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By electronic delivery

August 27, 2008

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
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Washington, D.C. 20551
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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: FACT Act Risk-Based Pricing Rule
FRB Docket Number R-1316
FTC RIN 3084-AA94, Project No. R411009

Dear Sir and Madam:

Citigroup Inc. ("Citigroup"), one of the largest U.S. financial services holding companies, respectfully submits these comments on behalf of itself and its subsidiaries in response to the rule proposed by the Federal Reserve Board and the Federal Trade Commission (collectively, the "Agencies'), related to their proposed regulation (the "Proposal") to implement the risk-based pricing provisions in Section 311 of the Fair and Accurate Credit Transaction Act (the "FACT Act")[1], which amends the Fair Credit Reporting Act (the "FCRA"). Because we use risk-based methods to price many of our products, such as mortgage loans, unsecured open- and closed-end loans, credit card loans, auto loans and student loans, we especially appreciate the opportunity to comment on the Proposal.

Citigroup compliments the Agencies on their efforts in creating a flexible and practical rule. In particular, we strongly endorse the Proposal's approach of allowing lenders to choose among multiple disclosure alternatives, so that they may decide which of these choices is most suited to a particular product and its pricing model. Although we do have several suggestions for improving the Proposal, we generally regard the Agencies' approach as thoughtful and well-considered. We believe that the Agencies' efforts will result in a workable set of

[1] Codified at Section 615(h) of the FCRA, 15 U.S.C. §1681m(h).

rules for lenders, while helping consumers to understand how their credit reports relate to the price they pay for credit. We hope that our suggestions further those goals.

Description of the Proposal

Section 311 of the FACT Act requires any person using a consumer report "in connection with an application for, or a grant, extension, or other provision of, credit" to provide an "oral, written, or electronic notice" to the consumer, if the credit is "on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person."[2] The statute directs the Agencies to provide rules to implement this requirement, which are set forth in the Proposal.

Risk-Based Pricing Notice. The Proposal contains content and timing requirements for providing a risk-based pricing notice (the "Risk-Based Pricing Notice"). As stated above, this notice would have to be given to consumers who receive less favorable terms than other consumers for similar types of credit products. It also prescribes two alternatives to making this direct comparison:

(i) The credit score proxy method, which would allow the lender to provide a notice only to consumers whose scores are below a predetermined "cutoff score". The Agencies propose a cutoff score as the point at which approximately 40% of the lender's consumers have higher credit scores and approximately 60% have lower scores.

(ii) The tiered pricing method, which would require the lender to place the consumer within one of a discrete number of pricing tiers, and to provide notices to consumers who are not in the top pricing tier(s).[3]

Credit card offers with multiple APRs. A credit card issuer must provide a Risk-Based Pricing Notice if it offers a program where more than a single annual percentage rate ("APR") for purchases may apply. The notice must be provided to consumers who are given a purchase APR that is greater than the lowest purchase APR available under that program. The lender would not, however, be required to provide a notice if the customer could have qualified for a lower APR pursuant to a different credit card solicitation.

Account review. Risk-Based Notices would also be required where a lender, as part of an account review, increases a consumer's APR if the increase is based in whole or in part on a credit report.

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[2] 15 U.S.C. §1681m (h)(1).

[3] If a lender has four or fewer pricing tiers, notices would have to be given to consumers who are not in the top tier. If a lender has five or more pricing tiers, notices must be provided to consumers who are not in the top two tiers and any other tier that, together with the top tiers, comprise no less than the top 30% but no more than the top 40% of the total number of tiers. For example, if a lender has nine pricing tiers, with the top three (i.e., lowest price) tiers comprising no less than the top 30% but no more than the top 40% of the tiers, a notice would have to be provided to consumers in the bottom six tiers.

Content and Form of Notices. Model forms are provided for Risk-Based Pricing Notices and for notices that are provided pursuant to the exceptions described below, as well as for situations where a credit score is unavailable. Use of the forms is not mandatory, although they would provide safe harbors under the regulation. The disclosures required in a Risk-Based Pricing Notice are illustrated in Model Form H-1[4]. These disclosures may be provided in oral, written or electronic form, provided they are clear and conspicuous.

Timing of Notices. A Risk-Based Pricing Notice must be provided:

(i) for closed-end credit, before consummation of the transaction, but not earlier than the time the decision to approve the credit is communicated to the consumer;
(ii) for open-end credit, before the first transaction is made under the plan, but not earlier than the time the decision to approve the credit is communicated to the consumer; or
(iii) in the case of review of credit that has already been extended, at the time the decision to increase the purchase APR is communicated to the consumer, or if no notice is provided prior to the effective date of the change, no later than five days after such effective date.

Exceptions. The Proposal contains a number of exceptions to the risk-based pricing rule, three of which would require the lender to make disclosures that are somewhat different from those included in a Risk-Based Pricing Notice. These exceptions are as follows:

(i) Where the consumer applies for specific material terms and is granted those terms (as in a firm offer of credit), regardless of whether other consumers are charged a lower rate for the same type of credit.

(ii) Where the consumer would otherwise be required to receive an adverse action notice pursuant to Section 615(a) of the FCRA.[5]

(iii) Where a lender obtains a prescreened list of consumers and uses the consumer report to make a firm offer of credit, regardless of the material terms that the lender includes in other firm offers of credit.

(iv) For loans secured by one to four units of residential real property, where the lender provides the consumer with a notice (the "Mortgage Exception Notice") that contains, among other things:

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[4] Model forms beginning with H are appended to the Federal Reserve Board proposal; identical forms beginning with B are appended to the Federal Trade Commission proposal.
[5] 15 U.S.C. §1681m(a).

- an explanation of the nature of a consumer report, the fact that a consumer's credit score can change over time and the fact that a consumer's credit history can affect the consumer's cost of credit;
- the information required to be provided to the consumer pursuant to Section 609(g) of the FCRA ("Section 609(g)")[6];
- the distribution of credit scores among all consumers using the same scale as that of the credit score provided to the consumer, presented in a bar or other graph, or by a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers;
- four key factors (plus a fifth, if applicable) that adversely affected a consumer's credit score; and
- additional disclosures such as contact information for a source from which consumers may obtain their free annual consumer reports.

Model Form H-3 illustrates the disclosures required in this notice. This notice must be provided at the time of the disclosure required by Section 609(g), which requires disclosure "as soon as reasonably practicable", but in any event at or before consummation of a transaction in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(v) For loans not secured by one to four units of residential real property, where conditions exist similar to those set forth in (iv) above. Disclosures similar to those contained in the Mortgage Exception Notice would be required, as illustrated in Model Form H-4.

(vi) Where a consumer's credit score is not available. In that case, the lender must inform the consumer that the lender was not able to obtain a credit score about the consumer due to insufficient information regarding that consumer's credit history, and that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit could be. These disclosures are illustrated in Model Form H-5.

Comments and Suggestions

1. Scope

The Agencies propose that the risk-based pricing requirements apply only to credit that is extended primarily for personal, family or household purposes, and solicit comment as to whether there are any circumstances where creditors should be required to provide risk-based pricing notices in connection with business credit.

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[6] 15 U.S.C. §1681g (g). This provision requires, among other things, that a lender of open- or closed-end credit secured by one to four units of residential real property must provide the consumer with a disclosure of the consumer's credit score and a notice regarding the nature and significance of a credit score.

We strongly agree that these requirements should be limited to consumer loans and not be extended to business loans, even if a consumer's report is used in connection with a business loan. First, a customer applying for a business loan is more likely to be financially sophisticated and aware of the role of credit scores on the availability and terms of credit. Second, unlike consumer loans, business loans tend to be heavily negotiated and customized to fit the borrower's unique circumstances and requirements, so that it would be very difficult to determine the "material terms" of a loan and compare it to other business loans. For these reasons, we believe it is appropriate to limit the risk-based notice requirement to consumer loans.

2. Definition of "Material Terms"

As described above, a risk-based pricing notice must be provided when a lender, based in whole or in part on a consumer report, "grants, extends or otherwise provides credit to the consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers" from or through that lender.

In order to avoid the difficulties involved in determining the "material terms" of a credit product, the Agencies have decided to narrow the definition of "material terms" to refer only to the APR. This would refer to the APR for purchases in the case of credit cards, and the APR computed pursuant to Regulation Z for other types of open-end credit[7]" and for closed-end credit[8]. We support the Agencies' determination that the APR is the key "material term" for basis of comparison and agree that it would be virtually impossible for a bank to make comparisons on the basis of multiple variables, such as term, down payment, points, and annual and other fees. We therefore urge the Agencies to retain this definition in the final rule.

3. Trigger of Notice Requirement at Account Review

As stated above, Risk-Based Notices would be required where a lender, as part of an account review, increases a consumer's APR if the increase is based in whole or in part on a credit report. We strongly urge the Agencies to delete this requirement.

First, there is no statutory basis for the imposition of the notice requirement after credit has been extended. Section 311 of the FACT Act states that a notice is required "in connection with an application for, or a grant, extension, or other provision of credit..."[9], but makes no mention of a notice required at account review, after the lender has already provided the credit. Elsewhere in the FCRA,

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[7] 12 CFR §226.6(a)(2).
[8] 12 CFR §226.17(c) and 12 CFR §226.18(e).
[9] 15 U.S.C. §1681m(h)(1).

where Congress intended to include an obligation to be performed at account review, it specifically used the word "review." [10]

Second, we question the circumstances where this notice requirement would apply and the purpose it is intended to serve. We expect that adverse action notices would often be required where a consumer's rate is raised as part of account review, thus triggering the disclosure exception in proposed Section 222.73. Even if this exception did not apply, any dubious benefit that would be provided to the customer by yet another notice would be outweighed by the significant compliance burden that the requirement would impose on lenders, particularly credit card lenders.

At the very least, we urge the Agencies to relax the timing requirement of the notice so that it can be included with the lender's next statement instead of requiring the lender to incur the cost of a separate mailing.

4. Timing and Format of Notices

Timing. In general, the Risk-Based Pricing Notice must be provided to the consumer:

(i) for closed-end credit, before consummation of the transaction, but not earlier than the time the decision to approve credit is communicated to the consumer by the person required to provide the notice;
(ii) for open-end credit, before the first transaction under the plan, but not earlier than the time the decision to approve credit is communicated to the consumer, as described above in (i).

Although this rule works in many situations, it is problematic where a lender must approve a loan at point-of-sale. This can occur with direct auto lending or co-brand credit card accounts, where the lender must rely on the auto dealer or retailer to provide the customized notice on the lender's behalf. It can also be problematic when a lender provides instant credit approval over the internet, since it would require the lender to immediately issue the customized notice.

Credit card decisions, for example, are frequently made instantaneously, whether the application is made online, by telephone or at point-of-sale. Unless a consumer is prohibited from using his or her card immediately, this leaves no time for the lender to provide a Risk-Based Pricing Notice.

We strongly urge the Agencies to adopt a more flexible rule that would allow lenders to provide the Risk-Based Pricing Notice within a reasonable period of time after consummation, such as 30 days. This would be consistent with the timing requirements for adverse action notices pursuant to Regulation B. Providing the lender with this flexibility would allow it to facilitate instantaneous

[10] See, for example, Section 604(a)(3) of the FCRA at 12 U.S.C. §1681b(a)(3).

transactions that benefit the consumer. It would also carry the added benefit of protecting the consumer's credit score or other personal information from being disclosed to a third party in point-of-sale transactions.

Format. In most cases, the lender is allowed to provide the Risk-Based Pricing Notice orally, in writing, or electronically[11]. This is in accordance with the statutory language in Section 311 of the FCRA.

In some instances, however, the Proposal provides a special rule that would require the notice to be provided "in writing, in a form the consumer may keep". This is true of the Mortgage Exception Notice discussed below[12], a similar exception for unsecured loans as set forth in proposed Section 222.74(e), and for notices where the consumer's credit score is not available, as described in proposed Section 222.74(f).

We believe that the writing requirement contradicts the statutory language referenced above. We see no reason why the rules for certain notices should be less flexible than others and request the Agencies to reconsider this point. Even if the Agencies believe that the content of certain notices is more complex than the content of other notices, there is no apparent reason for not allowing all notices to be provided electronically[13]. Prohibiting electronic disclosures would present a severe impediment to many lenders who conduct much of their business over the internet, as well as to consumers who prefer to conduct their business electronically as opposed to using the traditional paper method.

We respectfully request the Agencies to reconsider this position and eliminate the requirement that certain disclosures must be "in writing" in favor of the more flexible rule provided in the statute that allows oral, written or electronic disclosures. At the very least, we ask the Agencies to formalize into a regulatory safe harbor their statement in the preamble[14] that electronic disclosures will satisfy the writing requirement if those disclosures are made in accordance with the Electronic Signatures in Global and National Commerce Act (more popularly known as the "E-Sign Act").[15]

5. Proxy Notices: Credit Score and Tiered Pricing Proxies

As the Agencies acknowledge, proxy methods can result in overnotification – that is, notifying customers who fall within the majority of the score range that they have received a lower score than their counterparts. Nevertheless, we understand that some threshold is necessary in order to provide a workable rule

[11] Proposed Section 222.73(b)(ii).
[12] Proposed Section 222.74(d)(2)(iv).
[13] We acknowledge that, in the case of the Mortgage Exception Notice, the delivery requirements must tie in with the delivery requirements of the notice required by Section 609(g) of the FCRA. However, we see no reason why the regulators cannot permit the Section 609(g) notice to be delivered electronically as well.
[14] 73 Fed. Reg. at 28982.
[15] 15 U.S.C. §7001 et seq.

and that, in a proxy method, the message will not always be accurate for all customers since it is not tailored to individual circumstances. However, we believe that the suggested cutoff score for the credit score proxy of 40/60% (where 40% of a creditor's consumers have higher scores and 60% have lower scores) is inappropriate, since it would result in too many customers receiving the notice, making the message less meaningful or, at worst, conveying an incorrect message to a significant number of consumers that could be misunderstood or potentially disturbing. The Agencies recognize this issue and solicit comment on whether a different cutoff point is appropriate, such as the point at which 50% of a lender's consumers have higher scores and 50% have lower scores[16]. For the reasons mentioned above, we believe that a 50/50% cutoff point would be more appropriate than the 40/60% cutoff point presently proposed.

6. Proxy Notices; Requirements

Similar Transactions. In determining when to provide a Risk-Based Pricing Notice, the Proposal requires the lender to compare the material terms of a consumer's loan to the material terms offered to "other consumers in similar types of transactions". [17] To illustrate this requirement, the supplementary materials accompanying the Proposal (the "Supplementary Materials") state that "each consumer would need to be compared to an adequate sample of consumers who have engaged in similar transactions, such as those who have applied for or received the particular credit product for which the consumer has applied." The Supplementary Materials further provide that such products could include a 30-year fixed-rate purchase money mortgage, an auto loan, credit card, student loan or adjustable-rate mortgage[18].

The Agencies also state that if a lender uses one of the proxy methods for a loan type, it *must* use the *same* method to evaluate *all* "substantially similar products". As an example, if a lender uses the credit score proxy method in connection with the purchase of a new automobile, it must use that method for *all* new vehicle loans." It may, however, vary its method based on different product lines, such as mortgage loans. [19]

We agree in principal that a lender should use a proxy consistently for a specific type of loan, but we note that there can be distinctions even within a traditional loan category that could justify the use of different notification methods. For example, as the Proposal suggests, a fixed mortgage product could be treated differently from an adjustable-rate mortgage product. But beyond that, a lender could make legitimate distinctions between mortgages of the same type – for example, 30-year fixed-rate mortgages targeted to subprime borrowers versus 30-year fixed-rate mortgages targeted to prime customers. Or it could treat 30-

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[16] 73 Fed. Reg. at 28975.
[17] Proposed Section 222.72(b).
[18] 73 Fed. Reg. at 28974.
[19] 73 Fed. Reg. at 28974.

year jumbo mortgages held for portfolio differently from conventional mortgages which are sold into the secondary market. We ask the Agencies to recognize that differences in treatment between traditional "loan categories", such as those described above, are permissible under the regulation so long as the lender has a reasonable justification for those differences.

Frequency of Updates. The Agencies acknowledge that the distribution of credit scores for a lender's consumer base may shift over time, and propose a rule that would allow lenders utilizing the credit score proxy method to update these scores every two years[20]. We agree that a recalculation period of two years is appropriate, since these changes would only occur gradually over time.

7. Mortgage Exception Notice

In General. Citi strongly supports the proposed exception that would allow a lender to provide a disclosure (the "Mortgage Exception Disclosure") that combines information from the Risk-Based Pricing Notice with the disclosure presently required by Section 609(g). We agree with the Agencies that the consumer will better understand the content of both of these disclosures if they are provided in a single document.

Mortgage Broker Transactions; Responsibility to Provide Notice. The Proposal's general rule applicable to multi-party transactions[21] requires the risk-based pricing disclosure to be provided by the person to whom a credit obligation *is initially payable*, even if that person immediately assigns the credit agreement to a third party and is not the source of funding for the credit. We agree with this general rule. However, we note that for a transaction involving both a mortgage broker and a lender, a different rule would apply to the disclosure, pursuant to Section 609(g).

Section 609(g) places the disclosure responsibility on any person who uses a credit score to "make *or arrange*" a mortgage loan. Thus in many cases the mortgage broker, not the lender, will make the Section 609(g) disclosure. To harmonize the Proposal with Section 609(g), we recommend that it include a provision stating that, although the obligation to provide the notice rests with the person to whom the loan is initially payable, that obligation is satisfied if either that person *or* a mortgage broker involved in the transaction provides the Mortgage Exception Disclosure.

Mortgage Broker Transactions;Timing. As stated above, the Mortgage Exception Notice must be provided at the time of the disclosure required by Section 609(g) ("as soon as reasonably practicable"), but in any event at or before consummation of a transaction in the case of closed-end credit or before the first transaction is made under an open-end credit plan. The Agencies recognize that

[20] Proposed Section 222.72(b)(1)(ii)(C).
[21] Proposed Section 222.75.

industry practice is generally to provide the Section 609(g) disclosure within three business days of obtaining a credit score, and state that they will "expect the integrated disclosure [i.e., the Mortgage Exception Notice] to be provided within the same time frame."[22] The Agencies also state that they expect that the Mortgage Exception Notice will use the actual credit score that was used in connection with the credit decision.[23]

In transactions involving mortgage brokers, these expectations are somewhat inconsistent. The score disclosed by the mortgage broker on the Section 609(g) disclosure might be somewhat different than the score that the lender funding the loan uses to make the credit decision. For example a mortgage broker may obtain and disclose a score from a single consumer reporting agency ("CRA") but may not immediately submit the application to the lender. The lender may obtain an updated score and/or obtain scores from more than one CRA before making its credit decision.

Because it is helpful for the consumer to receive the disclosure early in the process, we recommend that the regulation: (i) permit both processing and table-funded mortgage brokers to provide the Mortgage Exception Notice using the score the broker obtained; and (ii) clarify that if the lender provides the Mortgage Exception Notice for an application received from a processing broker, the disclosure will be considered timely for both the lender and the broker if it is provided within three business days after the lender obtains a credit score.

Mortgage Exception Notice; Comparison to Other Consumers. The proposed regulation requires a "graph or statement" comparing the consumer's score to the score of other consumers. We would appreciate the following clarifications:

(i) Format. The proposed regulation[24] states that the person providing the notice may use the "graph or statement" of the score provider. We recommend that the regulation clarify that the person providing the notice may use the "information", rather than the "statement", of the score provider. This change would permit the person providing the notice, whether the lender or the mortgage broker, to present the information either in a statement or a graph of its own design without being limited solely to the format provided by the score provider.

(ii) Accuracy. As noted above, in many cases credit scores calculated using the same credit score model may be obtained from more than one CRA. Because the coverage of the CRAs differs slightly, the information provided by each CRA about how a given score compares to the scores of other consumers may also differ slightly. For example, one CRA may indicate that a certain credit score is in the 50th percentile, while another may indicate that that the same score is in the 49% percentile, while the third may indicate that it is in the 51st

[22] 23 Fed. Reg. at 28982.
[23] 23 Fed. Reg. at 28980.
[24] Proposed Section 222.74(d)(ii)(E).

percentile. The burden of providing the statement or graph would be lessened if the information provided by *any* of the CRAs, or an average of such information, could be used to illustrate how the score disclosed for the consumer compares to the scores of other consumers. The minor differences between the information provided by different CRAs in this context would not affect the value of the disclosure to the consumer. The regulation should also provide for some tolerance level concerning the accuracy of the disclosure.

(iii) Updating. The proposed regulation does not specify how often the statement or graph information needs to be updated. We suggest a two-year period, which is consistent with the period contained in the proposed regulation for recalculation of cutoff scores when the credit score proxy alternative is used.

Mortgage Exception for Co-op Apartments. Depending on state law, an interest in a co-op apartment may or may not be considered residential real property. Even if it is not, however, we believe that as a policy matter a lender should have the option to use the Mortgage Exception Notice. We therefore ask the Agencies to clarify that, for purposes of utilizing that exception, the regulation would consider an interest in a co-op apartment to be a "loan secured by one to four units of residential real property", regardless of state characterization of interests in co-op units.

Multiple Scores; Multiple Applicants. More than one credit score is often used in the credit decision. For example, a common industry practice is to obtain the borrower's FICO score from three CRAs and use the middle score as the borrower's "representative score" for making the credit decision. If scores from only two CRAs are obtainable, the lower of the two scores is the borrower's representative score. If there are two applicants, the representative score used to make the credit decision is the lower representative score of the two applicants. The final regulation should provide the following clarifications to address this common practice:

(i) A Mortgage Exception Notice should only be required for an applicant whose score was considered in determining the representative score, but not for other applicants. This would be consistent with the requirements for adverse action notices pursuant to Regulation B and the FCRA.

(ii) It should be permissible to show either the applicant's representative score or all of the applicant's scores.

Format of H-3 Credit Score Disclosure. The last page of the form, the "Notice to the Home Loan Applicant", instructs the consumer to contact the CRA "at the address and telephone number provided with this notice." However, the form does not contain a blank for the address and telephone number. We recommend that blanks for this information be included after the "[Insert source]" blank on the first page of the form.

8. Effective Date

The Proposal will affect multiple Citigroup consumer businesses, including credit cards, mortgages, installment lending, auto lending and student lending. Each of these businesses will be required to devote significant legal, compliance, systems and operational resources to implementation of the Proposal. In addition, significant other Agency proposals are outstanding that will require the time and attention of these consumer businesses. We therefore request the Agencies to provide for an eighteen-month effective date in the final rule.

Conclusion

Thank you for this opportunity to comment on the Agencies' risk-based pricing proposal. If you have any questions on any aspects of this letter, please feel free to call me at (212) 559-9342 or Carl Howard of this office at (212) 559-2938.

Sincerely,

Joyce ElKhateeb
Senior Bank Regulatory Counsel – Bank Regulatory

cc: Carl Howard
Viola Spain