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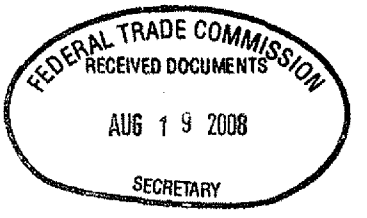

Delivered Electronically

August 18, 2008

Jennifer J. Johnson
Secretary,
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1316
regs.comments@federalreserve.gov

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, NW
Washington, DC 20580
Attention: FACT Act Risk
Based Pricing Rule,
Project No. R411009
https://secure.commentworks.com/ftc-RiskBasedPricing

Re: Federal Reserve Board Docket No. R-1316
Federal Trade Commission: FACT Act Risk Based Pricing Rule, Project No. R411009

FACT Act Risk-Based Pricing Rule

Ladies and Gentlemen:

This letter is submitted by American Express Travel Related Services Company, Inc., on behalf of itself and its affiliates (collectively "American Express"), in response to the proposed rule published in the *Federal Register* on May 19, 2008 by the Board of Governors of the Federal Reserve System (the "Board") and the Federal Trade Commission (the "Commission") to implement the risk-based pricing provisions of Section 311 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act").

American Express appreciates the opportunity to comment on the proposed FACT Act risk-based pricing rule and thanks the Board and the Commission (collectively, the "Agencies") for their hard work in developing the rule.

American Express believes the proposed rule represents a sound and reasonable implementation of the risk-based pricing provisions set forth in Section 311 of the FACT Act.

In general, we believe the rule implements the risk-based pricing notices required by the statute in a way that is workable for creditors and useful for consumers. As discussed in more detail below, however, we are concerned about several discrete aspects of the proposed rule. These include, for example, ambiguity in the treatment of charge cards under the proposed rule and rigidity in the format and timing requirements for the notices. We propose some modest adjustments to the rule as proposed to address these and other issues, and we urge the Agencies to adopt them.

In the sections of the letter that follow, we discuss our concerns and offer our comments on various aspects of the proposed rule in more detail. For the convenience of the Agencies, our discussion generally follows the order in which the various matters arise under the proposed rule. As the Agencies did in the supplemental information accompanying the rule, we use the numeration of the proposed rule as it would be added to the Board's Regulation V, 12 C.F.R. § 222, but we use only sub-section numbers in doing so.

I. Scope and Definitions

Business Credit Exclusion. American Express strongly supports proposed **Section .70(a)(ii)(2),** which excludes business credit from the proposed rule. In response to the Agencies' request for comment on the issue, we are aware of no circumstance in which creditors should be required to provide risk-based pricing notices in connection with credit granted primarily for business purposes. We agree with the Agencies' analysis in the supplemental information that the complex array of factors that underlie business credit decisions and the sophistication of business borrowers would make the notices inapposite and unhelpful in the context of business credit.

"Material Terms" for Charge Cards. American Express, a leading issuer of charge cards, agrees with the substance of the Agencies' position on the "material terms" of charge cards that should be subject to a risk-based pricing notice under the proposed rule. As stated in the supplemental information, those terms are any membership fees that vary based on information from a credit report. *See* 73 Fed. Reg. 28971 (May 19, 2008). Charge cards must be paid in full each month, have no annual percentage rates ("APRs"), but often carry membership fees. Those fees are therefore an appropriate analogue to the purchase APR defined in **Section .71(i)(1)(ii)** as the "material terms" for revolving credit cards. Both represent the key consumer pricing elements of their respective products.

However, we are concerned with the way the Agencies have handled the question of "material terms" for charge cards in the proposed rule.

First, we believe the question needs to be addressed through a dedicated provision in the rule itself rather than in the supplemental information. This will enhance accessibility and compliance and remove ambiguity about the terms of a charge card that the Agencies deem "material terms."

Second, we believe the question needs to be addressed in **Section .71(i)(1)(ii),** the credit card prong of the "material terms" definition, rather than in **Section.71(i)(3),** the prong of the "material terms" definition for credit not subject to APRs, which is where the supplemental information addresses the question. As an initial matter, we note that **Section.71(f)** of the

proposed rule defines "credit card" by ultimate reference to the definition in § 103 of the Truth in Lending Act, 15 U.S.C. § 1602(k), which encompasses "any card, plate, coupon book or other device" issued for the purpose of obtaining money, goods, or services on credit." Accordingly, charge cards are included in that definition and, as such, squarely covered by the credit card prong of the "material terms" definition, where "material terms" are defined by exclusive reference to APRs. By the same token, charge cards, not having APRs, are arguably covered by the prong of the "material terms" definition for non-APR credit as well, where material terms are defined as "any monetary terms" that vary based on a credit report. Without clarification, these competing prongs would create considerable confusion and ambiguity about the "material terms" of charge cards subject to risk-based pricing notices -- despite the Agencies' clear and exclusive reference in the supplemental information to membership fees as the "material terms" of a charge card.

We believe these problems can and should be eliminated through the addition of a dedicated charge card provision to **Section .71(i)(1)(ii),** the credit card prong of the "material terms" definition. This charge card provision should state, as is currently stated in the supplemental information, that the material terms of charge cards for purposes of the proposed rule are membership fees.

"Material Terms" for Non-APR Credit. In response to the Agencies' specific request for comment on the issue, we believe that the language of **Section .71(i)(3),** the prong of the "material terms" definition for non-APR credit, is too broad. As noted above, this prong states that the "material terms" of such credit are "any monetary terms" that vary based on a credit report. This language theoretically encompasses a limitless number of terms and could engender considerable confusion and dispute about the reach of the definition. This contrasts sharply with the open-end and credit card prongs of the "material terms" definition, which properly focus on the single most "material term" for those forms of credit, namely the primary APR and purchase APR respectively. The prong for non-APR credit should be similarly focused and capture the single most important term of each form of non-APR credit subject to variation based on information in a credit report.

II. General Requirements for Risk-Based Pricing Notices

Account Review. We urge the Agencies either to provide more pointed focus to **Section .72(d)** or to delete it from the proposed rule. This provision requires a risk-based pricing notice to be given following the use of a credit report for an account review that results in an APR increase. This provision, including the example set forth in **Section .72(d)(2)**, posits a routine account review situation in which any resulting APR increase would trigger the adverse action notice requirements of the Equal Credit Opportunity Act and its implementing Regulation B and of Section 615(a) of the FCRA. Accordingly, the provision is inconsistent with **Section .74(b)**, which is an exception providing that risk-based pricing notices are unnecessary in cases where an adverse action notice under Section 615(a) is given. This inconsistency clutters the proposed rule and can only lead to confusion and mischief in the interpretation of both **Section .72(d)** and **Section .74(b)**. We therefore urge the Agencies to revise **Section .72(d)** to address only circumstances, if any, in which **Section .74(b)** would not apply or if there are no such circumstances, to delete **Section .72(d)** from the rule as unnecessary, confusing, and potentially harmful to the proper interpretation of the rule.

Format. We are concerned that the *de facto* format standard for risk-based notices likely to be created by **Model Forms H-1 and H-2** and the "safe harbor" provided for their use in **Section .73(b)(2)** is too rigid and will prove costly and burdensome in many contexts. Instead, we believe creditors should have the flexibility to provide risk-based pricing notices in any "clear and conspicuous" manner. In this regard, we think they should be subject to the same formatting flexibility that applies to adverse action notices, which are comparable in purpose and importance to the proposed risk-based pricing notices. In our case and that of many other creditors, such notices are often provided in the form of a simple communication, where the information is delivered effectively and powerfully to the consumer without the burden of special formatting or challenging space requirements.

Toward these ends, we urge the Agencies to:

- substitute model clauses for the model forms. This would eliminate the formatting rigidity associated with the model forms, while preserving the Agencies' control over the content of the risk-base pricing notices;

- eliminate the question and answer format in the model forms or least provide expressly that "safe harbor" protection is not dependent on that format. This would save considerable amounts of space and associated production costs;

- eliminate superfluous or very elementary information on the model forms, particularly the "What is a credit report?" inquiry and associated answer, and further consolidate the information on the model forms to the extent feasible; and

- if the model forms and formatting requirements are retained, at least eliminate the multiple-boxes and columns in favor of a single text box for all of the required notice content. This would make lay out and printing on various media and in various contexts considerably easier and less burdensome for creditors while preserving clear and conspicuous disclosure to consumers.

Timing. We are also concerned with the rigidity of the timing requirement for risk-based pricing notices provided in connection with open-end credit as set forth in proposed **Section .73(c)(2).** Under this provision, the notice must always be provided "before the first transaction is made" using the credit. This would cause significant difficulties in a variety of contexts. For example, in cases where a credit card is approved at the point of sale and "instant credit" is provided to a consumer, it may not be feasible to provide the notice to the consumer before his or her first transaction. Accordingly, the notice timing requirement could result in the significant reduction if not elimination of such programs to the detriment of consumers and card issuers alike. We think this unhappy result can be avoided by allowing creditors to provide a risk-based pricing notice within 30 days of the date a credit card or other open-end credit plan is opened. We believe that a 30-day cushion for the consumer's receipt of the notice does no harm to the integrity of the proposed rule or its notice regime, while eliminating a significant burden on the speedy approval and use of credit cards and other forms of open-end credit.

Other Matters. We offer the following comments on various requirements for risk-based pricing notices in response to the Agencies' requests for specific comment on the requirements.

We support current **Section .72(b)(1)(ii)(C),** which requires creditors using the credit score proxy method to recalculate cutoff scores at least once every two years. We believe any shorter period would be potentially burdensome for creditors and provide no material benefit to consumers.

We support the approach to tiered pricing in current **Section .72(b)(2)**, which requires creditors to provide a risk-based pricing notice to consumers who are not in the top bracket or brackets. We believe that engrafting percentage tests and the like onto the tiered pricing method for providing the notice would increase complexity considerably for both creditors and consumers with no benefit for either. For creditors, this complexity would increase the burdens of implementation and compliance. For consumers, this complexity would harm their understanding of the risk-based pricing notice in the tiered pricing context.

We also support current **Section .73(a)(1)(3)**, which requires a risk-based pricing notice to contain a statement informing the consumer that the terms offered him or her "may be less favorable" than those offered other consumers with better credit histories. We believe this language communicates the purpose of the notice accurately and clearly. As discussed by the Agencies in the supplemental information, we believe that sharper language may be inaccurate in a variety of circumstances.

Effective Date. We urge the Agencies to adopt an effective date for the rule that is at least 18-24 months from the date that the rule is promulgated. The rule will require systems development and operational changes by creditors, who concurrently will be confronting the challenges of implementing the Board's pending overhaul of Regulation Z's open-end credit rules, and the pending Regulation AA UDAP rule. An implementation period of at least 18-24 months is necessary for creditors to plan, finance and execute the changes required by these various rules in their systems and operations.

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Once again, American Express thanks the Agencies for the opportunity to comment on this proposed rule. We would welcome the opportunity to discuss our comments further with staff members from any of the Agencies. Toward that end, any staff member should feel free to call me at any time at 212-640-5773.

Sincerely,

Benjamin Parks
Senior Counsel