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I. INTRODUCTION

Prescreened credit offers bombard most American consumers on a monthly basis, with many consumers receiving at least six such offers in a single month. Yet how do creditors obtain sufficient information regarding consumers’ individual creditworthiness to target them with such pre-approved credit offers while still complying with privacy protections? The answer lies in the provisions of the Fair Credit Reporting Act (FCRA or Act), an effort by Congress to strike a balance between consumer privacy and the financial services industry’s desire to solicit new customers.

The FCRA was enacted by Congress to “regulate[] the activities of consumer reporting agencies (CRAs), the users of reports, and those who furnish information to CRAs and provide rights to consumers

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2. See Recent Developments in Privacy Protections for Consumers Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the H. Comm. on Commerce, 106th Cong. (2000) (prepared statement of Robert Pitofsky, Chairman, Federal Trade Commission), available at http://www.ftc.gov/os/2000/10/pitofskystatement.htm (noting that some existing national privacy protections include the Children’s Online Privacy Protection Act (COPPA), which focuses on regulating the collection of personal information from children under the age of 13 from commercial websites directed to these children or which knowingly collect personal information from them, and the Gramm-Leach-Bliley Act (GLBA), which imposes certain disclosure requirements and limits on financial institutions with respect to the information it shares with both affiliates and nonaffiliated third parties).


4. See Cole v. U.S. Capital, Inc., 389 F.3d 719, 726-27 (7th Cir. 2004) (noting that Congress, vis-à-vis the FCRA, wanted to ensure consumers received a benefit sufficient to justify a creditor accessing those same consumers’ credit reports).
affected by such reports." The Act regulates the use of consumer credit information for purposes of denying or increasing the charge for credit or insurance, employment opportunities, government benefits, and certain other business transactions. The aim of the FCRA is to protect consumers from privacy invasions and the "dissemination of false, outdated, or misleading information by placing various obligations on persons who use or disseminate credit information about consumers." Recognizing that consumer credit helps keep the wheels of commerce in motion, the FCRA contains specific provisions to regulate the use of prescreening lists for solicitation purposes.

The FCRA regulates the actions of both furnishers and users of consumer credit reports while also delineating the rights of consumers with regard to their credit reports. To protect consumer privacy, the FCRA limits the access an interested party may have to a consumer's credit report. Creditors wishing to access consumer credit reports may only access consumer credit reports for a "permissible purpose." For credit transactions that are not initiated by the consumer, the only permissible purpose, absent consumer consent, is when a creditor intends to extend a "firm offer of credit" in connection with its use of the consumer credit information. What actually constitutes a firm offer of credit within the meaning of the FCRA, however, is unclear from the wording of the statute alone.

5. ANTHONY RODRIGUEZ ET AL., NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING 5 (5th ed. 2002).
6. Id. at 5-6.
7. Id. at 6.
8. See generally id. at 3-6 (explaining how the widespread use of credit cards, coupled with the high demand for consumer credit information from parties seeking to minimize the risk of extending credit, make the credit reporting industry highly profitable yet ripe with potential problems).
10. See § 1681b. The FCRA limitations are important, given that employers, creditors, identity thieves, and even nosy neighbors could have an interest in viewing a consumer's credit report. See id.
11. § 1681b.
12. § 1681b(c)(1)(B). Permissible purposes outside of credit transactions not initiated by the consumer include such things as use for employment purposes and use in connection with insurance underwriting. § 1681b(a)(3)(B), (C).
13. Compare Cole v. U.S. Capital, Inc., 389 F.3d 719, 728 (7th Cir. 2004) (examining if a purported firm offer of credit amounts to a sham offer of credit) with Kennedy v. Chase Manhattan Bank USA, N.A., 369 F.3d 833, 844 (5th Cir. 2004) (examining if a firm offer of credit may be conditioned on pre-set criteria), cert. denied, 125 S. Ct. 508 (2004).
defines "firm offer of credit,\textsuperscript{14}" recent decisions from the Fifth and Seventh Circuits indicate that there is still some ambiguity in the meaning of this term.\textsuperscript{15} This ambiguity is troubling for both financial institutions and consumers.\textsuperscript{16} Without clear guidelines, creditors may unwittingly expose themselves to allegations of impermissibly using consumer credit information.\textsuperscript{17} On the other hand, consumers risk an invasion of their financial privacy without receiving a sufficient benefit in return.\textsuperscript{18}

This Note explores the impact of the recent Fifth and Seventh Circuit holdings in \textit{Kennedy}\textsuperscript{19} and \textit{Cole},\textsuperscript{20} which examine firm offers of credit.\textsuperscript{21} Part II of this Note provides background information on the FCRA and the FCRA definition of a firm offer of credit.\textsuperscript{22} Part III examines the Fifth and Seventh Circuit interpretations of what

Moreover, some states have issued definitions in their consumer reporting statutes. In California, for example, a firm offer of credit is "any offer of credit to a consumer that will be honored if, based on information in a consumer credit report on the consumer and other information bearing on the creditworthiness of the consumer, the consumer is determined to meet the criteria used to select the consumer for the offer and the consumer is able to provide any real property collateral specified in the offer." \textit{See, e.g., CAL. CIV. CODE § 1785.3(h) (2000).}

\textsuperscript{14} § 1681b(1) ("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 credit report on the consumer, to meet the specific criteria used to select the consumer for the offer... [possible conditions the firm offer may depend on are then listed].")

\textsuperscript{15} \textit{Compare Cole v. U.S. Capital, Inc., 389 F.3d 719, 728 (7th Cir. 2004) (examining if a purported firm offer of credit amounts to a sham offer of credit) with Kennedy v. Chase Manhattan Bank USA, N.A., 369 F.3d 833, 844 (5th Cir. 2004) (examining if a firm offer of credit may be conditioned on pre-set criteria), cert. denied, 125 S. Ct. 508 (2004).}

\textsuperscript{16} \textit{See Christian T. Jones & Jeffrey P. Taft, Credit Screening: The Rest of the Story, 49 CONSUMER FIN. L.Q. REP. 391, 397 (1995) (explaining that creditors depend on clear guidelines to reduce risk, and the vagaries of the FCRA firm offer of credit requirement can harm creditors and the economy as a whole).}

\textsuperscript{17} \textit{See id. (explaining that violations of the FCRA can result in civil, criminal and administrative penalties); Sheldon Feldman, The Current Status of the Law Governing Prescreening, Including Permissible Postscreening Practices, 46 BUS. LAW. 1113, 1120 (1991) ("[F]ailure to conform to permissible prescreening practices can constitute a violation of the FCRA.").}

\textsuperscript{18} \textit{See Report to the Congress, supra note 1, at 28-30, 34-36 (explaining that for consumers, the benefits of relinquishing some privacy include a reduction in time and effort spent shopping for a suitable credit card as well as increased competition among credit issuers).}

\textsuperscript{19} Kennedy v. Chase Manhattan Bank USA, N.A., 369 F.3d 833 (5th Cir. 2004), cert. denied, 125 S. Ct. 508 (2004).

\textsuperscript{20} Cole v. U.S. Capital, Inc., 389 F.3d 719 (7th Cir. 2004).

\textsuperscript{21} \textit{See infra} notes 48-143 and accompanying text.

\textsuperscript{22} \textit{See infra} notes 26-47 and accompanying text.
constitutes a firm offer of credit.23 Part IV explores the ways a creditor may continue to utilize prescreened credit offers in accordance with the recent Kennedy and Cole decisions.24 Part V examines how a nationalized standard for evaluating firm offers of credit that is based on Cole will benefit consumers, creditors, and commerce.25

II. FIRM OFFERS OF CREDIT UNDER THE FCRA

Congress enacted the FCRA in part to protect consumer privacy.26 Among other things, a consumer credit report may contain information regarding "a consumer's creditworthiness, credit standing, . . . general reputation, personal characteristics, or mode of living." 27 Creditors often use consumer credit reports to solicit new customers by prescreening the myriad of consumers in the databases of CRAs such as Experian, Trans Union, and Equifax.28 In order to prescreen consumers, creditors specify certain desired criteria and pay the CRAs to compile a list of the consumers in the database who meet the criteria.29 The final list provided to the creditor thus only consists of those consumers who pass the screening criteria.30 The actual information that a CRA may reveal to creditors regarding the consumers on the prescreening list, however, is restricted by the FCRA.31

23. See infra notes 48-82 and accompanying text.
24. See infra notes 83-100 and accompanying text.
25. See infra notes 101-43 and accompanying text.
27. § 1681a(d).
29. See, e.g., RODRIGUEZ ET AL., supra note 5, at 127-30 (explaining the use of consumer credit reports for prescreening).
30. See Langer & Semmelman, supra note 28.
31. § 1681b(c).
Creditors may only receive information such as consumer name and address, a non-unique identifier solely for purposes of identity verification, and any other information that does not identify the relationship or experience that the consumer had with any particular creditor or other entity. While this information does not reveal the details of a consumer's creditworthiness, the mere fact that the consumer is included on the prescreened list reflects that the consumer meets a desired threshold of creditworthiness based on the criteria set forth by the creditor requesting the CRA list. Prescreened lists thus function as abbreviated consumer credit reports and are regulated by the FCRA similarly to full credit reports. By limiting access to consumer credit information under the FCRA, Congress endeavored to ensure that consumers receive a sufficient benefit in exchange for having their private credit information revealed.

Creditors may only use consumer credit reports in connection with consumer transactions. For a transaction not initiated by the consumer, one of the two ways a creditor may access a consumer's credit report is if the creditor intends to extend a firm offer of credit to that consumer. Extension of a firm offer of credit amounts to a consumer transaction for FCRA purposes. Prescreening is therefore permissible under the FCRA only if the creditor intends to extend a firm offer of credit to each consumer on the list. The FCRA defines a "firm offer of credit" as necessary in the logic of the statute because the report can be used only in connection with a consumer transaction. Having a firm offer apparently is close enough.

32. §1681b(c)(2).
33. See Langer & Semmelman, supra note 28 (explaining how prescreening works).
34. E.g., 16 C.F.R. pt. 600, App. (2005) ("A prescreened list constitutes a series of consumer reports, because the list conveys the information that each consumer named meets certain criteria for creditworthiness."); RODRIGUEZ ET AL., supra note 5, at 128-29.
35. Cole v. U.S. Capital, Inc., 389 F.3d 719, 726-27 (7th Cir. 2004); see also Report to the Congress, supra note 1, at 28-29, 34-36 (finding that in exchange for relinquishing some privacy, consumers reap benefits from unsolicited offers of credit, such as a reduction in time and effort spent shopping for a suitable credit card and increased competition among credit issuers).
36. RODRIGUEZ ET AL., supra note 5, at 129.
37. §1681b(c)(1)(B). The only other way a consumer credit report may be obtained in a non-consumer-initiated situation is if the consumer authorizes release of the report. §1681b(c)(1)(A).
38. RODRIGUEZ ET AL., supra note 5, at 129 ("A firm offer is necessary in the logic of the statute because the report can be used only in connection with a consumer transaction. Having a firm offer apparently is close enough.").
39. 16 C.F.R. pt. 600, App. (2005) ("Prescreening is permissible under the FCRA if the [CRA client, such as a creditor] agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit.").
offer of credit” as “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 . . . .” When a consumer responds by accepting a prescreened credit offer, he effectively grants the creditor permission to access his full credit report. Based on the consumer’s creditworthiness as reflected in the full, more detailed consumer credit report, the creditor may or may not honor the credit offer. Thus, despite being called a “firm” offer of credit, the offer extended in a non-consumer-initiated transaction may in fact be conditioned upon certain criteria.

The FCRA also imposes a duty upon creditors to make certain disclosures to consumers regarding the credit offer. Among these disclosures is a statement that the credit ultimately may not be extended if, “after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on creditworthiness . . . or does not furnish any required collateral.” In addition to the obligations creditors have

40. § 1681a(1).
41. See Langer & Semmelman, supra note 28, at 1127-28 (explaining that once a consumer rejects an unsolicited offer of credit, no further screening of the consumer’s creditworthiness is allowed).
42. Id. (explaining that a creditor may, for example, use the detailed consumer report to verify that the consumer had the same credit status reflected in the prescreening, but may not use the detailed report to reevaluate the consumer’s creditworthiness entirely, as doing so would suggest that the creditor in fact did not intend to enter into a business transaction with every consumer on the prescreened list).
43. § 1681m(d); see also Kennedy v. Chase Manhattan Bank USA, N.A., 369 F.3d 833, 841 (5th Cir. 2004), cert. denied, 125 S. Ct. 508 (2004). But see, e.g., Jones & Taft, supra note 16, at 393 (explaining that a truly conditional offer of credit is “inadequate since it indicates that the institution does not intend to enter into a credit transaction unless the consumer meets a subsequent condition. For example, imposing a minimum income requirement on the credit application it provides to consumers on the screened list would not be a firm offer of credit.”).
44. § 1681m(d). Though § 1681m states that users taking adverse actions based on information contained in a consumer report must provide notice of the adverse action to the consumer, the FTC has found that creditors do not have any obligation to those consumers who do not qualify for the creditor’s prescreened list. See Langer & Semmelman, supra note 28, at 1127 (explaining how a consumer’s exclusion from a prescreened list effectively amounts to that consumer being denied a firm offer of credit but does not impose a duty to disclose upon the creditor).
45. § 1681m(d)(1)(C). Other disclosures required include that “the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer” and that “the consumer has a right to prohibit information contained in the consumer’s file with any
to those consumers whom they solicit using prescreened lists, creditors also have obligations to the CRAs furnishing these lists. Creditors must certify to the CRA furnishing the list that they will make an offer to extend credit to each person on the list.

III. THE FIFTH AND SEVENTH CIRCUITS WEIGH IN ON WHAT CONSTITUTES A "FIRM OFFER OF CREDIT"

A. "Conditional" Firm Offers of Credit Permissible in the Fifth Circuit's Kennedy Decision

In *Kennedy v. Chase Manhattan Bank USA*, plaintiffs, alleging FCRA violations, asserted that they received pre-approved offers of credit from the defendant creditors, which they accepted by returning the corresponding applications. Upon plaintiffs' acceptance, the creditors then purportedly accessed the plaintiffs' full credit reports and consequently withdrew the credit offers based on information contained in the reports. The plaintiffs cite this failure to honor the "firm offers of credit" as a basis for alleging that defendants violated the FCRA by obtaining their credit information under false pretenses.

The United States District Court for the Eastern District of Louisiana granted defendants' motion to dismiss, noting that the defendant creditor "had a legal right to decline credit" if (i) the consumers did not satisfy the creditor's credit criteria, (ii) the credit consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer." § 1681m(d)(1)(B), (D).

46. See § 1681e(a) ("Every consumer reporting agency shall maintain reasonable procedures designed to... limit the furnishing of consumer reports to [permissible purposes, such as the extension of a firm offer of credit]. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.").

47. Id. (requiring creditors to certify the purpose for which the consumer credit report is sought); 16 C.F.R. § 600.5(c) (2005); see also Langer & Semmelman, supra note 28, at 1126.


49. Id.

50. Id. Obtaining credit information under false pretenses is enforced under § 1681q, which states that "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, United States Code, imprisoned for not more than 2 years, or both." § 1681q.
application contained information about this possibility, and (iii) the plaintiff acknowledged and agreed to such terms by signing the application.\footnote{113}

Moreover, the district court held that under the FCRA, a "firm offer" is an offer that depends on the consumer meeting certain criteria.\footnote{114} On appeal, the Fifth Circuit affirmed the district court's decision in favor of defendants and upheld the district court's interpretation of a firm offer of credit.\footnote{115} The Fifth Circuit also affirmed that under the FCRA, a firm offer of credit may only be conditioned on the consumer meeting the criteria established by the creditor prior to extension of an offer.\footnote{116} In other words, under the FCRA, a creditor has a permissible purpose for using prescreened lists if it extends a de facto conditional firm offer of credit, subject to withdrawal pending additional creditworthiness information.\footnote{117} Ultimately, the court found that plaintiffs failed to state a claim under the FCRA because the defendants' behavior fully complied with the FCRA requirements for prescreening.\footnote{118}

B. Firm Offers Must be "Valuable" to the Consumer Under the Seventh Circuit's Cole Decision

In Cole v. U.S. Capital, Inc., plaintiff brought an action against defendant creditor and car dealership for alleged violations of the FCRA.\footnote{119} Plaintiff asserted that she received an unsolicited pre-approved offer of credit from defendants which, among other things,
contained vague terms, an ambiguous offer, and was a sham orchestrated merely to justify obtaining her full credit report.\textsuperscript{58} The offer plaintiff received explained that she qualified for a credit card with a credit limit up to $2000 and automotive credit up to $19,500.\textsuperscript{59} Further, the offer explained that the defendant creditor may require her to pay off her currently financed vehicle and increase her down payment and stated that she was guaranteed to receive a credit line of at least $300 for the purchase of a vehicle.\textsuperscript{60} The offer later stated that "guaranteed approval is neither expressed nor implied, [and] interest rates may vary from 2.9% to 24.9% . . ."\textsuperscript{61} She cited these complaints as part of her basis for alleging that defendants violated the FCRA by prescreening her creditworthiness but extending an offer of credit that was more a sham offer than a firm offer.\textsuperscript{62}

The United States District Court for the Northern District of Illinois dismissed plaintiff's complaint, holding that the defendants permissibly obtained plaintiff's credit report for the purpose of extending a firm offer of credit.\textsuperscript{63} Moreover, the district court found no indication that the offer would not be honored and reasoned that because the offer was for at least $300, some consumers would be eligible for more than this minimum line of credit and thus it was a firm offer within the meaning of the FCRA.\textsuperscript{64} The district court also emphasized that the FCRA permits creditors to condition a firm offer on the consumer's satisfaction of credit criteria established prior to contact with the consumer.\textsuperscript{65}

On appeal, the Seventh Circuit reversed the lower court's decision.\textsuperscript{66} In addition, the Seventh Circuit court clarified the meaning

\begin{footnotes}
\item 58. Id. at 723-24.
\item 59. Id. at 722.
\item 60. Id. at 722-23.
\item 61. Id. at 723.
\item 62. Id. at 724.
\item 64. Id.
\item 65. Id. This facet of the holding is consistent with the Fifth Circuit's holding in Kennedy, which affirmed the creditor's right to withdraw a firm offer of credit upon subsequent screening of a consumer's creditworthiness using the pre-established criteria. Kennedy v. Chase Manhattan Bank USA, N.A., 369 F.3d 833, 841 (5th Cir. 2004), cert. denied, 125 S. Ct. 508 (2004).
\item 66. Cole, 389 F.3d at 732.
\end{footnotes}
of "firm offer of credit," finding that a firm offer of credit is one that, upon examination of the entire offer and its attendant terms, is *valuable* to the consumer\(^\text{67}\) and not just a firm offer in the sense that it will be honored.\(^\text{68}\) The court explained that the "consumer value" of a firm offer of credit is assessed by looking at the specific terms of the offer, such as the interest rate, the amount of credit to be extended, and the method of computing interest.\(^\text{69}\) In *Cole*, the court found the offer to be of questionable value because it (i) was ambiguous as to whether it would be honored, (ii) had significant limitations, (iii) involved a relatively small amount of credit, and (iv) lacked several material terms that inform the consumer's value assessment.\(^\text{70}\) In sum, the *Cole* court distinguished a firm offer of credit from a sham offer of credit by holding that a firm credit offer has subjective value to the consumer, as determined by the entire terms of the offer.\(^\text{71}\)

C. **Merging Kennedy and Cole**

The *Kennedy* decision maintains that a firm offer of credit under the FCRA includes those instances in which a creditor extends a firm offer of credit in connection with use of a consumer's credit information and later withdraws that offer if the consumer does not satisfy the pre-established credit criteria.\(^\text{72}\) Thus, under *Kennedy*, a creditor may avoid accusations of abusive use of a consumer's credit information by showing not only that its firm offer of credit guaranteed some amount of money and would be honored, but also that, if the offer was later

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67. *Id.* at 726-28.

68. *Id.* at 727. While under § 1681a(1) of the FCRA, honoring the "firm offer of credit" is a necessary element of the firm offer requirement, the *Cole* decision extends that analysis beyond the words of the statute. See *id.*; Murray v. Household Bank (SB), N.A., 386 F. Supp. 2d 993, 996 (N.D.Ill. 2005) (affirming *Cole's* holding that although a creditor must disclose to the consumer in a clear and conspicuous manner that the offer is conditional upon the consumer satisfying the pre-established credit criteria, analysis of the adequacy of the disclosure is only triggered once an offer is deemed a valid firm offer of credit).


70. *Id.* at 728 (noting that the offer contained conflicting statements regarding whether the credit would be honored, the credit would have to be used for the purchase of a car, the credit was for a mere minimum of $300, and the offer lacked details regarding the repayment period and method of computing interest).

71. *Id.*

withdrawn, it was withdrawn because the subsequent assessment of the consumer's creditworthiness revealed that the consumer did not satisfy the creditor's pre-established credit criteria.\textsuperscript{73} In assessing the disputed firm offer of credit in \textit{Kennedy}, the Fifth Circuit utilized a relatively basic two-pronged analysis, in which both prongs must be satisfied for a legitimate firm offer of credit.\textsuperscript{74} The first prong of the analysis requires that some amount of money be guaranteed, and the second prong requires that the financial institution show that the offer would have been honored if the consumer satisfied pre-established criteria for creditworthiness.\textsuperscript{75}

Among district courts in the Seventh Circuit before \textit{Cole}, the guidelines for creditors using consumer credit information involved a two-pronged analysis that was similarly based on a superficial reading of the language in the FCRA.\textsuperscript{76} Under this reading, a creditor may permissibly use consumer credit information by extending an offer that guarantees some amount of money, regardless of how much, and showing that the offer will be honored as long as the consumer meets the criteria for creditworthiness that had been used in the prescreening process.\textsuperscript{77} The Seventh Circuit's decision in \textit{Cole}, however, added depth to the first prong of this analysis.\textsuperscript{78} The \textit{Cole} decision states that a creditor must make efforts to disclose sufficient terms and conditions of the offer to allow a consumer to make an informed decision about whether the offer is of interest to him and to actually guarantee an amount of money that is of value to a consumer.\textsuperscript{79}

\textsuperscript{73} Id.
\textsuperscript{74} See id. at 841-44; Sampson v. Western Sierra Acceptance Corp., No. 03-CV-01396, 2003 WL 21785612, at *2 (N.D.Ill. Aug. 1, 2003) (noting that the FCRA requires that a firm offer of credit i) guarantee some amount of money but does not specify any particular amount and ii) must be honored).
\textsuperscript{75} Kennedy, 369 F.3d at 841-44.
\textsuperscript{76} See, e.g., Sampson, 2003 WL 21785612, at *2 (reasoning that because the FCRA does not explicitly state a minimum amount of credit that must be offered in order for an offer to constitute a firm offer of credit, the defendant's offer of credit was a firm offer of credit because it extended some amount of credit and would have been honored if the consumer met the credit criteria). Cf. Cole v. U.S. Capital, Inc., 389 F.3d 719, 726-28 (7th Cir. 2004) (holding that a firm offer of credit is not simply one that will be honored, but also one that has value, as determined by an assessment of the entire terms of the offer).
\textsuperscript{77} See, e.g., Sampson, 2003 WL 21785612, at *2; Tucker v. Olympia Dodge of Countryside, Inc., No. 03-CV-00976, 2003 WL 21230604, at *3 (N.D.Ill. May 28, 2003) ("FCRA does not require a 'firm offer' to be in any particular amount.").
\textsuperscript{78} See Cole, 389 F.3d at 726-28.
\textsuperscript{79} Id. at 727-28.
Thus, after Cole, the safest way for a creditor to use consumer credit information within the FCRA is to insure that it guarantees an amount of money with attendant terms that make the offer valuable to the consumer and will be honored as long as the consumer meets the pre-established criteria for creditworthiness. The Cole analysis thereby enhances the existing two-pronged approach by adding an examination of the entirety of the offer to determine if the offer does in fact amount to a firm offer of credit. If a credit offer does not pass the muster of the Cole analysis, the offer may be a sham aimed solely at gaining access to private consumer information and thus constitute a violation of the FCRA.

IV. HOW DOES A CREDITOR AVOID ACCUSATIONS OF ABUSE OF CONSUMER CREDIT INFORMATION UNDER THE CURRENT STANDARDS?

The provisions of the FCRA provide the basic guidelines to which a creditor should look in assessing whether its practices amount to an abuse of credit information. When a consumer has neither authorized access to his credit information nor initiated the financial transaction, a creditor must extend a firm offer of credit in order to permissibly use the consumer’s credit information. The requirements for a firm offer of credit may then be analyzed using the same two-pronged approach set forth in Kennedy and enhanced by Cole.

A. The First Prong: Guaranteeing Some Amount of Money

While the FCRA does not expressly delineate an amount of money that must be guaranteed, creditors must guarantee some

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80. See id.
81. Id.
82. Id.
83. See Fair Credit Reporting Act, 15 U.S.C. § 1681b, e (2000) (detailing permissible uses of consumer’s credit information and the requirement that creditors certify the use of the credit information to the credit reporting agency, respectively).
84. § 1681a(l) (defining a firm offer of credit as “[a]ny 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”).
amount.\textsuperscript{86} The conservative creditor should note, however, that under \textit{Cole}, a nominal guarantee of money with highly restrictive uses and vague or ambiguous terms is likely to lack the value that the \textit{Cole} court requires of firm offers of credit.\textsuperscript{87} To most effectively avoid an allegation of abusive use of consumer credit information, a creditor should therefore only extend valuable firm offers of credit to consumers.\textsuperscript{88}

The \textit{Cole} decision provides some guidance regarding what makes a firm offer of credit valuable, but indeed, even this guidance is incomplete.\textsuperscript{89} From \textit{Cole}, it is clear that the credit must be for more than a nominal amount, and that $300 is unacceptably nominal.\textsuperscript{90} What is not clear, however, is what amount of credit above $300 is necessary for a credit offer to be valuable and firm under \textit{Cole}.\textsuperscript{91} In addition, \textit{Cole} suggests that an offer that limits the use of the credit to a particular purchase, does not disclose details regarding repayment and interest computation, and makes equivocal statements as to whether the credit would in fact be honored is neither valuable nor firm.\textsuperscript{92} Besides these criticisms of the defendant's credit offer, however, the \textit{Cole} decision does not specifically indicate what an acceptable, firm offer of credit would be.\textsuperscript{93} Nonetheless, until further clarifications are provided, it would be prudent for creditors to make a good faith effort to incorporate the somewhat nebulous \textit{Cole} notion of "consumer value" in the firm offers of credit that they extend to prescreened customers.\textsuperscript{94} Indeed, in an advisory letter to national banks, the Office of the Comptroller of the

\textsuperscript{86} See § 1681a(l); \textit{Tucker}, 2003 WL 21230604, at *3 ("FCRA does not require a 'firm offer' to be in any particular amount.").

\textsuperscript{87} See \textit{Cole}, 389 F.3d at 728.

\textsuperscript{88} Cf. \textit{id.} (reasoning that a firm offer of credit without value to the consumer defeats the intent of the FCRA and thus should not be a permissible purpose for which a creditor may access consumer's credit information).

\textsuperscript{89} See \textit{id}.

\textsuperscript{90} See \textit{id}.

\textsuperscript{91} See \textit{id}. At least one district court has found that the \textit{Cole} notion of consumer value is an individualized issue that varies for each consumer. Murray v. New Cingular Wireless Services, Inc., No. 04-C-7666, 2005 WL 3115813, at *6, (N.D.III. Nov. 17, 2005) (reasoning that the need to assess the value of the offer for each consumer is not a barrier to class certification).

\textsuperscript{92} See \textit{Cole}, 389 F.3d at 728.

\textsuperscript{93} See \textit{id}. For example, \textit{Cole} does not explicitly state that an offer of credit must allow general use and provide no limitations regarding the use of credit in order to be considered valuable and firm. \textit{Id}.

\textsuperscript{94} See \textit{id}.
Currency (OCC) intimated that offers of credit should be more than illusory to reduce creditors’ exposure to compliance or reputation risks for engaging in unfair or deceptive practices. Moreover, at least one recent district court decision interpreting Cole has made it clear that “[i]f, after examining the entire context [of the credit offer], 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.”

B. The Second Prong: Honoring the Offer

Under both Kennedy and Cole, the second prong of the analysis must still be met; creditors must show that if they condition the credit offers on subsequent findings of creditworthiness, those subsequent findings must still be based on the creditworthiness criteria used in the prescreening. Thus, the practice of conditioning a firm offer of credit on subsequent screening (“postscreening”) is permissible, but the postscreening must not require that a consumer satisfy subsequently imposed conditions. Cautious creditors should therefore ensure that the criteria established for prescreening purposes are identical to the criteria that are applied during the postscreening. In particular, creditors may wish to maintain clear internal documentation that explicitly reflects the congruence between their prescreening and postscreening evaluation procedures.


97. See Fair Credit Reporting Act, 15 U.S.C. § 1681m(d) (2000); Cole, 389 F.3d at 728; Kennedy v. Chase Manhattan Bank USA, N.A., 369 F.3d 833, 841 (5th Cir. 2004), cert. denied, 125 S. Ct. 508 (2004); see also RODRIGUEZ ET AL., supra note 5, at 129.

98. See also Jones & Taft, supra note 16, at 393 (explaining that, for example, a minimum income requirement on the application given to consumers on a prescreened list would not constitute a firm offer of credit because it requires satisfaction of a subsequent condition, namely, income).

99. Cf. RODRIGUEZ ET AL., supra note 5, at 129.

100. See Joyce A. Ostrosky et al., The Fair Credit Reporting Act: Time to Mind the Details, THE INTERNAL AUDITOR, Dec., 2001, at 50, 55 (explaining that it is important for an organization to maintain documentation of its efforts to comply with the FCRA).
V. ADOPTING THE COLE STANDARD WILL PROVIDE GREATER CLARITY AND WILL BENEFIT CONSUMERS, CREDITORS, AND COMMERCE

The financial industry thrives on certainty and uniformity.\textsuperscript{101} The standard for determining creditor compliance with the FCRA-required firm offer of credit should therefore also be uniform.\textsuperscript{102} Indeed, the Cole court acknowledged the congressional intent for uniform application of the FCRA.\textsuperscript{103} Moreover, the FFIEC exists to ensure uniformity in enforcement across agencies.\textsuperscript{104} A uniform means of measuring whether a creditor has extended a firm offer of credit in connection with use of a consumer’s credit report would thus promote the efforts of the FFIEC.\textsuperscript{105}

Many ambiguities exist in the landscape of firm offers of credit.\textsuperscript{106} In addition to the ambiguity that arises from the slight variation between the Fifth Circuit, which maintains the status quo, and

\textsuperscript{101} See, e.g., Karen Flamme, 1995 Annual Report: A Brief History of Our Nation’s Paper Money, http://www.frbsf.org/publications/federalreserve/annual/1995/history.html (last visited Jan. 20, 2006) (explaining that the passage of the Federal Reserve Act in 1913, which created the Federal Reserve System as the nation’s central bank and advanced the modern national currency, resolved the rampant counterfeiting and economic instability that existed when there was a variety of regional currencies and no federal regulation or uniformity).

\textsuperscript{102} Cf., e.g., George W. Arnett, III, The Death of Glass-Steagall and the Birth of the Modern Financial Services Corporation, N.J. LAW. THE MAG., June 2000, 42, at 44-45 (asserting that the Gramm-Leach-Bliley Act is a reflection of the federalization of financial services regulation that is inevitable as banking, securities, and insurance gradually merge into a single industry); Comm’n Notice, U.S. Sec. & Exch. Comm’n, Annual Conference on Uniformity in Securities Laws (Apr. 9, 1998), http://www.sec.gov/rules/other/33-7524.htm#body2 (“Congress endorsed greater uniformity in securities regulation with the enactment of section 19(c) of the Securities Act in the Small Business Investment Incentive Act of 1980.”).

\textsuperscript{103} See Cole v. U.S. Capital, Inc., 389 F.3d 719, 726 n.6 (7th Cir. 2004) (“There is no question that Congress intended a uniform application of the meaning of ‘firm offer of credit.’”).

\textsuperscript{104} See FFIEC, http://www.ffiec.gov (last visited Jan. 8, 2006) (“The Council is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions . . . and to make recommendations to promote uniformity in the supervision of financial institutions.”).

\textsuperscript{105} See id. Particularly given the lack of regulatory guidance interpreting the FCRA and firm offers of credit, guidance from the Supreme Court would be helpful. See supra notes 83-91 and accompanying text.

\textsuperscript{106} See Jones & Taft, supra note 16 (“[I]n the absence of federal legislation, the FTC or FFIEC should take responsibility and offer additional guidance on permissible prescreening and postscreening activity.”).
the Seventh Circuit, which inserts a new notion of “consumer value” to the assessment of firm offers of credit,\textsuperscript{107} the Cole notion of consumer value itself is also somewhat ambiguous.\textsuperscript{108} Nonetheless, in an effort to reduce the ambiguities, one national standard should exist so that creditors and their attorneys know as definitively as possible whether their practices are in compliance with the FCRA standards.\textsuperscript{109} The Cole standard provides the greatest clarity by giving depth to the existing two-pronged analysis and should thus be the national standard.\textsuperscript{110}

Although the Kennedy and Cole decisions both examine firm offers of credit for purposes of evaluating defendants’ FCRA compliance, the decisions fine-tune different aspects of a necessary examination.\textsuperscript{111} The Kennedy decision affirms the right granted to creditors under the FCRA to withdraw firm offers of credit from consumers after the creditor has obtained information beyond the rudimentary pre-screening stage.\textsuperscript{112} On the other hand, the decision in Cole provides a gate-keeping strategy for analyzing firm offers of credit.\textsuperscript{113} By illuminating the criteria for analyzing a creditor’s offer, Cole facilitates an early determination of whether the creditor’s offer amounts to a firm offer of credit under the FCRA.\textsuperscript{114} Adopting the Cole standard, therefore, will extend the Kennedy decision by adding a meaningful inquiry into the firm offer of credit and thereby eliminate

\begin{itemize}
  \item \textsuperscript{107} Compare Cole, 389 F.3d at 728 (stating that a firm offer of credit is firm if an examination of the entirety of the offer indicates it has consumer value) with Kennedy v. Chase Manhattan Bank USA, N.A., 369 F.3d 833, 841 (5th Cir. 2004) (finding that a firm offer of credit guarantees some amount of money and may be a conditional offer), cert. denied, 125 S. Ct. 508 (2004).
  \item \textsuperscript{108} See Cole, 389 F.3d at 728; Murray v. New Cingular Wireless Services, Inc., No. 04-C-7666, 2005 WL 3115813, at *6 (N.D. Ill. Nov. 17, 2005) (interpreting Cole and speculating that the notion of value goes more to damages to plaintiffs than to the ultimate issue of defendant’s compliance with the FCRA).
  \item \textsuperscript{109} See Jones & Taft, supra note 16; cf. FFIEC, http://www.ffiec.gov (last visited Jan. 8, 2006) (explaining that it tries to promote uniform supervision of financial institutions).
  \item \textsuperscript{110} See Cole, 389 F.3d at 728.
  \item \textsuperscript{111} Compare Cole, 389 F.3d at 728 (deeming a creditor’s firm offer of credit a sham because it consisted of ambiguous terms, a guarantee of a nominal amount of money, etc.) with Kennedy, 369 F.3d at 841 (deeming a creditor’s firm offer of credit that was subsequently withdrawn still an FCRA-compliant firm offer of credit).
  \item \textsuperscript{112} See Kennedy, 369 F.3d at 841.
  \item \textsuperscript{113} See Cole, 389 F.3d at 728.
  \item \textsuperscript{114} See id.
\end{itemize}
some of the ambiguity among creditors seeking to extend firm offers of credit.115

Moreover, adoption of the Cole standard would effectively promote the congressional interest in balance intended by the FCRA.116 In allowing limited access to consumers’ private credit information, Congress reasoned that consumers would reap the benefit of targeted advertising that would reduce the time and effort they would spend shopping for suitable credit products.117 The decision in Cole enhances this consumer benefit by ensuring not only that targeted prescreened offers of credit guarantee an amount of money and will be honored if creditworthiness is satisfied, but also that the offer is in fact valuable from the consumer’s perspective.118 In Cole, the consumer’s perspective of value becomes the definitive lynchpin for what constitutes a firm offer of credit.119

Furthermore, the Cole approach to firm offers of credit instills increased confidence among prescreened consumers.120 If the solicitations these consumers receive are only for offers of valuable credit, consumer interest may be stronger than if all the credit offers they receive are trivial, nonvaluable, and for insignificant amounts.121 With increased confidence and satisfaction with credit offers, more consumers may be willing to accept offers, which ultimately may generate increased competition and lower costs.122 The Cole approach

115. Compare Cole, 389 F.3d at 728 (deeming a creditor’s firm offer of credit a sham because it consisted of ambiguous terms, a guarantee of a nominal amount of money, etc.) with Kennedy, 369 F.3d at 841 (deeming a creditor’s firm offer of credit that was subsequently withdrawn still an FCRA-compliant firm offer of credit).

116. See Cole, 389 F.3d at 727 (noting that Congress, vis-à-vis the FCRA, wanted to ensure consumers received a benefit sufficient to justify a creditor accessing those same consumers’ credit reports).

117. See Report to the Congress, supra note 1, at 28-29, 34-36.

118. See Cole, 389 F.3d at 728.

119. See id.

120. See Report to the Congress, supra note 1, at 36 (noting that creditors find prescreening solicitations to be a cost-effective way to attract new accounts).

121. See Cole, 389 F.3d at 727 (“It is clear that Congress did not intend to allow access to consumer credit information ‘for catalogs and sales pitches.’” (quoting Trans Union Corp. v. FTC, 81 F.3d 228, 234 (D.C.Cir. 1996))); Murray v. Sunrise Chevrolet, Inc., No. 04-C-7668, WL 2284245, slip op. at *2 (N.D.Ill. Sept. 15, 2005) (explaining that a firm offer of credit that is extended to a prescreened consumer should not be so paltry as to amount to a guise for solicitation).

122. See Report to the Congress, supra note 1, at 36 (“In a competitive market, cost savings for creditors and insurers translates into lower product prices, a greater range of choices, and wider availability of credit or insurance for consumers, including those
would thereby strengthen consumer confidence and generate a healthier financial marketplace.\textsuperscript{123}

Creditors would also benefit from adoption of the Cole standard.\textsuperscript{124} The greater control over risks associated with offering credit, coupled with the increased consumer confidence that may accompany the widespread adoption of the Cole standard, may very well be a gain for creditors.\textsuperscript{125} Inasmuch as increased consumer confidence translates into increased acceptance rates, creditors will reap the benefit of growth in new consumer accounts and even greater cost efficiency from the success that the Cole decision could promote with regard to prescreened solicitations.\textsuperscript{126} Moreover, the Cole decision provides a useful gate-keeping mechanism for creditors to evaluate their prescreened solicitations for FCRA compliance.\textsuperscript{127} Cole provides creditors with clearer guidance that can inform their decisions regarding marketing, effective use of consumer's credit information, and FCRA compliance.\textsuperscript{128}

Widespread adoption of the Cole standard, however, may also concern creditors because it would require them to exercise greater discretion in their prescreened credit solicitations.\textsuperscript{129} For example, the Cole requirement of consumer value may have the effect of increasing the amount of credit that a creditor must offer to prescreened consumers.\textsuperscript{130} This effect would increase the risk creditors face, as they may end up being forced to extend higher amounts of credit to traditionally underserved.

\textsuperscript{123} See id.; Jones & Taft, supra note 16 (explaining that if FCRA prescreening rules are too vague, the economy as a whole may suffer).

\textsuperscript{124} Cf. Cole, 389 F.3d at 728.

\textsuperscript{125} See Report to the Congress, supra note 1, at 5 ("By having access to credit record information for the purposes of prescreening, creditors and insurers are better able to control certain risks related to offering these products."); Jones & Taft, supra note 16 (explaining that creditors use sophisticated calculations to reduce the risk of unexpected losses from credit offers, and vagaries in FCRA prescreening rules can negatively impact creditor's risk).

\textsuperscript{126} See Report to the Congress, supra note 1, at 5 (noting that creditors find prescreened solicitations to be a cost-effective strategy for attracting new accounts).


\textsuperscript{128} See id. at 180-82.

\textsuperscript{129} Cf. Cole, 389 F.3d at 728 (holding that a firm offer of credit within the meaning of the FCRA must have value to the consumer).

\textsuperscript{130} See generally id.
consumers without the desired creditworthiness. Indeed, Kennedy affirms the creditor's right to withdraw a firm credit offer, but the risk remains that a creditor will extend too high a credit limit to too many consumers simply in an effort to meet the FCRA requirement for a permissible purpose. This risk, however, may be mitigated by the implementation of tiered credit limits for different levels of creditworthiness that are discovered upon postscreening. Because vagaries in the FCRA prohibit creditors from clearly determining whether their prescreening practices comply with the FCRA and may even increase creditor's risk, national adoption of Cole would effectively replace the confusing nuances of the existing jurisprudence and the FCRA with a more definitive statement.

Additionally, creditors may be concerned that, with the implementation of a consumer value requirement to their use of consumer credit information, they may incur costs to revise their solicitation efforts to comply with the new guidelines. Any costs associated with becoming compliant with the new standard, however, may be counterbalanced by the increased success that may arise from increased consumer confidence in the prescreened offers. Though consumers may not explicitly know that they should be more confident with prescreened offers, the disappearance of trivial credit offers may consequently boost consumer confidence and interest.

131. See Jones & Taft, supra note 16, at 393 (“Given the FCRA’s offer of credit requirement, creditors must use safeguards when having a prescreened list prepared by a consumer reporting agency. Without appropriate safeguards, the creditor could be forced to extend credit to borrowers who may fall below its normal credit standards.”).

132. See id.

133. Feldman, supra note 17; see, e.g., Jones & Taft, supra note 16, at 395 (explaining that a creditor could offer a modest amount of credit as a back-up offer for those on the prescreening list who do not qualify for a higher credit amount). While it is unclear what amount would qualify as “modest,” “it would seem reasonable that most consumers be offered more than the absolute minimum terms granted by the creditor.” Jones & Taft, supra note 16, at 395.

134. Cf. Jones & Taft, supra note 16 (explaining that creditors use sophisticated calculations to reduce the risk of unexpected losses from credit offers, and vagaries in FCRA prescreening rules can negatively impact creditor’s risk).

135. See id.

136. Cf. Report to the Congress, supra note 1, at 36 (noting that creditors find prescreening solicitations to be a cost-effective way to attract new accounts).

137. See generally id. at 5 (“[B]ecause prescreened solicitations are widely used and must be “firm” offers of credit, consumers gain better awareness of available credit products and rates.”).
Ultimately, by requiring firm offers of credit to have value, creditors may find the need to implement more stringent prescreening criteria to avoid being compelled by the FCRA to extend a firm offer of credit for a large and valuable amount to an unqualified consumer.\(^\text{138}\) Effectively, a national Cole approach would thereby create a win-win situation for consumers and creditors—creditors may prescreen more selectively, thereby reducing risk, creditors’ marketing costs may be reduced since they will have to whittle down their prescreening lists to a more targeted group, the amount of junk mail circulating in the mailboxes of American residences may decline,\(^\text{139}\) and consumers who meet the prescreening criteria will get valuable offers of credit.\(^\text{140}\)

A recent district court decision in the Fourth Circuit followed the Cole holding, which may very well be an indication that the Cole decision will have some influence across the country.\(^\text{141}\) Regardless of whether Cole becomes the national standard for evaluating firm offers of credit, however, it is currently the most probative analysis of what constitutes a firm offer of credit.\(^\text{142}\) Cautious creditors seeking to maximize compliance with FCRA regulations should thus integrate into their business practice the Cole concept of value as a part of a firm offer of credit.\(^\text{143}\)

**VI. CONCLUSION**

The Cole decision furthers the goals of the FCRA.\(^\text{144}\) Cole strengthens the requirement that a creditor accessing consumer credit

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\(^{138}\) See Jones & Taft, supra note 16, at 393.

\(^{139}\) See Report to the Congress, supra note 1, at 5 ("Written prescreened solicitations for credit . . . carry some potential costs, including the inconvenience of receiving unwanted mail . . ."); ANTHONY RODRIGUEZ ET AL., supra note 5, at 127 ("[Prescreening] is a common source of junk mail. [It] is at the heart of all those preapproved credit card solicitations that inundate many households.").

\(^{140}\) See Report to the Congress, supra note 1, at 5 ("[C]ost savings for creditors . . . translate into lower prices and wider credit . . . availability for consumers, possibly benefiting those consumers who have traditionally been underserved.").


\(^{143}\) Cf. Report to the Congress, supra note 1, at 5 ("The ability of creditors . . . to tailor offers of credit . . . to consumers’ pricing and product preferences at relatively low cost enhances competition and marketing efficiency.").

\(^{144}\) See supra notes 26-35 and accompanying text.
information for a non-consumer-initiated business transaction provide a worthwhile benefit to the consumer in exchange for access to the consumer's private financial information.\textsuperscript{145} Under \textit{Kennedy} and \textit{Cole}, a creditor is well within its rights to identify creditworthy consumers using a prescreened list, extend a firm offer of credit, and then withdraw that firm offer once consumer acceptance reveals additional information on that consumer's financial background.\textsuperscript{146} \textit{Cole} does not, however, permit the creditor to access rudimentary consumer credit information through a prescreened list and then extend a worthless firm offer of credit to the consumer.\textsuperscript{147}

Nationalized implementation of the \textit{Cole} decision would have a positive impact on consumers, creditors, and the financial industry.\textsuperscript{148} By restricting the definition of a firm offer of credit to those offers that are actually valuable, \textit{Cole} balances the privacy interests of the consumer with the business interests of the creditor even more effectively than the basic two-pronged approach used in \textit{Kennedy} and the pre-\textit{Cole} jurisprudence.\textsuperscript{149} A prescreened offer post-\textit{Cole} is more likely to be worth a consumer's consideration because of the reduced possibility that the offer is merely an attempt to invade that consumer's privacy.\textsuperscript{150} With consumers' increased faith in credit offers, creditors' may achieve greater success with their prescreened solicitations, and ultimately the health of the financial industry may prosper from this symbiotic relationship.\textsuperscript{151} Integrating the \textit{Cole} notion of consumer value into firm offers of credit would thus benefit American consumers and businesses by protecting the balance between consumer privacy, creditor marketing, and the vitality of the financial industry.\textsuperscript{152}

\textit{April B. Chang}

\begin{footnotes}
\footnote{145. See supra notes 86-96 and accompanying text.}
\footnote{146. See supra note 65 and accompanying text.}
\footnote{147. See supra notes 57-71 and accompanying text.}
\footnote{148. See supra notes 101-43 and accompanying text.}
\footnote{149. See supra notes 72-82 and accompanying text.}
\footnote{150. See supra notes 116-23 and accompanying text.}
\footnote{151. See supra notes 120-43 and accompanying text.}
\footnote{152. See supra notes 120-28, 138-43 and accompanying text.}
\end{footnotes}