firm offer).

121. See, e.g., S. REP. NO. 103-209, at 4 (1993) (focusing not on the definition of a firm offer of credit, but on the ability of consumers to opt out of receiving credit solicitations); H.R. REP. NO. 102-692, at 37 (1992) (highlighting that a credit solicitation must be honored unless specific credit criteria are not satisfied).

122. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of 15 U.S.C.).

123. *Id.*

124. *Id.* at 1979 (inquiring about the potential impact of “further restricting the ability of lenders and insurers to provide written offers of credit or insurance to consumers”).

125. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 47.

2. *Plain Language.* A plain language analysis of the FCRA favors a strict constructionist approach as well. Statutory analysis requires courts to “presume that a legislature says in a statute what it means and means in a statute what it says there.”<sup>126</sup> Congress has explicitly stated that certain disclosures are required under the FCRA. With regard to a firm offer of credit, the FCRA states that users must disclose any potential collateral requirement.<sup>127</sup> The FCRA requires no other credit term disclosure within a firm offer of credit.<sup>128</sup> No language within the FCRA definition of a firm offer of credit indicates that credit offers must contain sufficient value or specific terms, both of which are required under the restrictive approach. Because Congress has expressed one particular credit term, courts “should not imply any additional disclosure requirements.”<sup>129</sup>

An examination of the entire statute also suggests sufficient value and specific terms are not necessary. The FCRA requires users of consumer reports to include specific additional information in a firm offer of credit.<sup>130</sup> Users must include a “clear and conspicuous statement” that “information contained in the consumer’s consumer report was used in connection with the transaction.”<sup>131</sup> Users must also include within a firm offer of credit an address and toll-free number that consumers may use to opt out of future solicitations.<sup>132</sup> Yet, under the plain language of the statute, the FCRA does not require users to disclose specific credit terms, nor does it require an offer to contain sufficient value.<sup>133</sup> Because the FCRA requires an offer to contain

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126. Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

127. See 15 U.S.C. § 1681a(1)(3) (2006).

128. See *Nasca v. J.P. Morgan Chase Bank, N.A.*, No. 06 Civ. 3472(SHS), 2007 WL 678407, at \*4 (S.D.N.Y. Mar. 5, 2007) (“[T]he FCRA requires disclosure of only one particular credit term—the disclosure of any requirement for collateral.”).

129. *Id.* at \*4; cf. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (“Congress implicitly excluded a general discovery rule by explicitly including a more limited one.”).

130. See 15 U.S.C. § 1681m(d)(1)–(2) (2006).

131. 15 U.S.C. § 1681m(d)(1)(A) (2006). Users must also disclose that the consumer received the offer after satisfying predetermined criteria, received information regarding limitations on extension of credit, and received information about the right to opt out of future credit solicitations. 15 U.S.C. § 1681m(d)(1)(B)–(E) (2006).

132. 15 U.S.C. § 1681m(d)(2) (2006).

133. See *supra* notes 127–29 and accompanying text (describing the disclosures required under the FCRA). Certain mortgage lenders are required to disclose credit scores as well as a copy of the information obtained from a consumer reporting agency. 149 CONG. REC. E2512, E2514–15 (2003) (statement of J. Michael G. Oxley). However, such mortgage lenders are not required to disclose any other credit information. *Id.* Moreover, citing extra costs and the heavy burden that disclosures put on lenders, some members of Congress strongly advocated against the additional disclosure requirements for home lenders. See, e.g., H.R. REP. NO. 108-263, at 79–80 (2003) (statement of Rep. Robert W. Ney) (arguing that Congress should simplify disclosure requirements for mortgage

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certain information, additional value and financing terms are unnecessary.

The FCRA also prohibits users of consumer reports from engaging in certain actions. For instance, a creditor may not “obtain or use medical information . . . pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit.”<sup>134</sup> The FCRA, however, does not expressly prohibit sending a firm offer of credit without specific credit terms.<sup>135</sup>

Further, Congress has expressly required disclosure of credit terms in other statutes. The Truth-in-Lending Act (TILA), for instance, requires disclosure of finance charges and annual percentage rates before a consumer enters into a credit transaction.<sup>136</sup> Similarly, the Federal Reserve Board has provided lengthy commentary regarding credit term disclosure under the TILA.<sup>137</sup> If Congress had intended to require firm offers of credit to contain specific terms or sufficient value, Congress would have expressly included such language in the FCRA, as it did in the TILA.

*3. Congressional Intent.* The underlying purposes of the FCRA also favor the adoption of the strict constructionist approach. One purpose of the FCRA is to provide consumers with credit and access to credit at competitive costs.<sup>138</sup> Specifically, Congress intended “to create ‘operational efficiency for [the credit] industry . . . and competitive prices for consumers in the credit reporting and credit granting [ ] industries.’”<sup>139</sup> By enacting FCRA amendments to accomplish these purposes, Congress

lenders).

134. 15 U.S.C. § 1681b(g)(2) (2006).

135. See 15 U.S.C. § 1681b (2006) (describing both permitted and prohibited uses of consumer reports).

136. See 15 U.S.C. § 1637(a) (2006) (requiring disclosures on open-end credit plans); see also THE HANDBOOK OF MORTGAGE BANKING: TRENDS, OPPORTUNITIES, AND STRATEGIES 117–19 (Jess Lederman ed., rev. ed. 1993) (describing the TILA’s various disclosure rules and requirements). A finance charge is “the cost of consumer credit as a dollar amount” and includes all direct and indirect costs paid by the consumer. Truth In Lending (Regulation Z), 12 C.F.R. § 226.4(a) (2007).

137. See 12 C.F.R. §§ 226.5a(b), 226.5b(d) (2007) (mandating additional disclosure requirements for credit cards as well as home mortgage transactions).

138. See H.R. REP. NO. 108-263, at 24 (2003) (stating a goal of the FCRA is to create “competitive prices for consumers in the credit reporting and credit granting [ ] industries” and “give[ ] creditors the ability to make credit decisions quickly and in a fair, safe and sound, and *cost-effective* manner” (emphasis added)). Another primary purpose of the FCRA is to protect a consumer’s right of privacy. See discussion *infra* Part V.C (detailing the statutory and voluntary mechanisms available to protect a consumer’s right of privacy).

139. H.R. REP. NO. 108-263, at 24.

continues to recognize the importance of the credit industry in American society.<sup>140</sup> Because of the industry's importance, Congress has been reluctant to implement extreme measures that would hamper its growth.<sup>141</sup> The integration of a sufficient value requirement and specific credit terms would run counter to these purposes. Creditors, in order to comply with additional regulations, likely would incur significant costs.<sup>142</sup> In addition to regulation and disclosure costs, creditors and lenders will be forced to incur legal fees to defend lawsuits as well as pay additional upfront attorney's costs prior to sending an offer in order to minimize the potential of a lawsuit.<sup>143</sup> To recoup these additional costs, creditors will either pass the costs on to consumers in a higher annual percentage rate or additional fees,<sup>144</sup> or avoid sending prescreened solicitations altogether.<sup>145</sup> Creditors will thus attempt to acquire customers using other marketing methods.<sup>146</sup> Congress noted that "[c]onsumers benefit

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140. See, e.g., 15 U.S.C. § 1681(a)(3) (2006) (recognizing the "vital role" of the consumer credit industry); S. REP. NO. 103-209, at 3 (1994) (acknowledging the utility of the consumer reporting agencies); Press Release, Linda Young, AHN, Federal Reserve Figures Show Outstanding Consumer Credit High; Slowdown in Growth of Credit (Feb. 8, 2008), <http://www.allheadlinenews.com/articles/7009973510> (noting that consumer debt totaled approximately \$2.5 billion in 2007). The important role of credit in our society is magnified during the current financial crisis.

141. See *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 2-3 (1991) (statement of Carroll Hubbard, Jr., Comm. Member, Subcomm. on Consumer Affairs and Coinage) (cautioning against "overly extending the scope of . . . legislation to such an extent that [would] penaliz[e] an industry that has been so crucial to our economic growth").

142. See *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 145 (1991) (statement of The American Bankers Association, The Consumer Bankers Association, and The American Financial Services Association) (arguing that "the cumulative effect [of regulation] will be expensive"); cf. *Prescreen Opt-Out Disclosure*, 70 Fed. Reg. 5022, 5030 (Jan. 31, 2005) (codified at 16 C.F.R. pts. 642, 698) (estimating creditors spent over \$1.1 million to comply with opt-out disclosure requirements).

143. Prior to *Cole*, there were few lawsuits challenging a lender's use of prescreening to extend firm offers of credit. See *Gottlieb*, *supra* note 8, at 598. The *Cole* decision set forth a wave of FCRA litigation. See, e.g., *Murray v. Sunrise Chevrolet, Inc.*, No. 04-C-7668, 2005 WL 2284245, at \*2-3 (N.D. Ill. Sept. 15, 2005) (holding a mailing for a pre-approved auto loan which failed to include the pre-approved amount of credit and other specific credit terms did not meet the requirements of a firm offer under the FCRA).

144. *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 145 (1991) (statement of The American Bankers Association, The Consumer Bankers Association, and The American Financial Services Association) (noting these additional costs will be "ultimately borne by consumers in the form of higher fees and interest rates").

145. Cf. INFO. POLICY INST., *supra* note 21, at 58 (noting that increased acquisition costs will result in fewer new customers obtained through prescreening).

146. See *id.* (stating the creditors "faced with a loss of prescreening, would still try to

from the access to credit from different sources, vigorous competition among creditors, quick decisions on credit applications, and reasonable costs for credit.”<sup>147</sup> If a creditor decides to avoid prescreening solicitations altogether, competition and access to credit may decrease, causing the cost of credit to increase further.<sup>148</sup>

The continuing change within the Seventh Circuit regarding the proper judicial interpretation of sufficient value within a firm offer of credit also stifles the FCRA's purpose. In *Cole*, the Seventh Circuit determined sufficient value by reviewing “the entire offer and the effect of all the material conditions that compromise the credit product in question.”<sup>149</sup> However, in *Perry v. First National Bank*, the Seventh Circuit distilled *Cole* and the sufficient value analysis into three factors: whether the credit offer would be honored; whether the offer contained specific credit terms; and whether the offer was subject to too many limitations.<sup>150</sup> Compounding the issue, federal district courts since *Perry* have applied different tests in determining sufficient value.<sup>151</sup> Inconsistent application of the sufficient value test along with the Seventh Circuit's continued refinement of the sufficient value test increases uncertainty within the credit industry, particularly within the Seventh Circuit and other jurisdictions yet to address this issue. Such uncertainty may result in fewer credit solicitations and higher costs, both of which are inconsistent with the purposes of the FCRA.

### B. Practicality

Another argument favoring a strict constructionist approach is the inability of businesses sending firm offers of credit to include specific credit terms, particularly in the mortgage and auto loan contexts. Both home and mortgage loans require lenders to analyze multiple ratios and consumer information in determining the specific credit rates to apply to a loan.<sup>152</sup> Much of

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acquire the same number of new accounts each year” using other methods).

147. H.R. REP. NO. 108-263, at 24 (2003).

148. See discussion *supra* Part II (detailing the benefits to consumers through increased competition and greater access to credit).

149. *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 726–28 (7th Cir. 2004).

150. *Perry v. First Nat'l Bank*, 459 F.3d 816, 824 (7th Cir. 2006).

151. Compare, e.g., *Cavin v. Home Loan Ctr. Inc.*, 469 F. Supp. 2d 561, 566–73 (N.D. Ill. 2007) (applying the *Perry* reasoning in granting summary judgment for the defendant), with *Klutho v. Home Loan Ctr., Inc.*, 486 F. Supp. 2d 957, 960–63 (E.D. Mo. 2006) (using the *Cole* analysis in denying defendant's motion to dismiss).

152. See *Cavin*, 469 F. Supp. 2d at 570 (explaining how “interest rate and loan terms are based on risk analysis that evaluates such factors as the individual borrower's income,

the consumer information needed by lenders, however, may not be obtained via a consumer's credit report alone.<sup>153</sup>

In the mortgage loan context, loan approval and corresponding credit terms are tailored to the individual consumer.<sup>154</sup> Lenders establish specific credit terms based upon the perceived risk of the consumer.<sup>155</sup> The higher the perceived risk, the less favorable credit rates available to the consumer.<sup>156</sup> Lenders calculate risk by analyzing the consumer's credit history, debt to income ratio, down payment, and property's appraisal value.<sup>157</sup> Yet, other than the consumer's credit history, the remaining factors are not obtainable by accessing the consumer's credit report alone.<sup>158</sup>

The debt-to-income ratio, an important measurement in the lending process, is calculated by dividing all the consumer's monthly obligations by the consumer's "gross monthly income from all sources."<sup>159</sup> A good debt-to-income score may enable consumers

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loan-to-value ratio, and debt-to-income ratio") (citing RICHARD F. DEMONG & JAMES E. BURROUGHS, MORTGAGE PRICING IS BASED ON RISK (2004), available at [http://www.commerce.virginia.edu/faculty%5Fresearch/faculty\\_homepages/DeMong/MortgagePricingIsBasedonRisk.pdf](http://www.commerce.virginia.edu/faculty%5Fresearch/faculty_homepages/DeMong/MortgagePricingIsBasedonRisk.pdf)). While this Comment addresses only firm offers of credit, not insurance, insurance rates are also difficult to calculate based solely on information within a consumer's credit report. See REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 30 ("Prescreened solicitations for insurance generally do not contain complete pricing information tailored to a consumer because it is difficult to set the price of insurance solely based on information in [consumer credit reports]."). In addition to information obtained in a consumer's credit report, the insurer must obtain information concerning the property or life to be insured. *Id.*

153. See H.R. REP. NO. 102-692, at 37 (1992).

154. See *Cavin*, 469 F. Supp. 2d at 569 ("[U]nlike a credit card, a mortgage is tailored to the individual consumer depending on such factors as how much he or she wishes to borrow, his or her income, and the value of the property offered as collateral.").

155. *New Study Puts Real Numbers on Mortgage Risk*, MORTGAGE NEWS DAILY, July 19, 2005, [http://www.mortgagenewsdaily.com/7192005\\_Mortgage\\_Qualification\\_Risk.asp](http://www.mortgagenewsdaily.com/7192005_Mortgage_Qualification_Risk.asp).

156. See *Soroka v. Homeowners Loan Corp.*, No. 8:05-CV-2029-T-17MAP, 2006 WL 4031347, at \*4 (M.D. Fla. June 12, 2006) ("Lenders charge the highest rate that the market will bear, and consumers obtain the lowest rate justified by their credit information, which involves an assessment of risk as to that individual consumer by the lender.").

157. See *New Study Puts Real Numbers on Mortgage Risk*, *supra* note 155.

158. See *Murray v. HSBC Auto Fin., Inc.*, No. 05-C-4040, 2006 WL 2861954, \*4 (N.D. Ill. Sept. 27, 2006) (acknowledging that a mortgage interest rate and other key credit terms are "contingent on additional information that [the consumer has] to provide"). For a detailed listing of a credit report's components, see HANDBOOK OF CREDIT SCORING, *supra* note 9, at 58-61.

159. See Erin Peterson, *Debt-to-Income Ratio Important as Credit Score*, BANKRATE.COM, [http://www.bankrate.com/brm/news/mortgages/20070116\\_debt\\_income\\_ratio\\_a1.asp](http://www.bankrate.com/brm/news/mortgages/20070116_debt_income_ratio_a1.asp) (last visited Sept. 17, 2008) (stating that the debt-to-income ratio plays "a key role in determining if [a consumer] qualifies] for a loan and how much [the consumer] can get"). Monthly obligations include house, car, and student loans as well as minimum payments on credit card debt. *Id.*

to receive better credit terms.<sup>160</sup> The consumer's income, however, may not be provided in a credit report.<sup>161</sup> Because the consumer's income may not be provided, the all important debt-to-income ratio is unobtainable in the prescreening process.<sup>162</sup>

Auto loans, like mortgage loans, also require creditors to analyze a variety of ratios and consumer information. Lenders consider "the exact amount borrowed, the type of car purchased, the consumer's current income, and the duration of the loan."<sup>163</sup> Because critical terms such as the consumer's income and amount borrowed cannot be correctly calculated by reviewing a consumer's credit report, lenders cannot set specific credit terms in the initial prescreening process.<sup>164</sup>

Another challenge in providing specific credit information is that terms are dependent upon the market.<sup>165</sup> Credit terms change almost daily depending upon various "economic and political factors well beyond [the lender's] control."<sup>166</sup> By requiring lenders to include specific credit terms, lenders who have yet to obtain vital consumer information will not be able to offer interest rates tailored to a specific consumer. This would force creditors to propose less marketable rates to consumers, likely resulting in companies spending less money on prescreened offers and more on other less efficient means of solicitation.<sup>167</sup>

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160. *See id.* ("[A] good debt-to-income ratio can give [a consumer] leverage to negotiate.")

161. *See* S. REP. NO. 108-209, at 10 (2003) ("[C]onsumer reports often lack accurate information concerning income, and therefore, credit . . . providers often do not use income criteria when requesting prescreened lists.")

162. *See* OFFICE OF THRIFT SUPERVISION, REGULATORY BULLETIN RB 37-13, FAIR CREDIT REPORTING ACT, CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND MARKETING ACT, AND THE TELEPHONE CONSUMER PROTECTION ACT § 1300.12 (2006), available at <http://files.ots.treas.gov/74824.pdf> (explaining that the debt-to-income ratio is only obtainable when the consumer responds to the prescreened offer).

163. *Phinn v. Capital One Auto Fin., Inc.*, 502 F. Supp. 2d 625, 630 (E.D. Mich. 2007).

164. *See id.* at 630 n.6 (explaining that the potential interest rate and other terms of the loan offered by the lender would "undoubtedly" be affected by the consumer's exact income and the amount borrowed).

165. *See Soroka v. Homeowners Loan Corp.*, No. 8:05-CV-2029-T-17MAP, 2006 WL 4031347, at \*5 (M.D. Fla. June 12, 2006).

166. THE HANDBOOK OF MORTGAGE BANKING, *supra* note 136, at 147; *see also* 149 CONG. REC. E2493, E2494 (2003) (statement of Rep. Dennis Moore).

167. *See Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 101st Cong. 467-68 (1989) (statement of Visa U.S.A. Inc. and MasterCard International, Inc.) (indicating that if creditors do not have access to enough information to provide "an adequate basis upon which [they] may determine whether to issue credit to particular customers. . . [they] will be forced to curtail or cease using prescreening, and rely on less selective and less efficient means").

Because the restrictive approach entails such challenges, courts should apply the strict constructionist approach.

C. *Privacy*

1. *Limited Access to Information.* The primary argument courts make in advocating the restrictive approach is that Congress enacted the FCRA to balance the concerns of the consumer's right of privacy with the benefits of prescreening.<sup>168</sup> Restrictive courts note that by requiring a firm offer contain sufficient value, as well as specific credit terms, the FCRA's purpose of protecting consumer data and privacy is protected.<sup>169</sup> If businesses are allowed to send firm offers containing little value to the consumer, these courts note that anyone could "gain access to a sea of sensitive consumer information simply by offering some nominal amount of guaranteed credit."<sup>170</sup>

Contrary to these assertions, businesses that access a consumer's credit report in order to send an unsolicited offer of credit do not gain access to a sea of consumer information. Instead, the initial inquiry is limited to only certain information, which is expressly stated in the FCRA.<sup>171</sup> A business may only obtain the name and address of the consumer, an identifier not unique to the consumer, and "other information about the consumer that does not identify the relationship or experience of the consumer with a particular creditor or other entity."<sup>172</sup> A full consumer report is only available once the customer has responded to the offer.<sup>173</sup> More sensitive information, such as a consumer's income, needed by lenders to calculate essential credit terms, is not available simply by accessing an initial credit

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168. See *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 726–27 (7th Cir. 2004) ("A definition of a 'firm offer of credit' that does not incorporate the concept of value to the consumer upsets the balance Congress carefully struck between a consumer's interest in privacy and the benefit of a firm offer of credit for all those chosen through the pre-screening process."); see also 15 U.S.C. § 1681(a)(4) (2006) ("There is a need to insure that consumer reporting agencies exercise their grave responsibilities with . . . respect for the consumer's right to privacy.")

169. See discussion *supra* Part IV.A (discussing the restrictive approach and the case law that has structured this approach).

170. *Cole*, 389 F.3d at 726.

171. See 15 U.S.C. § 1681b(c)(2) (2006).

172. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 11.

173. See *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 101st Cong. 459–60 (1989) (statement of Visa U.S.A. Inc. and MasterCard International, Inc.) (indicating that a creditor "may obtain a hard copy of a credit report on a consumer who responds to the solicitation").

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report.<sup>174</sup> The initial credit report does not contain any information from which creditors can independently analyze credit information.<sup>175</sup> Moreover, in many instances, the business does not even receive the credit information until the consumer chooses to accept the offer. Instead, the consumer reporting agency “mail[s] the solicitation materials directly to the consumers on the prescreened list.”<sup>176</sup>

2. *FCRA Opt-Out Provisions.* More importantly, the FCRA allows consumers concerned about third parties accessing their credit information to opt out of receiving future solicitations.<sup>177</sup> The FCRA specifically states that consumers may elect to be excluded from any lists furnished by consumer reporting agencies to a third party for an unsolicited firm offer of credit or insurance.<sup>178</sup> Congress has taken specific measures to ensure consumers receiving unsolicited offers have no difficulty in finding the opt-out notice.<sup>179</sup>

Any offer of credit not initiated by the consumer must include a “clear and conspicuous statement” that the consumer may opt out of future solicitations.<sup>180</sup> The opt-out statement must include an address and toll-free number to opt out of future

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174. See discussion *supra* note 158 and accompanying text.

175. See *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 101st Cong. 462 (1989) (statement of Visa U.S.A. Inc. and MasterCard International, Inc.).

176. *Id.* at 458. Additionally, creditors that receive the information from consumer reporting agencies generally do not share the information with affiliates or other companies. REPORT TO THE CONGRESS ON FURTHER RESTRICTIONS ON UNSOLICITED WRITTEN OFFERS OF CREDIT AND INSURANCE, *supra* note 8, at 44. A company might avoid such actions to prevent being labeled as a consumer reporting agency and to avoid additional government regulation. *Id.*

177. Congress implemented the opt-out provision in the enactment of the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-426, 3009-432 (codified as amended in 15 U.S.C. § 1681b).

178. The pertinent section states:

A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

15 U.S.C. § 1681b(e)(1) (2006).

179. Consumer awareness of opt-out measures was critical to avoid criticism from opponents stressing the confusion and ineffectiveness of potential measures. Prescreen Opt-Out Disclosure, 70 Fed. Reg. 5022, 5026 (Jan. 31, 2005) (codified at 16 C.F.R. pts. 642, 698).

180. 15 U.S.C. § 1681m(d)(1) (2006).

solicitations and be presented in a particular size and format that is “simple and easy to understand.”<sup>181</sup>

Furthermore, Congress charged the FTC with determining the appropriate presentation of the opt-out notice.<sup>182</sup> The FTC, receiving feedback from industry trade organizations and business organizations as well as individual consumers and consumer advocacy groups, determined the format, type size, and manner in which the notices were to be presented.<sup>183</sup> To ensure consumer awareness, the FTC implemented a layered notice, consisting of a short notice at the beginning of the mailing and a longer notice elsewhere in the solicitation.<sup>184</sup> The short notice alerts the consumer to the ability to opt out and provides a telephone number for opting out.<sup>185</sup> The long notice includes the remaining information mandated by the FCRA.<sup>186</sup> To limit any consumer confusion, the FTC disallows any contradictory information to be included in the long notice.<sup>187</sup> The font size also had to be large enough for consumers to easily see. The FTC elected to require a 12-point type for the short notice and a font no smaller than 8-point type for the long notice. Neither the short nor long notice could have a font size less than the primary font size within the prescreened solicitation.<sup>188</sup> Along with the layered notice and type size, the FTC determined the form of each notice. The short notice is required to be on the first page of the

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181. 15 U.S.C. § 1681m(d)(2)(A)–(B) (2006).

182. See Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5022; see also 15 U.S.C. § 1681m(d)(2)(B) (2006) (directing the FTC to establish the format by rule).

183. Prescreen Opt-Out Disclosure, 70 Fed. Reg., at 5022–23. The FTC only wanted “essential information” displayed in the short notice. *Id.* at 5026. For comments relating to prescreen opt-out disclosures, see Federal Trade Commission, Implementation of the Fair and Accurate Credit Transactions Act of 2003, Public Comments, <http://www.ftc.gov/os/comments/prescreenedoptout/index.htm> (last visited Feb. 3, 2008). Many FTC decisions went against consumer trade group recommendations.

184. Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5024.

185. *Id.* Many trade organizations commented that inclusion of a short notice was improper and outside the authority granted the FTC. *Id.* at 5026. However, the layered notice has proven consistent with Congress’s intent that consumers are aware of how to opt out if they so choose. See 149 CONG. REC. S15,806 (2003) (statement of Sen. Paul Sarbanes).

186. Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5024.

187. See *id.* Consumer advocacy groups argued that permitting additional information would confuse consumers and allow companies the ability to discourage consumers from opting out, but the Commission nevertheless permitted the additional information, so long as the information did “not interfere with, detract from, contradict, or otherwise undermine the purpose of the prescreen notice.” *Id.* at 5026–27.

188. *Id.* at 5027. A 12-point type appearing in the short notice is a larger font than normally contained in a prescreened solicitation, thus making it stand out. The FTC was satisfied with a smaller type for the long notice, noting that the size of the short notice should alert the consumer to the details within the long notice. *Id.*

solicitation. The long notice is required to include the heading “**PRESCREEN & OPT-OUT NOTICE.**” Both notices require the type style to be distinct from the other type appearing in the solicitation.<sup>189</sup> Finally, the FTC even provided model language to make the notices easier for the consumer to comprehend and understand.<sup>190</sup>

In addition to a clear notification on the ability to opt out, consumers are provided cost-efficient and hassle-free methods to opt out of receiving solicitations. For example, consumers electing to opt out only have to call the toll-free number listed within the mailing.<sup>191</sup> When calling the opt-out number, the consumer follows a series of prompts, verifying the consumer’s information via an automated system.<sup>192</sup> The consumer also determines whether to opt out for a period of five years or permanently.<sup>193</sup> The consumer has the ability to opt out for his spouse as well. The entire notification process takes only a few minutes.<sup>194</sup> In addition to opting out using the toll-free number, a consumer may elect to opt out via the Internet.<sup>195</sup> This process is even quicker than using the toll-free number.<sup>196</sup>

Because the FCRA already provides consumers a process to opt out of receiving future prescreened solicitations, which is efficient and easy for the consumer to comprehend, additional measures to protect a consumer’s privacy are unwarranted. Thus,

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189. *Id.* at 5028. Distinct styles include “bolded, italicized, underlined, and/or in a color that contrasts with the color of the principal text on the page.” *Id.* at 5032.

190. *Id.* at 5029. The model language for the short notice states: “You can choose to stop receiving ‘prescreened’ offers of [credit or insurance] from this and other companies by calling toll-free [toll-free number]. See **PRESCREEN & OPT-OUT NOTICE** on other side [or other location] for more information about prescreened offers.” *Id.* at 5034. The FTC updated its initial model language to avoid any “negative characterization of prescreened solicitations.” *Id.* at 5029. Moreover, for consumers desiring to opt out, but without knowledge of how to do so, a simple Google search of “opt-out” provides plenty of information on the opt-out process. *See, e.g.*, Opt-Out: Protect Your Identity, <http://www.optout.com> (last visited Jan. 11, 2008).

191. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681m(d)(2) (2006) (mandating consumer access to a toll-free number to opt out).

192. Information prompted (or asked to verify) includes phone number, address, first and last name, social security number, and date of birth.

193. 15 U.S.C. § 1681b(e)(3) (2006) (explaining that the length of the opt out is determined by the manner of notification in 15 U.S.C. § 1681b(e)(2)). If the consumer elects to permanently opt out, a signed election form, received by the consumer reporting agency, must be completed and returned. *Id.* (explaining that any other manner of opting out is only effective for five years). The consumer may also elect to opt in.

194. It took the Author 3 minutes and 20 seconds to opt out using the toll-free notification system.

195. OptOutPrescreen.com, [http://www.optoutprescreen.com/opt\\_form.cgi](http://www.optoutprescreen.com/opt_form.cgi) (last visited Jan. 10, 2008). This website is “the official Consumer Credit Reporting Industry website to accept and process requests from consumers to Opt-In or Opt-Out of firm offers of credit.” *Id.*

196. It took the Author less than 1 minute to opt-out via the Internet.

courts should follow the strict constructionist approach when defining a firm offer of credit.

The FCRA also includes additional mechanisms to maintain consumer privacy (as well as protect against identity theft). Consumers who are victims of fraud, or believe they will soon be a victim, may contact a consumer reporting agency.<sup>197</sup> In response to the consumer's call, the consumer reporting agency is required to place a fraud alert in the consumer's file as well as provide access to free credit reports.<sup>198</sup> Moreover, a consumer reporting agency is required to exclude such customers from lists provided to third parties for five years after the submission of an identity theft report.<sup>199</sup> The consumer reporting agency is also required to send such information to the other national credit agencies,<sup>200</sup> which in turn cannot provide the consumer information to third parties. Consumers on active duty within the military are also excluded from consumer lists for a two-year period.<sup>201</sup>

3. *Other Mechanisms.* Along with the FCRA's mandated opt-out provisions, many private companies and institutions provide separate opt-out lists for consumers concerned with privacy. For instance, the Direct Marketing Association (DMA)<sup>202</sup> allows consumers the ability to opt out of receiving direct mail solicitations at no charge.<sup>203</sup> Through the DMA's "Commitment to Consumer Choice," members are required to notify consumers of the opportunity to modify or eliminate "future mail solicitations from their organization in every commercial solicitation."<sup>204</sup> In

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197. 15 U.S.C. § 1681c-1(a)(1) (2006).

198. 15 U.S.C. § 1681c-1(a)(1)-(2) (2006).

199. 15 U.S.C. § 1681c-1(b)(1) (2006). Therefore, consumers that have suffered fraud will not receive unsolicited offers of credit or insurance. *Id.*

200. 15 U.S.C. § 1681c-1(e) (2006).

201. 15 U.S.C. § 1681c-1(c) (2006). Both an active-duty consumer and a consumer suffering from fraud may receive unsolicited offers of credit on request. 15 U.S.C. § 1681c-1(b)(1)(B), 1681c-1(c) (2006). Active-duty and fraud alerts must be accessible to the consumer in a "simple and easy manner." 15 U.S.C. § 1681c-1(d) (2006).

202. The Direct Marketing Association (DMA) is an "association of business and nonprofit organizations using and supporting direct marketing tools and techniques." Direct Marketing Association, <http://www.the-dma.org/aboutdma/> (last visited Jan. 11, 2008).

203. See Press Release, Direct Marketing Association, DMA Unveils Free Online Service; Enhances DMAChoice, the Consumer Portal for Choice (Jan. 8, 2008), <http://www.the-dma.org/cgi/disppressrelease?article=1059> (announcing that "DMA will allow consumers to opt out of mailing lists by individual brands for free online through DMAChoice").

204. Press Release, Direct Marketing Association, DMA Launches New 'Commitment to Consumer Choice' Guidelines to Empower Consumers, Build Consumer Trust (Oct. 15, 2007), <http://www.the-dma.org/cgi/dispanouncements?article=883>.

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addition to nationwide initiatives, state legislatures are actively pursuing mail registry bills.<sup>205</sup>

Given the limited information available to businesses providing firm offers of credit, as well as the many statutory and voluntary mechanisms available to consumers who wish to opt out of such offers, adequate procedures are already in place to protect consumer privacy.

## VI. THE DISSOLUTION OF THE SUFFICIENT VALUE RATIONALE

Considering the Seventh Circuit's most recent decisions on firm offers of credit, the court has significantly weakened the sufficient value analysis, resulting in future restrictive court holdings that are closely aligned with the strict constructionist approach. In *Cole*, the court stated that "a 'firm offer' must have *sufficient value* for the consumer to justify the absence of the statutory protection of his privacy."<sup>206</sup> The court found the offer a "solicitation" that violated the underlying purposes of the FCRA.<sup>207</sup> The court determined an offer guaranteeing \$300 for an automobile at one particular dealership not of sufficient value.<sup>208</sup>

In *Perry*, the Seventh Circuit acknowledged the *Cole* reasoning and provided a three-step analysis for determining sufficient value.<sup>209</sup> The court held the mailing satisfied the firm offer definition.<sup>210</sup> The mailing guaranteed a \$250 limit for a Visa credit card, fifty dollars less than the mailing in *Cole*.<sup>211</sup> Additionally, a consumer who accepted the offer was required to pay \$250 in credit card fees within the first year.<sup>212</sup> Netting the minimum amount of credit with the mandatory credit fees, the consumer actually received zero credit in the first year. Thus, factoring in an 18.9% interest rate on all credit balances,<sup>213</sup> a consumer potentially lost money by accepting the offer. From a monetary standpoint, an offer that might result in negative cash flow to the consumer does not appear to meet the "sufficient

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205. See Direct Marketing Association, State Do Not Mail Registry Bills—2007, <http://www.the-dma.org/donotmail/2007legislation.shtml> (last visited Oct. 13, 2008) (providing a summary of state bills in 2007 concerning Do Not Mail legislation).

206. *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 726 (7th Cir. 2004) (emphasis added).

207. See *id.* at 727–28 ("If, after examining the entire context, the court determines that the 'offer' was a guise for solicitation rather than a legitimate credit product, the communication cannot be considered a firm offer of credit.")

208. *Id.* at 724.

209. See *Perry v. First Nat'l Bank*, 459 F.3d 816, 824–25 (7th Cir. 2006).

210. *Id.* at 824.

211. *Id.* at 818.

212. *Id.* at 824.

213. *Id.*

value” requirements laid out in *Cole*. Nevertheless, the *Perry* court concluded that the offer did provide “sufficient value.”

The *Perry* court rationalized its conclusion by emphasizing that the offer was “useful to individuals . . . trying to establish credit for the first time or to reestablish good credit.”<sup>214</sup> Under this rationale, any credit card solicitation containing specific credit terms would have sufficient value. Thus, it appears a business simply could guarantee a specifically high interest rate (and possibly include a provision lowering the rate depending on certain factors). If so, the only other requirement for credit card offers is that the offer be honored, the requirement advocated under the strict constructionist approach.<sup>215</sup> Considering that Americans receive over five billion credit card solicitations each year, “such a definition would permit anyone to gain access to a sea of sensitive consumer information simply by offering some nominal amount of guaranteed credit.”<sup>216</sup>

Moreover, in its most recent *Murray* decision, the court retreats further (and possibly completely) from *Cole* and the sufficient value requirement. In *Murray*, the Seventh Circuit acknowledges that offers of credit (as opposed to offers of merchandise) do not require all material terms and notes the proper inquiry for offers of credit “is whether the offer is ‘firm’ rather than whether it is ‘valuable.’”<sup>217</sup> While it is not completely evident how the court distinguishes between offers of credit and offers of merchandise, it is clear the Seventh Circuit is shifting to a firm offer of credit analysis that is more aligned with the strict constructionist approach.

## VII. CONCLUSION

Courts going forward should apply the strict constructionist approach. Not only is the strict constructionist approach consistent with the plain language of a firm offer and with Congress’s intentions, but there are adequate statutory and voluntary mechanisms in place to protect a consumer’s privacy—the overriding concern of the restrictive courts. Additionally, the

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214. *Id.* at 825. Courts following *Perry* have applied similar rationale. See *Zawacki v. Discover Fin. Servs., Inc.*, No. 06-C-4925, 2007 WL 625454, at \*3 (N.D. Ill. Feb. 23, 2007) (“If an offer might have utility for some consumers, the offer has sufficient value for purposes of the FCRA.”).

215. See *supra* Part IV.B (explaining the strict constructionist approach).

216. *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 726 (7th Cir. 2004).

217. *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 722 (7th Cir. 2008); see also *Cavin v. Home Loan Ctr., Inc.*, 531 F.3d 526, 529 (7th Cir. 2008) (reiterating *Murray*).

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restrictive approach is difficult to apply in the context of home and auto loans. Moreover, when considering the Seventh Circuit's rationale in its recent decisions, it becomes clear that the very court that first framed the restrictive approach has significantly retreated from its earlier position and moved closer to a strict constructionist viewpoint.

*James M. Garrett*