
BOOKLETTER



January 19, 2021

To: Chair, Board of Directors
Chief Executive Officer
Each Farm Credit System Institution

From: Glen R. Smith
Board Chairman and Chief Executive Officer

Subject: Criminal referral guidance (BL-073)

The Farm Credit Administration is issuing this booklet to answer some of the most frequently asked questions about FCA's criminal referral regulations and filing requirements. This guidance clarifies our expectations for Farm Credit System (FCS or System) institutions regarding adherence to our criminal referral regulations and provides information on filing the Criminal Referral Form.¹

Your institution must ensure timely reporting of known or suspected criminal activity. Your board of directors and senior management have a responsibility to establish and maintain safeguards to deter, detect, and report known or suspected criminal activity involving the assets, operations, or affairs of your institution. The board's internal controls, especially its policies and related guidance, should outline the processes for identifying and reporting known or suspected criminal activities by internal or external parties.²

FCA criminal referral regulations

The FCA criminal referral regulations promote consistency, efficiency, and timeliness by FCS institutions in reporting and aiding the prosecution of known or suspected criminal activities. The regulations are located at [12 C.F.R. 612, subpart B](#).³ The following regulatory sections

¹ FCA's criminal referral regulations apply "to all institutions of the Farm Credit System as defined in Section [1.2\(a\)](#) of the Farm Credit Act of 1971, as amended, (Act) (12 U.S.C. 2002(a)), including, but not limited to, associations, banks, service corporations chartered under section [4.25](#) of the Act, the Federal Farm Credit Banks Funding Corporation, the Farm Credit Leasing Services Corporation, and the Federal Agricultural Mortgage Corporation ..." 12 C.F.R. 612.2300(a).

² See FCA Bookletter BL-069, [Strengthening Lending and Loan Servicing Controls](#), dated March 8, 2018.

³ In accordance with the Farm Credit Act of 1971, as amended, FCA regulates and examines FCS institutions for safety and soundness and for compliance with federal laws and regulations. Violations of federal laws and regulations could undermine public confidence in the System and affect the safety and soundness of System institutions. Federal law enforcement agencies need to receive timely and

describe the requirements you will need to be aware of when making a referral of known or suspected criminal activity:

- [612.2300](#) — Purpose and scope
- [612.2301](#) — Referrals
- [612.2302](#) — Notification of board of directors and bonding company
- [612.2303](#) — Institution responsibilities

Our regulations establish the minimum requirements your institution must follow when filing a criminal referral to federal law enforcement agencies of known or suspected criminal violations perpetrated against the institution by insiders or others, such as borrowers. One of the requirements is to use the FCA Criminal Referral System, to which a link is available from our [Criminal referrals page](#), as well as [section EM-1.5 \(PDF\)](#) of our FCA Examination Manual.

“Known or suspected criminal activity” means there appears to be a **reasonable basis through discovery of relevant facts** of a known or suspected federal criminal violation. In making these determinations, your institution board and senior management must ensure an effective and timely criminal referral reporting process.

As we explain in the response to question 13 below, a director, officer, employee, agent, or other individual of your institution who makes a good-faith disclosure of information that may be relevant to a possible violation of any federal or state law or regulation is not liable to any person for the disclosure under any law of the United States or any state.

Frequently asked questions

1. What policies and procedures must my institution have regarding the criminal referral reporting process?

FCA regulation 612.2303 requires each System institution to establish policies and procedures to comply with the FCA criminal referral regulations, including adequate internal controls. Your institution's internal controls for the criminal referral program promote compliance with regulatory requirements and the criminal referral reporting process. Your institution should do the following:

- Establish policies and procedures for identifying and reporting known or suspected criminal activities in accordance with FCA criminal referral regulations. These policies and procedures should include, at a minimum, the following:
 - Designating an employee to oversee the criminal referral reporting process who is responsible for ensuring the Criminal Referral Form is completed and submitted. This individual should have direct access to your board or designated board committee.

specific information from System institutions on known or suspected criminal violations to determine whether investigations and prosecutions are warranted. See section [5.17\(a\)\(10\)](#) of the Farm Credit Act.

- Maintaining the confidentiality of information regarding known or suspected criminal activity and any referral of such activity. In accordance with your institution’s whistleblower program, anyone who reports known or suspected criminal activity should not fear retribution.
 - Documenting the rationale for not filing a criminal referral if a reasonable person could question the decision. Such documentation must include your evaluation of atypical activity. Your institution should document the facts and circumstances related to atypical activity (e.g., borrower action inconsistent with the lending agreements) that give the institution a reasonable basis to conclude that no criminal activity has occurred.
 - Providing instructions for preparing, reviewing, and submitting the FCA Criminal Referral Form and preparing and reviewing related documentation that must be collected, organized, and retained in accordance with [FCA Examination Manual Section EM-1.5 \(PDF\)](#).
 - Retaining records of known or suspected criminal activity, including cases when a reasonable person could question why a referral was not pursued. Your institution should retain records in accordance with the FCA Criminal Referral Form and Instructions.⁴ Ensure that all records are maintained to allow for possible federal prosecution of a known or suspected criminal violation within the statute of limitations. Federal law enforcement may require that criminal referral and supporting records be retained for longer than FCA does.
- Follow the requirements for promptly notifying your institution’s board and bonding/insurance company under FCA regulation 612.2302⁵ and the bonding/insurance contract.
 - Establish a process for obtaining legal and other resources that may be needed to help your institution determine whether there appears to be a reasonable basis to file a criminal referral for a known or suspected criminal violation.
 - Audit the criminal referral reporting process for compliance with FCA regulations and the instructions for filing the Criminal Referral Form. Identify and document any weaknesses and recommend necessary corrective actions to your institution’s board or designated committee of the board.
 - Train employees to comply with FCA criminal referral regulations, to follow the instructions for filing the Criminal Referral Form, and to follow your institution’s criminal referral policies and procedures.

2. How does my institution identify a known or suspected violation of federal criminal law?

FCA regulations require your institution to submit a criminal referral if it determines that there appears to be a reasonable basis to conclude a known or suspected criminal violation

⁴ Institutions should retain one copy of the FCA Criminal Referral Form, along with any supporting documents, for 10 years (the statute of limitations for most financial banking crimes), consistent with the requirements stated on the forms which are authorized in FCA regulation 612.2300(e).

⁵ The notification requirement is usually defined in the bonding or insurance contract. A System institution must not provide a copy of the FCA Criminal Referral Form to the bonding or insurance company.

of the United States Code has occurred that involves the assets, operations, or affairs of the institution. When evaluating and reporting known or suspected criminal activity, you should, to the best of your ability, identify the facts that may be relevant to the known or suspected activity. Investigation is the responsibility of federal law enforcement.

However, if the facts show that the act was inadvertent and no relevant facts support the belief that suspected criminal activity occurred, you may not be required to file a referral. For instance, if the only relevant facts are that a person accidentally omitted a small liability or inadvertently inverted numbers on a financial statement or inadvertently sold an inconsequential amount of collateral, a referral may not be required based on those facts alone.

When deciding whether to file a criminal referral, your institution should consider all relevant facts, including the contractual agreements between your institution and the borrower(s). A collateral sale or exchange by one borrower may be considered criminal activity but not by another borrower because of the terms of the written contractual agreements between the parties or other facts and circumstances. For example:

- A written contractual agreement between the borrower and institution could allow collateral to be sold without prior approval of the institution when a similar item is purchased, and the new similar item automatically becomes collateral.
- An institution could have a collateral release agreement that provides for a written and enforceable release on the original collateral.
- The relevant written agreement could provide that the institution's prior approval is always required for the sale of collateral.

Institutions are not required to prove the intent of the actor when intent is an element of a suspected crime. Instead, your institution should **consider whether all the relevant facts constitute a reasonable basis for filing a Criminal Referral Form**. You should not consider customer loyalty, threatened repercussions for filing a criminal referral, and other concerns not covered under the FCA criminal referral regulations. Objective analysis of every situation ensures your institution is treating all your borrowers equitably, including borrowers under the Young, Beginning, and Small Farmer Program, and protecting them from disparate treatment.

As an internal control, and in accordance with your institution's policies and procedures, your institution should adequately document why a criminal referral was not filed if you conclude, on the basis of the relevant facts and circumstances, that the conduct in question was an isolated incident and does not constitute a basis for a criminal referral, and a reasonable person would not question the decision.

3. When must my institution file a criminal referral?

An FCA Criminal Referral Form must be filed within 30 calendar days of determining that there appears to be a reasonable basis to conclude a known or suspected criminal violation of the United States Code has occurred that involves the assets, operations, or affairs of the institution. FCA regulation 612.2301(a) provides applicable reporting thresholds for filing a criminal referral. The Criminal Referral Form must be filed promptly since the passage of time may inhibit law enforcement's ability to act on the known or suspected criminal

activity. Question 6 includes additional information on reporting thresholds when filing a criminal referral.

The following table summarizes the thresholds for potential loss you should use when filling out the Criminal Referral Form.

Type of Suspect	Threshold for Potential Loss	FCA Regulation
Insider (director, employee, or agent)	Any amount	612.2301(a)(1)
Identifiable suspect	>\$5,000	612.2301(a)(2)
Unidentifiable suspect	>\$25,000	612.2301(a)(3)

Your institution must apply these thresholds for all known or suspected criminal activity, including conduit-related transactions (i.e., when your institution has been used as a conduit for transferring funds). See question 10 for additional information on this topic.

FCA regulations require institutions to immediately notify federal law enforcement authorities and the FCA Office of Examination at (888) 244-3365 in special situations requiring urgent attention. Such cases include the following:

- The suspect or suspects are likely to flee.
- The magnitude or the continuation of the known or suspected criminal violation may imperil your institution's continued operation.
- Key personnel at your institution are involved.

In some situations, the facts supporting a criminal referral may unfold over time. In these cases, your institution must file a referral within 30 days of the initial discovery when there is a reasonable basis to conclude there is known or suspected criminal activity. You may file an updated Criminal Referral Form if relevant facts or circumstances are discovered after your initial filing.

4. *How can my institution make a criminal referral more persuasive?*

You must fill out the Criminal Referral Form according to the criminal referral instructions in the Examination Manual. Your criminal referral may be more persuasive in convincing federal law enforcement to investigate when you include a detailed narrative commensurate with the seriousness of the offense. The criminal referral should be fact based and avoid any unsubstantiated information or opinions on the criminal activity or the subject's guilt.

The preparer's comments should describe the relevant facts of a known or suspected federal criminal violation, including the following:

- Identity of the person(s) involved in the criminal activity
- Type of criminal activity

- Pattern or frequency of a known or suspected criminal activity, including the dates of each occurrence
- Name and location of the institution where the criminal activity occurred
- Account number(s) and account type(s) involved in the transaction(s)
- Reasons the criminal activity (or pattern of activities) drew your institution's suspicion

5. *Should my institution file a referral on minor criminal violations?*

It depends. Your institution may make referrals on minor criminal violations when the dollar amount of the actual or potential loss is less than the reporting threshold amount in accordance with FCA regulation 612.2300(c). Reporting this type of violation is particularly relevant when a borrower may have repeated criminal activities, such as several instances of diverting or converting collateral, in which the individual amounts involved are less than the reporting threshold amount.

6. *How should my institution determine if the reporting threshold has been met?*

The FCA criminal referral regulations do not require your institution to sustain an actual loss to trigger your obligation to file a criminal referral. The "potential for loss" satisfies the regulatory requirement of a threshold amount for filing a criminal referral. Your institution may not consider a borrower's financial condition, tenure with the institution, capacity to repay, or collateral value when calculating the potential loss.

When analyzing the potential for loss, you must include the following as part of your analysis:⁶

- Calculate the potential for loss on the basis of a reasonable assessment at the time of discovery of known or suspected criminal activity.
- Calculate the loss before recovery or reimbursement to determine the total loss.
- Estimate the range of the potential loss if an exact amount cannot be determined. A criminal referral is required if any part of the range exceeds the applicable threshold.

For example:

- You must calculate loss on the basis of the potential loss to the institution even if a borrower satisfies the debt after the criminal activity occurred.
- If a borrower is engaged in criminal activity and was denied credit by your institution, you must calculate the loss on the basis of the potential loss to your institution if the loan had been extended. In many cases, the potential loss would be the value of the loan if it had been extended.
- If a borrower has misstated his or her financial statements or converted collateral valued at more than \$5,000, the borrower has engaged in criminal (or suspected criminal) activity, regardless of whether the loan is well secured and has adequate repayment capacity. In this case, your institution must file a Criminal Referral Form.

⁶ There is no need to define and analyze the loss amount for an insider since there is no reporting threshold and all criminal activity must be reported.

- If your institution was used as a conduit for transferring funds, you must determine the potential loss to your institution regardless of the borrower's pledged collateral, line of credit, or ability to recover the funds. See question 10 for additional information on conduit-related transactions.

7. Should my institution file a criminal referral when there is a pattern of known or suspected federal criminal violations, but each individual act does not exceed the reporting threshold amount?

Your institution should file a criminal referral when the amounts resulting from these repeated violations add up to a loss that equals or exceeds the reporting threshold amount. The discovery of relevant facts must provide a reasonable basis to conclude such a pattern exists.

8. Are overstated financial statements provided by the borrower considered a "false financial statement"?

It depends. Your institution should review the relevant facts and circumstances to determine whether the omitted credit or falsified financial statement had a material impact on the credit decision and whether it was an isolated incident or the borrower repeatedly distorts financial statements. For instance, you should consider whether the borrower omitted a small loan or overstated the value of assets by a significant amount to induce a favorable lending decision.

If your designated officer or employee determines the relevant facts and circumstances show that the omission or misstatement was not material and was in fact an isolated incident, your decision not to file a criminal referral must be documented because a reasonable person could question the decision.

9. What action(s) should my institution take if a collateral conversion or false financial information is discovered after my institution begins the distressed loan notification process with a borrower?

FCA borrower rights regulations do not affect your institution's criminal referral reporting obligations. Our criminal referral regulations require an institution to act separate and apart from our borrower rights regulations. However, you should consider other actions that may be needed to protect your institution's financial interests.

10. What action(s) should my institution take if it was used as a conduit for criminal activity?

Your institution must file a criminal referral when it is used as a conduit to perpetrate a known or suspected financial crime.

FCA regulations 612.2301(a)(1) through (3) establish the monetary thresholds that should be applied when an institution is used as a conduit. The thresholds are as follows:

- A loss of any amount when the suspect is an insider
- A loss of over \$5,000 when the suspect is identifiable but is not an insider (e.g., a borrower)
- A loss of over \$25,000 when the suspect is unknown

You should determine loss on the basis of the potential loss to the institution. See question 6 for additional information on analyzing loss or a potential for loss to determine if the reporting threshold has been met.

For example, your institution should file a criminal referral if a borrower attempts to cash a check over \$5,000 drawn on a fake account even if your institution does not process the check. Your institution should also file a criminal referral when it receives a fraudulent wire transfer request from an unknown person for over \$25,000 even if your institution does not transfer the money. In both instances, there was an attempt to use the institution as a conduit in transferring money, and your institution's assets, operations, or affairs were involved or affected by these actions.

Generally, each System institution affected by a known or suspected federal criminal violation is responsible for filing a criminal referral; however, there are exceptions. Many conduit-related criminal referrals involve multiple System parties. For example, a Farm Credit System bank may provide cash management services for an association. In this case, one institution may be designated to file the referral on behalf of all institutions since there are no confidentiality issues. The responsibility for filing should be clearly defined between the parties. A copy of the referral should be shared with each institution involved in the known or suspected criminal activity. If the institutions do not file a coordinated criminal referral report, each institution must file a separate Criminal Referral Form.

11. Do loan participations present any special issues?

Yes, loan participations present special issues concerning legal jurisdictions and reporting responsibilities. In a case involving loan participations, one System institution may be designated to file the referral on behalf of all System participants. The institution filing the Criminal Referral Form should make its best effort to file it in the jurisdiction(s) where the known or suspected criminal activity took place. The filing institution should share a copy of the referral with all participating institutions. If the institutions do not file a coordinated criminal referral report, each institution must file an individual Criminal Referral Form. Sharing information between institutions who are loan participants is appropriate in this instance because the activity affects all the participating institutions, and cooperation is likely necessary to file a complete and effective criminal referral.⁷

12. Are criminal referrals confidential?

Yes, criminal referrals are confidential and should not be disclosed to anyone other than government entities and law enforcement agencies. FCA regulations at [12 CFR part 618, subpart G](#), provide specific information concerning the release of confidential borrower and applicant information. This confidentiality requirement is further defined in FCA regulation 612.2302. FCA also maintains the confidentiality of criminal referrals.

If your institution is subpoenaed or asked by a nongovernment entity or individual to disclose a criminal referral or related information, you should cite FCA's information release regulations at 12 CFR part 618, subpart G. You should notify the FCA Office of General Counsel of any requests or subpoenas for information related to a Criminal Referral Form. In addition, your institution should not inform the borrower or suspect of the contents of the

⁷ See [FCA regulation 618.8320\(b\)\(4\)](#).

Criminal Referral Form, related information, or the status of your filing with law enforcement authorities.

13. Can I be held liable for making a criminal referral? What are the safe harbor provisions?

It depends. Your institution and its personnel have immunity from liability if the criminal referral was reported in good faith. Under [12 U.S.C. § 2219e](#), any institution and its personnel who file a criminal referral with the appropriate federal or state law enforcement authority in good faith will not be liable to any person for the disclosure of the relevant information or for failing to notify the person involved in the possible violation. The FCA Criminal Referral Form and filing instructions include this information.

Further, your institution and any director, officer, employee, agent, or other individual of your institution may disclose information in confidence to a government authority if the information is relevant to a possible violation of any law or regulation. Fear of reprisal, litigation, or reputation risk should not keep anyone from filing a criminal referral.

14. Does a law enforcement inquiry or civil subpoena for borrower loan documents trigger the requirement to make a criminal referral?

No, an institution's receipt of a law enforcement inquiry or civil subpoena for a borrower's loan documents does not, by itself, require the filing of a criminal referral. However, a law enforcement inquiry or a civil subpoena may be relevant to your institution's decision to review account activity for the borrower and determine whether a criminal referral is required. If you encounter this situation, you may want to consult with your counsel and with the FCA Office of General Counsel. Also, see questions 12 and 13, which both discuss the confidentiality of criminal referrals.

15. How should my institution file a criminal referral with FCA?

You must use the FCA Criminal Referral System to file a criminal referral. You can access the system from FCA's [Criminal referrals webpage](#). After you sign in to the system, you will be immediately redirected to the FCA Criminal Referral Form and Instructions. This system provides the copy of the criminal referral to FCA's Office of General Counsel, as required by regulation.

When filing with FCA, do not include any supporting documentation. You must retain supporting documentation in accordance with the FCA Criminal Referral Form and Instructions. Do not send emails, faxes, paper submissions, or courtesy copies to FCA's Office of General Counsel or other FCA employees.

The instructions list the federal law enforcement authorities with whom you should file your referral, depending on the type of violation involved.

16. Can my institution use its discretion to decide not to file a criminal referral?

No, your institution does not have discretion to decide not to file if a known or suspected criminal activity meets the reporting threshold. You may not decide on your own whether a criminal referral is required, even if you assume that there will be no prosecution. The response to question 2 can help you determine whether there is a reasonable basis to conclude that a known or suspected federal criminal violation has occurred.

17. What happens if FCA finds my institution did not file a criminal referral?

Failure to comply with the FCA criminal referral regulations may subject an institution, as well as its employees and directors, to supervisory or enforcement actions, including civil money penalties.

18. What should I do if anyone discourages me from filing a criminal referral or otherwise interferes with the process?

You should consult your institution's whistleblower program and file a complaint on the basis of the relevant facts and circumstances used to discourage you from filing the criminal referral.

19. Should my institution train credit staff, senior management, legal staff, and others to identify known or suspected suspicious criminal activity?

Yes, your institution should conduct criminal referral training at least annually. The training should be consistent with FCA criminal referral regulations, this booklet, and your institution's criminal referral policies and procedures.

20. Can my institution file a suspicious activity report under the Bank Secrecy Act instead of a Criminal Referral Form?

No, System institutions are not subject to the Bank Secrecy Act and should not file a suspicious activity report.⁸

21. What notifications of criminal activity must my institution make to state or local law enforcement?

Your institution must notify state or local law enforcement authorities if you determine there is a reasonable basis to conclude there is a known or suspected criminal violation of state or local law, including robbery or burglary (committed or attempted). Your institution should use whatever method it deems appropriate to make the notification and should notify its FCA examiner-in-charge if the reported violation is material. Your institution is not required to file the FCA Criminal Referral Form with federal law enforcement for criminal activity that only qualifies as a state or local offense.

22. What if a borrower or insider is suspected of committing crimes that are not related to my institution's business?

Your institution is not required to file a Criminal Referral Form if a borrower or an insider is suspected of committing crimes that are not related to your institution's business. Your institution also is not required to report these crimes to state or local law enforcement.

However, you should consider how continuing a relationship with such a borrower or insider may affect your business.⁹ For example, your institution may know or suspect that a

⁸ Even though System institutions are required by regulation to file an FCA Criminal Referral Form, they may also voluntarily file a suspicious activity report with the Financial Crimes Enforcement Network.

⁹ Also, see FCA's standards of conduct regulations at [12 CFR part 612, subpart A](#).

borrower or insider has committed a crime involving drugs or retail theft. While these crimes do not directly relate to your institution's business, they are violations of state or local laws and could affect the borrower's or insider's continued relationship with your institution. Further, discovering a borrower's involvement in such activities may affect your institution's evaluation of the borrower's creditworthiness, risk rating, and servicing requirements.

23. Whom should my institution contact if we have additional questions about FCA's criminal referral regulations?

Please contact FCA's Office of General Counsel at (703) 883-4020 or Office of Regulatory Policy at (703) 883-4498.