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Via Electronic Filing

Ms. Jennifer Johnson
Secretary
Board of Governors of the Federal Reserve System

RE: FACT ACT RISK-BASED PRICING RULE; DOCKET R-1316

Office of the Secretary
Federal Trade Commission

RE: FACT ACT RISK-BASED PRICING RULE; PROJECT NO. R411009

Ladies and Gentlemen:

Wells Fargo & Company and its subsidiaries ("Wells Fargo") appreciate the opportunity to comment on the Risk-Based Pricing Rule being proposed pursuant to Section 311 of the Fair and Accurate Credit Transactions Act of 2003 ("Fact Act" or the "Act") by the Board of Governors of the Federal Reserve System (the "Board") and the Federal Trade Commission (the "Commission"; collectively, the "Agencies"). Wells Fargo is one of the largest financial services organizations in the United States and includes commercial banks, a consumer finance company, insurance agents, brokers and underwriters, and securities broker-dealers and investment and funds managers. A number of Wells Fargo units use risk-based pricing as defined in Section 311 of the Act.

The Agencies are to be congratulated for fashioning a proposed rule that is, for the most part, simple, clear and feasible while starting from the ambiguous, confusing and even contradictory provision of Section 311. In particular, the proposal of multiple compliance alternatives should provide most credit grantors with a workable solution. Wells Fargo does believe, however, that the proposed timing requirement for delivery of the risk-based pricing notice (and the score disclosure “exceptions” notice) will cause significant disruptions in some types of credit transactions.

SECTION-BY-SECTION ANALYSIS

Section __.70: Scope

Wells Fargo strongly supports the limitations of the proposed rule to consumer purpose transactions. This comports with the limits of Section 311 which simply does not support expansion to business purpose credit. And, as the Agencies acknowledge, application of the proposed rule to business purpose credit would require comparing transactions where many factors in addition to consumer credit information are used in setting terms, including APR.

Section __.71: Definitions

The definition of “material terms” as the APR if there is an APR is the key to resolving one of the biggest ambiguities in the statute. While there are certainly other terms that might be “material” in specific instances, any attempt to account for all such possibilities would result in either continued ambiguity or unworkable complexity. The reference to the appropriate provisions of Regulation Z for the definitions of APR, “closed-end credit” and “open-end credit plans” is simply a matter of common sense. It is hard to see what purpose could be served by introducing new meanings for any of these well-established credit terms.

Ignoring “introductory” and “penalty” rates in choosing which APR should be used in making determinations under the proposed rule also provides a much needed level of certainty and simplicity to the rule. We also believe that the use of the “purchase annual percentage rate” will generally be the most appropriate APR to use in the case of credit cards. However, Wells Fargo has at least one credit card product, not tied to a home equity line of credit, which can only be used for cash advances and not for “purchases.” Accordingly, we believe Section __.71(i)(1)(ii) should be modified to read:

> “In the case of credit card (other than a credit card that is used to access a home equity line of credit), the annual percentage rate that applies to the purchases (“purchase annual percentage rate”) and no other annual percentage rate, unless there is no “purchase annual percentage rate” in which case the annual percentage rate applicable to the majority of transactions shall be used.”

Wells Fargo believes that the limitation of “material terms” to a single easily determinable APR, as long as there is an APR in the transaction, is the only practical way to apply the risk-based pricing rule. Thus we urge the Agencies to retain this aspect of the proposed rule and reject any suggestions to introduce other factors in the definition of “material terms” in situations where there is an APR.

Wells Fargo has not identified any use of “risk-based pricing” where there is no APR in its own businesses. However, we believe that the proposed definition of “material terms” in those cases as “any monetary terms” may introduce needless uncertainty and complexity for businesses such as utilities which use risk-based pricing to vary more than one monetary term but where one such term is clearly predominant.

Wells Fargo does not believe that the proposed definition of "materially less favorable" is particularly helpful. At the same time, we understand the Agencies' reluctance to provide a more specific definition of this term and to attempt definitions of "substantial proportion" or "most favorable terms." Since these terms are important only for those creditors that will use the direct comparison compliance option (Section __.72(b)), and Wells Fargo does not currently expect to use that option, we simply do not have any suggestions for better defining any of these terms. It may be that creditors undertaking to use the direct comparison method will appreciate the flexibility inherent in the current proposal.

Section __.72 General Requirements

"Original Creditor"

In the preamble to the proposed rule and in Section __.75(b), the Agencies clearly state that the obligation to provide a risk-based pricing notice (or one of the score disclosure "exception" notices) applies only to the "original creditor" and not to a purchaser or assignee of the credit contract. In the preamble, this rule is tied primarily to the "one notice per credit extension" aspect of the proposed rule. However, it also has implications for the timing of delivery requirements. Wells Fargo believes that the "original creditor" rule is appropriate and urges the Agencies to retain it, even if there are situations in which the "original creditor" does not use "risk-based pricing" but the purchaser or assignee of the credit contract does. Any deviation from the "original creditor" rule is likely to further exacerbate the timing of delivery issues discussed below.

"Direct Comparisons"

As noted above, the less-than-precise definition of "materially less favorable" and the failure to even attempt to define "most favorable terms" and "substantial proportion" present a creditor with a challenging set of complexities and ambiguities. We believe that only creditors (or particular portfolios of a given creditor) with very small volume will choose this compliance option. Such creditors may welcome the flexibility inherent in the regulation as currently proposed. Wells Fargo does not anticipate using the direct comparison method for any of its lines of business and thus offers no suggested changes.

Credit Score Proxy Method

Wells Fargo believes that the "credit score proxy" compliance alternative will be a workable solution for many credit grantors and generally supports the Agencies' proposal in this regard. The term "consumers" is ambiguous; for example, it is unclear whether it refers to "applicants" or "accepted applicants." The Agencies should make it clear that the appropriate population to consider in setting the cutoff score for the method is "accepted applicants."

However, we believe the arbitrary selection of the "cutoff score" as the point at which 60 percent of the creditor's consumers will receive the risk-based pricing notice may produce a result which is wholly inappropriate in some cases. For example, there are probably creditors or credit portfolios for which it can be demonstrated that the "most favorable" APR is extended to a large majority of accepted applicants. Alternatively, there may be cases in which a creditor extends the "most favorable" APR to only a very small percentage of consumers, "standard" terms to a large percentage of consumers, and "materially less favorable" terms to only a small percentage of the accepted consumers.

In either of these cases, sending the risk-based pricing notices to sixty percent of the accepted consumers, thus implying they have received "materially less favorable" terms than those extended to a "substantial proportion" of that lender's customers is potentially misleading. We believe lenders should be given greater flexibility in establishing the cutoff score if they can demonstrate that either (a) more than 40 percent of their accepted applicants receive the "most favorable" APR (or other material term(s) if applicable); or (b) fewer than 20 percent of their accepted applicants receive the "most favorable" APR (or other term(s) if applicable) and the cutoff score selected is a reasonable proxy for the percentage that receive "materially less favorable" terms than a "substantial proportion" of the accepted applicants.

For example, if a creditor extends the "most favorable" APR to seventy-five percent of its accepted applicants, it should be able to select a cutoff score at the 75% - 25% point rather than the 40%-60% point. Or, if a creditor extends the "most favorable" APR to only 10% of its accepted applicants, "standard" terms to 60% of its accepted applicants, and "materially less favorable terms to only 30% of its applicants, it should be able to select a cutoff score at the 70%-30% point.

Wells Fargo believes that the Agencies' proposals regarding "sampling" (Section __.72(b)(ii)(A)), "secondary source" (Section __.72(b)(1)(ii)(B)) and "recalculation" of cutoff scores (Section __.72(b)(i)(ii)(c)) are appropriate. We also believe that the proposal regarding situations in which multiple scores are obtained (Section __.72 (b)(1) (iii)) is appropriate.

Tiered Pricing Method

Wells Fargo believes that the tiered pricing compliance alternative will also be attractive to certain creditors. However, we believe that deciding who must receive a risk-based pricing notices under this option based solely on the number of tiers may again produce misleading results. We believe that a creditor grantor wishing to use this method ought to be able to consider the percentage of accepted consumers assigned to each tier, and the differences in APR (or other terms, if appropriate).

For example, a creditor with only three tiers might assign only a small percentage (say 10% of its accepted applicants to the "best" tier, the majority of accepted applicants to the "middle" or "standard" pricing tier (say 60%) and the remainder to the least favorable" tier (in this example, 30%). In this case, we believe it would be appropriate for only those 30% in the "least favorable" tier to receive the risk-based pricing notice.

We realize that there may be many different combinations of percentages of the accepted applicants in various tiers and that this method is intended to provide a simple and certain compliance alternative. Nevertheless, we believe it would be reasonable to permit credit grantors using tiered pricing to consider any number of tiers which account for less than a specified percentage of accepted applicants (for example, use 30 or 35%) to be "top tiers" for which no risk-based pricing notice would be required.

We do not understand the Agencies' concern regarding circumvention by creating tiers for which no accepted applicant qualifies. Under the Agencies' proposal which considers only the number and percentage of tiers, empty "low end" tiers could easily be disqualified from consideration as fraudulent, while empty "high end" tiers would actually increase the number of consumers to whom the risk-based pricing notice must be given. Under the "percentage of accepted applicants" method which we propose, empty tiers at either end of the spectrum would simply be irrelevant.

Credit Cards

Wells Fargo believes that the proposed provision stating that a notice is not required when a consumer applies for and receives a specific APR or receives the lowest APR available in a particular offer is not only appropriate but, indeed, required by the provisions of Section 311.

Account Review

The proposed rule requires that a risk-based pricing notice be given if a consumer report is used in connection with a review of credit and, based in whole or in part on the consumer report, the APR is increased. We ask the Agencies to delete this portion of the proposal. The statutory risk-based pricing notice requirement is in connection with the "grant, extension, or other provision of credit" to a consumer. We do not believe Congress intended this to include account reviews. Congress apparently does not believe that "grant, extension, or other provision of credit" includes "review" of an account. For example, under Section 604(a)(3)(A) of the FCRA, Congress provided for a permissible purpose to obtain a consumer report "in connection with a credit transaction…involving the *extension* of credit to, or *review* or collection of an account of, the consumer." In this portion of the FCRA, it appears that Congress did not view an account review to be the equivalent of an extension of credit and therefore provided a separate permissible purpose for "review" of the account.

Alternatively, we would note, and ask the Agencies to recognize, that risk-based pricing notices will not be required in many cases when the APR is increased as a result of an account review program. First, when the action is taken because of activity in that account or in the account holder's other accounts with the same institution, a risk-based pricing notice will not be required because "consumer report" information will not be the basis for the action. Nor will a risk-based pricing notice be required if an adverse action notice is given, for example, when the action is taken with respect to an account that is not delinquent or in default.

Section __.73: Content, Form and Timing

Content

Wells Fargo generally believes that the content requirements in this proposed rule for risk-based pricing notice are appropriate. However, we believe the Agencies are mistaken in their belief that the reference in Section 311 to a "free consumer report" is intended to create a right to a free credit report in addition to the annual free report required by Section 612(a) of FCRA. We think this is clear from the fact that Section 311 permits the risk-based pricing notice to be given "at the time of application," i.e. before a credit report has been ordered and when the identity of the consumer reporting agency from which a report will be obtained may not be known. As discussed below under "Timing," we believe the Agencies should reconsider their rejection of this statutory alternative.

Format

We believe that the option of providing the risk-based pricing notice "in writing, orally or electronically" is appropriate and, indeed is required by the statute. However, we believe the Agencies should go even further and permit a combination of channels to be use to deliver the required notice. As discussed below under "Timing," there are situations in which delivery of the entire risk-based pricing notice (or score disclosure "exception" notice) in writing or even electronically, before a closed-end credit transaction closes or before the first transaction occurs under an open-end credit plan, may substantially delay the transaction. At the same time, many creditors many not want to rely on oral delivery of the entire notice, and it may not be reasonable to expect consumers to understand and retain all of the information in the notice if it is delivered only orally. This problem could be alleviated by permitting the "static" components of the notice to be given in writing and the "dynamic" components – those which will change from one consumer to the next, such as the identity of the consumer reporting agency which supplied the report use in the case – to be delivered orally.

Timing

The proposed rule requires the risk-based pricing notice or the score disclosure "exception" notice to be delivered prior to the "consummation" of a closed-end transaction and prior to the first transaction under an open-end credit plan. For the sake of convenience, we will refer to either of these points when "an obligation is incurred." While we recognize the desirability of alerting consumers of the possibility of errors in their credit reports which may impact the cost of credit before that cost is incurred, we believe that the requirement to deliver a customized notice before an obligation is incurred will materially disrupt the way many credit transactions are handled, particularly transactions involving various forms of "in-store" credit, including some forms of automobile financing, and credit purchases made by telephone.

We believe that avoiding such disruption was one of the reasons Congress provided the alternative of giving the notice at the time of application. Other regulations, for example Regulation P and the proposed changes to Regulation Z, provide for delayed delivery of notices when requiring delivery before an obligation is incurred would substantially delay the transaction. We believe the Agencies should provide similar relief in the case of risk-based pricing notices (and notices issued under the score disclosure exception).

We further believe that such disruption could be minimized if the rule permitted "split" notices, with the "static" portions of the notice deliverable as early as the time of the application, and the "dynamic" portions of the notice - the identity of the consumer reporting agency used and, in the case of score disclosure "exception" notices, the actual score at the time the decision is communicated to the consumer, with the further proviso that the dynamic elements of the score disclosure "exception" notice could be delivered orally. (Because there is generally a reasonable interval between the time a score is first obtained and the closing of real estate secured transaction, either closed-end or open-end, we would not expect the "split" notice to be used in transactions also covered by Section 609(g)). Alternatively, the Agencies should permit delivery of the notices within a reasonable time after the first transaction under an open-end credit plan.

Section __.74: Exceptions

Wells Fargo believes the proposed "statutory" and prescreened solicitation exemptions are appropriate.

Credit Score Disclosure Exceptions

Wells Fargo believes the proposed "credit score disclosure" exceptions will provide many credit grantors an attractive compliance alternative while providing consumers with equal or greater benefits than they would receive from the standard risk-based pricing notice. However, there is a significant inconsistency between the proposed rule itself and the preamble with respect to the score disclosure exception. The preamble states: "Under this exception, a consumer will provide this disclosure to **ALL** consumers...." (Emphasis added) The proposed rule itself contains no such requirement. The Agencies should clarify that use of this exception does not require delivery of a score disclosure notice to consumers to whom one of the categorical exceptions applies, such as those who apply for and receive a specific rate, those who are given an adverse action notice, and those who apply for a type of credit where risk-based pricing is not used.

We further believe that, for this alternative to be useful for credit grantors and to avoid confusing consumers, following the existing parameters of the disclosures required by FCRA Section 609(g) is essential. However, the same concern noted above under "Timing" applies to the proposed requirements for the score disclosure notices. While we believe that the credit score disclosure notices under the Section 311 exception should generally be consistent with the notices already given under Section 609(g), we agree with the Agencies that the statement of "four key factors" – required by Section 609(g) – is frequently confusing to many consumers, especially those with good or excellent credit scores. Thus we support the Agencies' decision not to require this information in the score disclosure exception for credit not secured by residential real estate.

Wells Fargo agrees that the proposed notice to be used when no score is available in a particular case by credit grantors, who regularly use the score disclosure "exception" notice is appropriate.

Section __.75: Rules of Construction

Wells Fargo strongly supports the proposed rule that a consumer is entitled to only one risk-based pricing notice or score disclosure notice per "transaction." We also support the proposed rule that the obligation to provide a notice under Section 311 applies only to the initial creditor. However, we note that even with this rule in place, there will be cases in which delivery of the notice before an obligation is incurred would disrupt the transaction. See above under "Timing."

Model Forms

We believe the name of the consumer and the date of the notice should be added to all of the model forms. (The "date score was created" in the score disclosure forms may be different than the date of the notice.) We also believe the Agencies should make it clear that a creditor may add relevant, truthful explanatory language to any of the proposed model forms without losing the benefit of "safe harbor." For example, much of the language in the "Notice to Home Loan Applicant" required by Section 609(g) may be helpful to consumers receiving the score disclosure notice in connection with credit not secured by residential real estate. Finally, the Agencies should make it clear that the format of the disclosures can be altered without losing the "safe harbor" of the model forms. For example, all of the model forms could be condensed to take up much less space than those published by the Agencies.

IMPLEMENTATION PERIOD

Again, the Agencies should be commended for proposing a rule that actually makes sense despite a statute that is rather confusingly drafted. With the exception of the issues discussed under "Timing," we believe most creditors will be able to successfully implement at least one of the compliance alternatives. However, in order to do so in an automated fashion, significant systems changes will be required. Based on the extent of the system and procedural changes that will be required, and to allow for proper testing, Wells Fargo asks that the mandatory compliance date be at least two years from the date any final rule is published in the Federal Register. We would remind the Agencies of the cumulative demand on systems resources resulting from the proposed rule plus the other regulations recently issued under the Fact Act, the Regulation Z proposals from June 2007 and May 2008, the proposed rules for Regulation AA, and the proposed rules for Regulation DD.

CONCLUSION

Wells Fargo appreciates the opportunity to comment on the proposed rule. Please feel free to contact the undersigned at (415) 396-0940 or mccorkpl@wellsfargo.com if you have any questions regarding the foregoing.

Sincerely,