Bank of America

August 18, 2008 BY ELECTRONIC MAIL

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: FACT Act Risk-Based Pricing Rule; Docket No. R-1316

Dear Ms. Johnson:

Bank of America Corporation and its financial services affiliates ("Bank of America") appreciate the opportunity to comment on the proposed risk-based pricing rules that the Board of Governors of the Federal Reserve System and Federal Trade Commission (collectively, the "Agencies") published in the Federal Register on May 19, 2008.

Bank of America wishes to express our appreciation that the Agencies have taken clear steps to craft a rule that acknowledges distinctions among credit products, and permits operational flexibility in providing meaningful information to consumers. The Agencies' proposal is of great consequence to our consumer loan businesses, and our customers. We largely support the rule and appreciate the opportunity to provide comments that we think will both help improve overall positive impact for consumers and lessen unnecessary compliance burden. The recommendations and questions posed in this letter primarily relate to mechanics of compliance (timing of delivery and content to a lesser degree) but we urge the Agencies to also reconsider the notice requirement in the existing account review context.

We offer the following specific comments, and requests for clarification:

Material Terms [§222.71(i)(1)]

We agree with the Agencies that the annual percentage rate (APR) (and in the case of the credit card, the purchase APR) is the pertinent "material term." We also agree that temporary initial rates and penalty rates should be excluded from the definition of "material terms." We request that the Agencies make clear that the exceptions described in §222.71(i)(1)(i) (for temporary initial rates and penalty rates) apply equally to credit cards under §222.71(i)(1)(ii), and that a promotional "rate-for-life" purchase offer, such as a rate that expires only when the promotional balance is paid-in-full, would be deemed a "temporary initial rate" and thus not a "material term." This clarification would eliminate ambiguity.

Determining when consumers must receive a notice (credit score proxy method) [§222.72(b)(1)]

We appreciate and strongly support the Agencies' alternative options to direct comparison. With regard to the "sampling approach" for creditors currently using risk-based pricing (§222.72(b)(1)(ii)), we request that the Agencies confirm in the final rule that the credit score to be used in sampling, is the credit score currently available to the lender (*i.e.*, the lender is neither required to update the score, nor to use the credit score from the original credit decision). This would ease implementation of the sampling approach.

Notice requirement for account review [§222.72(d)]

We recommend that the Agencies not require the risk-based pricing notice in connection with rate increases on existing accounts. That requirement is neither mandated by the Fair Credit Reporting Act (the "FCRA") nor, for the reasons described below, necessary to further its goals of promoting consumer awareness of their consumer reports and the need to monitor their contents.

Section 615(h) of the FCRA requires creditors to provide the risk-based pricing notice in certain circumstances when using a consumer report "in connection with an application for, or a grant, extension or other provision of, credit…." (§615(h)(1)). Further, the FCRA speaks directly to notice timing: "… the notice … may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit…." (§615(h)(2)). In neither provision is the notice contemplated in connection with existing account review.

When provided in connection with existing account review, the notice does not significantly help consumers to understand why their APRs were increased, and may lead them to the wrong conclusion altogether. Consider that lenders, including Bank of America, typically follow one or both of two methods of increasing APRs on existing accounts: (1) rate increases by amendment (with prior notice and opportunity to reject the rate increase); and, (2) rate increases under default pricing programs (referred to in the proposed rule as "penalty" pricing, *i.e.*, rate increases triggered by customer default, such as failing to pay on time or exceeding the credit limit, twice in a year). Because rate increases by amendment, when based in whole or in part on a consumer report, require lenders to provide adverse action notification under §615(a) of the FCRA, the risk-based pricing notice would not be required as it would be subject to the exception under §222.74(b) of the proposed rule.

The impact of the proposal thus falls principally on lenders' default pricing programs. However, for default pricing increases under terms like the Bank of America credit card default program, it is a customer's "on us" default (*i.e.*, a default on our credit card account), not the consumer report, that acts as the trigger for the APR increase. The consumer report, when used, is used only in the evaluation of the customer's risk profile, and its determination of the appropriate APR. In such a case, providing the notice is sending at best a mixed signal, because there was nothing in the consumer report that triggered the repricing. For these reasons, we recommend not requiring the risk-based pricing notice in the context of account review.

However, if the final rule requires notice in the context of account review, we respectfully recommend that the Agencies align the risk-based pricing notice requirement with the forthcoming requirements under the pending amendments to Regulation Z. The amendments to Regulation Z and Regulation AA would likely result in substantive changes to default pricing programs and the timing of related notices. We think this alignment would create efficiencies and further the Agencies' goals of enhancing disclosures, while reducing the compliance burden.

Timing of notice for new accounts [§222.73(c)(2)]

The timing of delivery of the risk-based pricing notice generally aligns with the initial disclosure requirements for open-end credit under Regulation Z; the notice must be provided "before the first transaction is made … but not earlier than the time the decision to approve an application … is communicated to the consumer…." However, we think the Agencies' proposal could be improved with greater flexibility around timing of delivery for credit card and other unsecured open-end credit products.

This is particularly true in point-of-sale and other instant credit channels where compliance with the proposed rule will pose system and fulfillment process challenges due to the timing and variable content requirements of the notice (*e.g.,* the name and address of the credit bureau(s) used, or credit score). In these channels, lenders often rely on third parties to provide required disclosures at account opening, in accordance with the general disclosure requirements of Regulation Z, §226.5. To ensure compliance in these channels, lenders typically provide pre-printed agreements to approved applicants (any supplemental disclosure is limited to the actual approved APR). However, to comply with the risk-based pricing notice we would need to materially modify our systems and point-of-sale interfaces to identify approved consumers that must receive the notice, and provide the variable content.

We respectfully recommend that in these instant credit channels, lenders be permitted to provide only fixed portions of the notice (*e.g.,* the information described in §222.73(a)(1)(i)-(iv)) within the timing currently proposed in §222.73(c)(2), and to provide the additional variable information within a reasonable period of time thereafter. We think that in this forum, consumers would have the information necessary to make an informed choice whether to accept or decline the credit offer. Consumers are unlikely to be inclined to review their consumer report for errors while at the point-of-sale, and they will be more inclined to do so when they receive the additional information specific to them, within a reasonable period of time thereafter. Indeed, it may be best in these channels if all of the information in the notice were to be provided to the consumer, once, within a reasonable time after the credit decision.

Credit score disclosure exceptions for loans secured by residential real property, and other extensions of credit [§222.74(d) and §222.74(e)]

Section 222.74(d) of the proposed rule permits creditors to comply by providing additional information concerning credit scores with the existing credit score disclosure required by §609(g) of the FCRA. We believe that this "exception disclosure" is a practical approach for accomplishing the Agencies' goals, and will be easier for consumers to use than the risk-based pricing notice.

- It will be much less burdensome for mortgage lenders to implement than the other compliance alternatives in the proposed rule.

- Combining the existing credit score disclosure with the additional information contemplated in the proposed rule in a single disclosure to be provided "as soon as reasonably practicable" will give consumers time to take appropriate action in the event a low credit score is caused by errors in the consumer report. Information about the distribution of credit scores generally will enhance consumers' ability to put their own credit score into context and better understand whether they should expect to receive favorable credit terms. The same is true for proposed rule §222.74(e), in the personal property secured lending environment, where the credit score disclosure has typically not been disclosed to consumers. Providing consumers with their current or most recent credit scores will enhance their ability to make sound decisions about their credit terms.

- It avoids one of the primary sources of potential consumer confusion with the risk-based pricing notice in the real estate lending arena – namely, that mortgage credit terms are significantly influenced by a number of factors other than the credit score. As the Agencies correctly point out, a consumer with a high credit score could be offered materially less favorable credit terms due to circumstances such as down payment, occupancy (e.g., primary residence vs. a vacation home), property condition, loan type, debt-to-income ratio, etc. It also avoids similar issues in the personal property lending arena. Absent our ability to rely on the exception disclosure, we believe that a significant number of consumers with high credit scores would receive a risk-based pricing notice under both the credit score proxy method and the tiered pricing method, and responding to inquiries from confused consumers would be burdensome to our loan origination staff and negatively impact customer satisfaction.

Sections 222.74(d) and 222.74(e) are drafted in such a way that the credit score disclosure exceptions could be read as allowing lenders the flexibility to either: (1) deliver the exception disclosure (model forms H-3 and H-4) to all consumers; or (2) only to those customers who would otherwise receive the risk-based pricing notice using the credit score proxy method or the tiered pricing method. However, the Supplementary Information to the proposed rule could be read to imply that the creditor is required to deliver the exception disclosure to *all* consumers. We believe that lenders should be given the flexibility to use the credit score proxy method (or the tiered pricing method) to determine which consumers will receive an exception disclosure. This approach is consistent with the Agencies' desire to provide the risk-based pricing information only to those consumers who may receive materially less favorable terms based on consumer report information. We recommend that the final rule make clear that lenders have the flexibility to deliver the exception disclosure (model forms H-3 and H-4) to all consumers or to use the credit score proxy method (or the tiered pricing method) to determine which consumers receive the exception disclosure provided for in the §222.74(d) and §222.74(e) exceptions.

With regard to the graphical information in model forms H-3 and H-4, we believe that disclosing the distribution of credit scores generally will be helpful to consumers without creating an undue burden to industry. A graphical illustration of score distribution is much easier to understand than a narrative, and the proposed bar graph is simple to grasp. However, we request that the Agencies clarify the frequency with which lenders need to update the content requirements under both §222.74(d)(1)(ii)(E) and §222.74(e)(1)(ii)(F) (e.g., bar graph content), and also request that period be expressly deemed a safe harbor for compliance. Updating this disclosure "real time" would create significant compliance challenges; rather, it seems reasonable to update this content on an annual basis. Updating annually would not impact the accuracy of the information, as this data changes slowly over months and years, but a shorter time period would increase the cost of compliance for creditors.

Further we recommend a modification to the rule to address wholesale lending, where a mortgage broker processes the consumer's loan application and submits it to a lender for closing. Under §609(g) of the FCRA, a mortgage broker must provide the consumer with a credit score disclosure because the broker is a "person who makes or arranges loans and ... uses a consumer credit score ... in connection with an application initiated or sought by a consumer...." The proposed rule would require the wholesale lender to provide the exception disclosure, most of which would be duplicative of the credit score disclosure previously provided by the mortgage broker. Further, since the consumer's application file is essentially complete and ready to close by the time it is submitted to the wholesale lender, the consumer would have very little time prior to consummation to take any action on the information provided by the wholesale lender. We believe it would be more useful to consumers to receive the additional information about credit scores as early as practicable in the process. It would also be less burdensome to lenders to not have to provide the exception disclosure if the mortgage broker has already done so. We propose that the rule be modified to permit a mortgage broker to provide the exception disclosure along with the credit score disclosure. If the mortgage broker does so, then the wholesale lender would not be required to provide an additional disclosure. It would be the wholesale lender's responsibility to ascertain that the disclosures were provided. This is similar to the process outlined in HUD Regulation X §3500.7(b) when a mortgage broker provides a Good Faith Estimate of Closing Costs.

Additional statutory exceptions [§222.74]

We appreciate and strongly support the exceptions provided under proposed §222.74. We respectfully recommend that additional exceptions be permitted under §222.74, such as when a consumer withdraws the credit application before the creditor has provided a risk-based pricing notice (or the exception disclosure), and when the consumer expressly agrees to a change in the material terms of an existing account. This latter exception for consent would not be necessary if the Agencies determine that no notice is required under §222.72(d), as is recommended in this letter.

Multi-party transactions [§222.75(b)]

In the personal property secured credit process, we agree that the person to whom a credit obligation is initially payable should provide the risk-based pricing notice or the notice required under one of the exceptions. The notice will have the most impact when provided by the original creditor to the consumer prior to the consummation of the transaction, which is the most practicable timing in this context; any other approach would present logistical difficulties and more complex compliance requirements.

Rule implementation timing and costs

We expect significantly more system development time to comply with a final rule than the 40 hours projected by the Agencies. While we appreciate the flexibility offered under the proposed rule, numerous and complex systems will nevertheless need to be modified, and processes changed, to meet its requirements.

To that end, we respectfully request that the Agencies align the mandatory compliance dates of the final risk-based pricing rule with the mandatory compliance dates for proposed Regulation Z and proposed Regulation AA (for which Bank of America has requested an implementation time of at least two years). This would promote system development synergies, as common corporate resources are tasked to redesign systems, create notices, and provide education.

Conclusion

Our comments are intended to seek clarification on aspects of the proposed rule we find ambiguous, and to recommend changes to the proposal which we think would improve the balance between consumer benefit and compliance burden. We recognize and appreciate the flexible approach taken by the Agencies in crafting these proposed rules. Thank you for the opportunity to present Bank of America's views on this important proposal.

Respectfully Submitted,

John Byrne
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Bank of America