

Guidance On Regulation B Spousal Signature Requirements

This guidance provides information on the rules governing spousal signatures as they relate to extensions of credit, including business credit.¹ (For reference, see the attached chart depicting the regulatory requirements concerning spousal signatures.)

I. ECOA and Regulation B.

The Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), or because an applicant receives income from a public assistance program or has in good faith exercised any right under the Consumer Credit Protection Act. The Federal Reserve Board's Regulation B at 12 C.F.R. Part 202 implements ECOA, and the staff's official interpretations are incorporated in Part 202, Supp. I.

II. General Rule.

Under Regulation B, § 202.7(d)(1), generally a creditor may not require the signature of an applicant's spouse or any other person (other than a joint applicant) on any *credit* instrument if the applicant qualifies for the amount and terms of the credit requested under the creditor's standards of creditworthiness.² This rule applies to all open-end and closed-end, secured and unsecured extensions of consumer credit and business credit.³

If an applicant does not meet the creditor's standards of creditworthiness, then the creditor may condition approval of the credit application upon the applicant either (1) furnishing the signature of another person (cosigner, guarantor or similar person), but the creditor may not require that person to be the applicant's spouse,⁴ or (2) securing the credit extension with sufficient collateral (or in the case of an application for secured credit, additional collateral) to satisfy the creditor's standards.⁵ Therefore, if a creditor routinely requires spousal guarantees, for example, without first ascertaining whether an applicant is creditworthy, then the conditioning of the loan on the spousal guarantee violates § 202.7(d)(1).

III. Exceptions to the General Rule.

There are three exceptions to the general prohibition against requiring signatures of non-applicant spouses for creditworthy applicants under § 202.7(d)(1). A creditor is permitted to take into account state property laws that directly or indirectly affect an applicant's creditworthiness.⁶

- 1. Unsecured credit-non-community property state:** If an applicant requests unsecured credit and relies in part on property the applicant owns jointly with the applicant's spouse to satisfy the creditor's standards of creditworthiness, the creditor may under § 202.7(d)(2) require the signature of the applicant's spouse only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary,⁷ under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.⁸

NOTE: Some states' property laws treat married applicants differently from unmarried applicants in a way that affects their creditworthiness. For example, several states provide that real property and/or personal property acquired by married persons jointly is owned as tenants by the entirety (i.e., where neither spouse would be able to commit any interest in the property without the signature of the other spouse on the promissory note), unless specified otherwise. In such states, if state law so provides, a creditor could require the signature of the non-applicant spouse on the promissory note where the creditor relies upon real property and/or personal property owned by the applicant and the applicant's spouse as tenants by the entirety in order to qualify the applicant for the loan.

2. **Unsecured credit-community property state:** If a married applicant requests unsecured credit and resides in a community property state, or if the property upon which the applicant is relying is located in such a state, the creditor may under § 202.7(d)(3) require the signature of the applicant's spouse on any instrument necessary, or reasonably believed by the creditor to be necessary,⁹ under applicable state law, to make the community property available to satisfy the debt in the event of default if:
 - (i) applicable state law denies the applicant power to manage or control sufficient community property to qualify for the amount of credit requested; and
 - (ii) the applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.^{10,11}

NOTE: Section 202.5(c)(2)(iv) permits a creditor to request any information concerning an applicant's spouse (or former spouse) that the creditor could request about the applicant under certain circumstances, including when the applicant requests unsecured credit affected by community property laws.

3. **Secured credit:** If an applicant requests secured credit, a creditor may under § 202.7(d)(4) require the signature of the applicant's spouse on any instrument necessary, or reasonably believed by the creditor to be necessary,¹² under applicable state law, to make the property being offered as security available to satisfy the debt in the event of default (e.g., an instrument creating a valid lien).¹³

NOTE: A signature is generally only needed on a security instrument. If applicable state law requires both spouses to sign the promissory note (or other credit instrument) in order to create an enforceable security interest, then the creditor may do so.¹⁴

IV. Asset Valuation.

Regulation B requires that when an applicant relies on his or her individual interest in property owned jointly with the applicant's spouse to satisfy the creditor's standards of creditworthiness, the creditor may not require the spouse's signature on any instrument as a condition of the approval of the credit extension, unless the applicant's interest in the property does not support the amount and the terms of the credit requested or one of the three exceptions set forth in Section III above applies.¹⁵ The creditor must determine (and not presume) the actual form of ownership of the property prior to or at consummation of the credit transaction.¹⁶ The possibility of subsequent changes in the form of ownership (e.g., by transfer or divorce) may not be considered.¹⁷

The creditor is permitted in its evaluation of assets to determine whether the applicant's interests in the assets being offered are of sufficient value to protect the creditor in the event of death or default in the following way:

- If a person applies for individual credit, a decision about creditworthiness requires an institution to look at the individual's interests in the assets, including individually-owned assets, first in deciding whether it will extend credit. If the individual's interests in the assets are sufficient to satisfy the creditor's standards of creditworthiness, it is impermissible for the creditor to require any guarantor or any cosigner on the promissory note.¹⁸ If property that an applicant offers the creditor is owned jointly with another person, the creditor may only look to the applicant's interest in the jointly owned property and, as a general rule, cannot require the signature of the non-applicant joint owner on the promissory note.
- If, however, the applicant's interest in the jointly owned property is insufficient to protect the creditor, the creditor may require the signature of an additional person on the promissory note (but may not require it to be the spouse's signature), or may require the credit to be secured with sufficient additional collateral to satisfy the creditor's standards.
- If the non-applicant joint owner's signature is necessary for the creditor to reach the property being relied upon or offered as security by the applicant (such as with tenants by the entirety), the creditor may require the signature of the non-applicant joint owner, but only on the document necessary or reasonably believed¹⁹ necessary by the creditor to provide adequate protections to satisfy the debt in the event of the applicant's death or default.

A creditor has broad discretion in deciding what property, if any, is required to assist in a determination about creditworthiness. For example, assuming the creditor is looking to property as opposed to income, there is no requirement that the creditor look to a certain type of property (e.g., personal property over real property). The decision whether to prefer personal or real property, however, must be made in a nondiscriminatory manner. For example, a creditor may prefer real property in cases involving a married applicant only if the creditor also prefers real property in instances in which the applicant is unmarried.

The same analysis is true regarding extensions of credit for a business as set forth in Section V below.

V. Significance in Business Lending.

ECOA and Regulation B can raise particular problems for the creditor in business lending. Regulation B does not require written applications for business credit.²⁰ Consequently, such "applications" are often the result of several conversations (including negotiations), the submission of a financial statement(s), and a business plan(s). It is not always clear who the applicants are, what signatures are actually voluntarily offered by the applicant, and what signatures are needed by the creditor. Regulation B, clarified by the amendments in 2003, prohibits a creditor from presuming that the submission of joint financial information constitutes an application for joint credit.²¹ Thus, where the financial statement lists jointly held property of a husband and wife and is signed by both spouses (attesting to the accuracy of the data), there would be ECOA and Regulation B problems if a creditor treats the financial statement as an indication that the husband and wife are making a joint application. By doing so, a creditor may find itself requiring both property owners (husband and wife) to sign the

promissory note when, in fact, only the property owner who is involved with the business intends to be obligated on the extension of credit.

A person's intent to be a joint applicant must be evidenced at the time of application. Although the mere presence of two signatures on a promissory note may not be used to show an intent to apply for joint credit, signatures or initials on a written application that affirm the applicants' intent to apply for joint credit, as opposed to merely affirming the veracity of data may be used to establish an intent to apply for joint credit.²² Where there is no written application, the applicants' intent to apply for joint credit may be evidenced, for example, by the presence in the file of a written statement by the applicants that expresses such an intent.

Even if a corporation is creditworthy, a creditor may require the personal guarantees of the partners, directors or officers of a business, and the shareholders of a closely held corporation.²³ In accordance with Regulation B, a creditor is prohibited from requiring the signature of the guarantor's spouse in the same way that it is prohibited from obtaining the signature of an applicant's spouse and the Official Commentary to Regulation B states that the signature rules of § 202.7(d) apply equally to guarantors.²⁴ Thus, if a creditor first determines that the guarantor is not creditworthy based upon his or her individual assets, then, in accordance with the signature rules of § 202.7(d), the creditor may require an additional signature and that signature may be required to be the guarantor's spouse's in appropriate circumstances (i.e., in accordance with § 202.7(d)(2) (unsecured credit), § 202.7(d)(3) (unsecured credit involving community property) or § 202.7(d)(4) (secured credit)).²⁵ In any event, while a creditor may require officers of a business to personally guarantee the business loan, and may require the guarantee of another person in appropriate circumstances, the creditor may not automatically require that spouses of married officers also personally guarantee the loan.²⁶

As previously indicated, the rules set forth in Section IV above, regarding what property a creditor may prefer, also apply to business credit. Regulation B does not require a creditor to limit its evaluation of the guarantor's creditworthiness to individually owned assets in the business lending context if (1) the guarantor's interest in individually owned assets is insufficient to protect the creditor or (2) if the joint owner's signature is necessary for the creditor to reach the property being relied upon or offered as security by the guarantor such as with tenants by the entirety. In such instances, the creditor may require the signature of the non-applicant joint owner, including a spouse, but only on the document necessary, or reasonably believed necessary by the creditor, to provide adequate protections to satisfy the debt in the event of the applicant's death or default.

Attachment: Chart of Spousal Signature Requirements

¹ This guidance augments that provided by FDIC FIL-9-2002, "Spousal Signature Provisions of Regulation B," dated February 4, 2002.

² The Official Staff Interpretations make it clear that, with the exception for closely held corporations, it is impermissible for a creditor to require any applicant who is individually creditworthy to provide a cosigner, even if the creditor applies the requirement without regard to any prohibited basis. Official Staff Interpretations, 12 C.F.R. pt. 202, Supp. I, Paragraph 202.7(d)(1), Comment 1, as *amended* by 68 Fed. Reg. 13,144, 13,191 (2003). All references in this guidance to Regulation B and its accompanying staff commentary take into account the Federal Reserve Board's amendments to those documents, made effective as of April 15, 2003, and with a mandatory compliance date of April 15, 2004.

³ Although this guidance strictly relates to the requirements for "spousal" signatures, the requirements also apply to obtaining the signatures of other persons in addition to the applicant.

⁴ 12 C.F.R. § 202.7(d)(5) and Official Staff Interpretations at Paragraph 202.7(d), Comment 2. ECOA and Regulation B do not prohibit spouses from signing voluntarily. A creditor should leave it up to the applicant to name the additional party.

⁵ Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 1(ii).

⁶ 12 C.F.R. § 202.6(c).

⁷ Regulation B requires reasonable belief to be supported by a thorough review of pertinent statutory law and decisional law or an opinion of the state attorney general. Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 2.

⁸ If instead of jointly owned property, the applicant is relying on the spouse's income, the creditor may require the spouse's signature to make the income available to pay the debt. Official Staff Interpretations at Paragraph 202.7(d)(5), Comment 2.

⁹ Regulation B requires reasonable belief to be supported by a thorough review of pertinent statutory law and decisional law or an opinion of the state attorney general. Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 2.

¹⁰ Most community property laws specify how married couples own and control property and who has the legal power to commit the property to support a credit application or secure a loan. A creditor may assume an applicant who applies for credit in a community property state is a resident of that state, unless the applicant indicates otherwise. Official Staff Interpretations at Paragraph 202.7(d)(3), Comment 1.

¹¹ If the applicant is relying on the spouse's income (including future earnings), the creditor may require the spouse's signature to make the income available to pay the debt. Official Staff Interpretations at Paragraph 202.7(d)(5), Comment 2.

¹² Regulation B requires reasonable belief to be supported by a thorough review of pertinent statutory law and decisional law or an opinion of the state attorney general. Official Staff Interpretations at Paragraph 202.7(d)(4), Comment 2.

¹³ Regarding integrated notes and security agreements, see Official Staff Interpretations at Paragraph 202.7(d)(4), Comment 3.

¹⁴ See Official Staff Interpretations at Paragraph 202.7(d)(4), Comments 1 and 2.

¹⁵ See generally, Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 1.

¹⁶ This would require considering not only applicable law, but also any documents evidencing and/or affecting the form of ownership (e.g., a trust instrument).

¹⁷ Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 1(i).

¹⁸ Official Staff Interpretations at Paragraph 202.7(d)(1), Comment 1, as amended by 68 Fed. Reg. 13,144, 13,191 (2003). An exception to this prohibition is made for guarantors of closely held corporations. See Section V of this Guidance.

¹⁹ Regulation B requires reasonable belief to be supported by a thorough review of pertinent statutory law and decisional law or an opinion of the state attorney general. Official Staff Interpretations at Paragraph 202.7(d)(4), Comment 2.

²⁰ Under Regulation B, written applications are only required for credit for the purchase or refinancing of a dwelling as a principal residence. 12 C.F.R. §§ 202.5(e) (recodified as 12 C.F.R. § 202.4 (c) by 68 Fed. Reg. 13,144 (2003)), and 202.13(a). Issues raised in this section of the guidance also may occur in the consumer credit context.

²¹ 68 Fed. Reg. 13,144, 13,165 (2003) (to be codified at 12 C.F.R. § 202.7(d)(1)).

²² 68 Fed. Reg. 13,144, 13,165 (2003) (to be codified at 12 C.F.R. § 202.7(d)(1)).

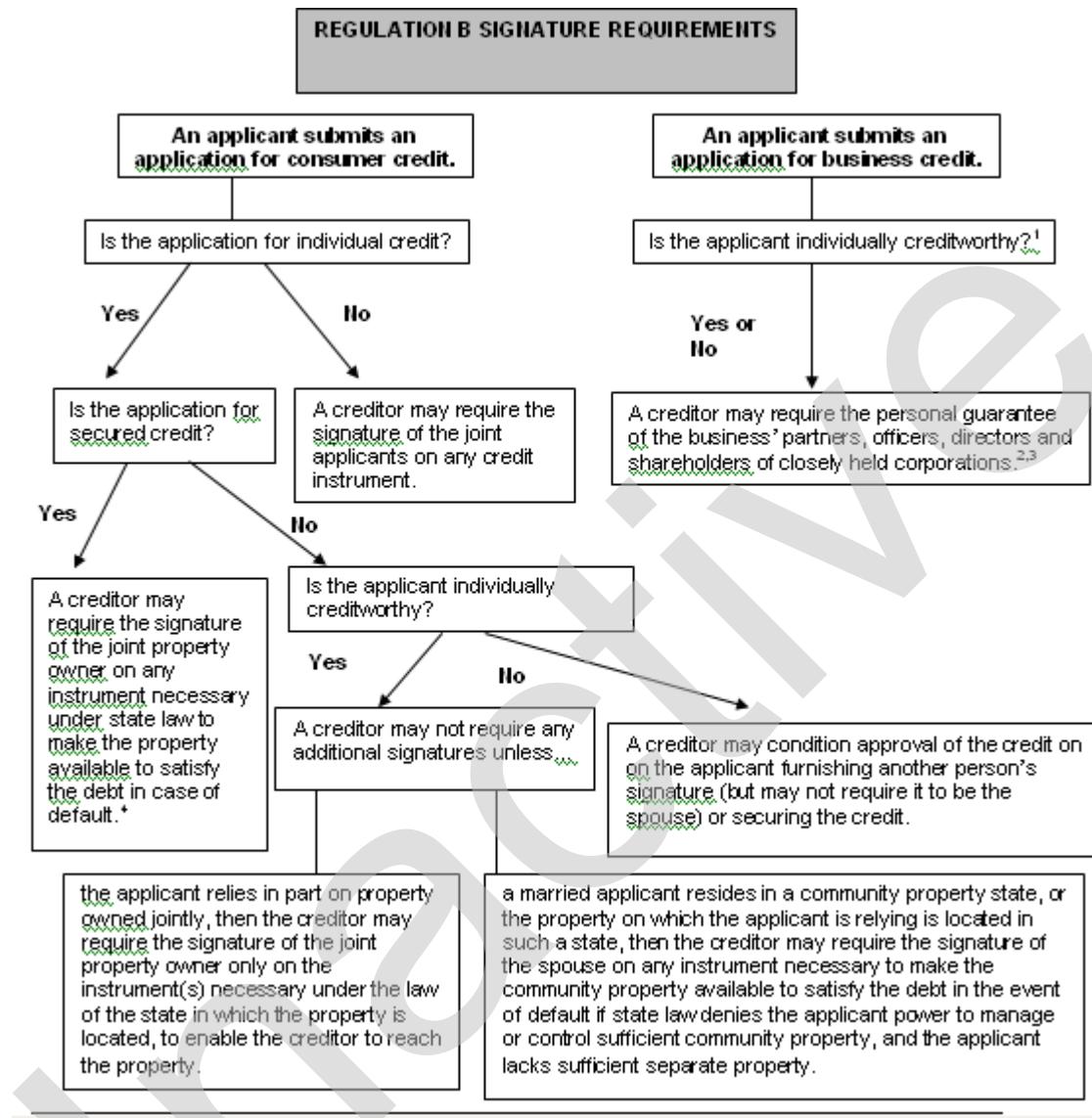
²³ Official Staff Interpretations at Paragraph 202.7(d)(1), Comment 3, as amended by 68 Fed. Reg. 13,144, 13,191 (2003). Model Application Form 1-4, contained in the Appendix to Regulation B, provides for applicants to check an option and initial the application form so as to indicate whether joint credit is sought. See *id.* at 13,172. Official Staff Interpretations at Paragraph 202.7(d)(6), Comment 1.

²⁴ Official Staff Interpretations at Paragraph 202.7(d)(6), Comment 2.

²⁵ *Id.* The guarantor is treated as an "applicant" for such purposes. 12 C.F.R. § 202.2(e).

²⁶ Official Staff Interpretations at Paragraph 202.7(d)(6), Comment 2.

Chart of Spousal Signature Requirements



1. If the applicant lacks sufficient separate property, a creditor must value applicant's interest in jointly owned property.
2. The requirement for the guarantee must be based on the guarantor's relationship with the business. A creditor must evaluate the financial circumstances of the partners, etc. before determining if the joint property owner's signature would be required.
3. Follow the chart regarding individual unsecured or secured credit.
4. For example, an instrument to create a valid lien, pass clear title, waive inchoate rights or assign earnings. A creditor may require both property owners to sign the credit and security agreements, if required under state law.