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Fair Credit Reporting Risk-Based Pricing Regulations; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 222

[Regulation V; Docket No. R–1316]

FEDERAL TRADE COMMISSION

16 CFR Parts 640 and 698

RIN 3084–AA94

Fair Credit Reporting Risk-Based Pricing Regulations

AGENCIES: Board of Governors of the Federal Reserve System (Board) and Federal Trade Commission (Commission).

ACTION: Final rules.

SUMMARY: The Board and the Commission are jointly issuing final rules to implement the risk-based pricing provisions in section 311 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), which amends the Fair Credit Reporting Act (FCRA). The final rules generally require a creditor to provide a risk-based pricing notice to a consumer when the creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. The final rules also provide for two alternative means by which creditors can determine when they are offering credit on material terms that are materially less favorable. The final rules also include certain exceptions to the general rule, including exceptions for creditors that provide a consumer with a disclosure of the consumer's credit score in conjunction with additional information that provides context for the credit score disclosure.

DATES: These rules are effective on January 1, 2011.

FOR FURTHER INFORMATION CONTACT:

Board: David A. Stein, Managing Counsel; Amy B. Henderson, Senior Attorney; or Mandie K. Aubrey, Attorney, Division of Consumer and Community Affairs, (202) 452–3667 or (202) 452–2412; or Kara L. Handzlik, Attorney, Legal Division, (202) 452–3852, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of a Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

Commission: Manas Mohapatra and Katherine White, Attorneys, Division of Privacy and Identity Protection, Bureau of Consumer Protection, (202) 326–2252, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) was signed into law on December 4, 2003. Public Law 108–159, 117 Stat. 1952. In general, the FACT Act amended the Fair Credit Reporting Act (FCRA) to enhance the ability of consumers to combat identity theft, increase the accuracy of consumer reports, and allow consumers to exercise greater control regarding the type and amount of solicitations they receive.

Section 311 of the FACT Act added a new section 615(h) to the FCRA to address risk-based pricing. Risk-based pricing refers to the practice of setting or adjusting the price and other terms of credit offered or extended to a particular consumer to reflect the risk of nonpayment by that consumer. Information from a consumer report is often used in evaluating the risk posed by the consumer. Creditors that engage in risk-based pricing generally offer more favorable terms to consumers with good credit histories and less favorable terms to consumers with poor credit histories.

Under section 615(h) of the FCRA, a risk-based pricing notice must be provided to consumers in certain circumstances. Generally, a person must provide a risk-based pricing notice to a consumer when the person uses a consumer report in connection with an application, grant, extension, or other provision of credit and, based in whole or in part on the consumer report, grants, extends, or provides credit to the consumer 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. The risk-based pricing notice requirement is designed primarily to improve the accuracy of consumer reports by alerting consumers to the existence of negative information on their consumer reports so that consumers can, if they choose, check their consumer reports for accuracy and correct any inaccurate information. It is meant to complement the existing adverse action notice provisions of the FCRA.[1]

Section 615(h) requires the Board and the Commission (the Agencies) jointly to issue rules implementing the risk-based pricing provisions. The statute requires the Agencies to address in the implementing rules the form, content, timing, and manner of delivery of any notices pursuant to section 615(h). The rules also must clarify the meaning of certain terms used in this section, including what are "material" credit terms and when credit terms are "materially less favorable." Section 615(h) gives the Agencies the authority to provide exceptions to the notice requirement for classes of persons or transactions for which the Agencies determine that risk-based pricing notices would not significantly benefit consumers. Finally, the Agencies must provide a model notice that can be used to comply with section 615(h).

The Agencies published proposed regulations that would implement these risk-based pricing provisions on May 19, 2008 (73 FR 28966). The comment period closed on August 18, 2008. The Agencies received more than 80 comment letters regarding the proposal from banks and other creditors, industry trade associations, consumer groups, a trade association representing consumer reporting agencies, and others.

II. Developing the Final Rules

In developing the risk-based pricing rules, the Agencies sought to implement the statutory provisions in a manner that would provide a substantial benefit to consumers and be operationally feasible for the wide variety of entities subject to the rules. Based on in-depth outreach with interested parties undertaken before issuing the proposed rules, the Agencies determined that it would not be operationally feasible in many cases for creditors to compare the terms offered to each consumer with the terms offered to other consumers to whom the creditor has extended credit. The Agencies considered several approaches and concluded that the most effective way to implement the statute was to develop certain tests that could serve as proxies for comparing the terms offered to different consumers. The Agencies' goal was to determine which tests would both identify those consumers who likely received materially less favorable terms than the

[1] Under § 615(a) of the FCRA, creditors that deny a consumer's application for credit, based in whole or in part on information in a consumer report, must provide an adverse action notice to that consumer. Where a creditor does not reject an applicant with impaired credit, however, but instead offers credit on less favorable terms, the creditor generally is not required to provide an adverse action notice. The Senate Committee on Banking, Housing, and Urban Affairs cited concerns that the adverse action notification construct had been made obsolete in certain circumstances and found this problematic because the adverse action notice is the "primary tool the FCRA contains to ensure that mistakes in credit reports are discovered." *See* S. Rep. No. 108–166, at 20 (Oct. 17, 2003).

terms obtained by other consumers and be operationally feasible for creditors to implement. The tests that satisfied these criteria were included in the proposed rules.

The final rules retain the tests the Agencies identified in the proposal as the best approaches for meeting the statute's requirements with some revisions made in response to the comments received on the proposal. As noted in the proposal, the Agencies recognize that no single test or approach is likely to be feasible for all of the various types of creditors to which the rules apply or for the many different credit products for which risk-based pricing is used. Therefore, the final rules provide a menu of approaches that creditors may use to comply with the statute's legal requirements. The next section provides a brief explanation of the final rules.

III. Summary of the Final Rules [2]

Risk-Based Pricing Notice

The final rules implement the risk-based pricing notice requirement of section 615(h). The final rules apply to any person that both: (i) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer 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. The rules clarify that the risk-based pricing notice requirements apply only in connection with credit that is primarily for personal, household, or family purposes, but not in connection with business credit. For more information about the scope of the final rules, see the discussion of § ____.70 in the Section-by-Section Analysis.

Definitions

The final rules define certain key terms. Specifically, the final rules define "material terms" as the annual percentage rate for credit that has an annual percentage rate,[3] or, in the case of credit that does not have an annual percentage rate, as the financial term that the person varies based on the consumer report and that has the most significant financial impact on consumers, such as an annual membership fee or a deposit. For credit cards, which may have multiple annual percentage rates applicable to different features, "material terms" is defined generally as the annual percentage rate applicable to purchases. In addition, the final rules define "materially less favorable," as it applies to material terms, to mean that the terms granted or extended to a consumer differ from the terms granted or extended to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit to the other consumer. For more information about the definitions of these and other terms used in the final rules, see the discussion of § ____.71 in the Section-by-Section Analysis.

General Rule and Methods for Identifying Consumers Who Must Receive Notice

The final rules state that a person must provide the consumer with a notice if that person both: (i) uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer primarily for personal, family, or household purposes; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer 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. The final rules apply to the person to whom the obligation is initially payable (also referred to as "the original creditor").

A person subject to the rule may determine, on a case-by-case basis, whether a consumer has received material terms that are materially less favorable than terms other consumers have received from or through that person by comparing the material terms offered to the consumer to the material terms offered to other consumers for a specific type of credit product. Because it may not be operationally feasible for many persons subject to the rule to make such direct comparisons between consumers, the final rules provide two alternative methods for determining which consumers must receive risk-based pricing notices for those persons that prefer not to compare directly the material terms offered to their consumers. Using either of the alternative methods, a person may determine when credit offered from or through that person 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.

The first alternative method is the credit score proxy method. A credit score is a numerical representation of a consumer's credit risk based on information in the consumer's credit file. The final rules permit a creditor that uses credit scores to set the material terms of credit to determine a cutoff score, representing the point at which approximately 40 percent of its consumers have higher credit scores and 60 percent of its consumers have lower credit scores, and provide a risk-based pricing notice to each consumer who has a credit score lower than the cutoff score. The final rules also provide that, in the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, a person may set its cutoff score at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section. The final rules require periodic updating of the cutoff score.

The second alternative method is the tiered pricing method. Under this method, a creditor that sets the material terms of credit by assigning each consumer to one of a discrete number of pricing tiers, based in whole or in part on a consumer report, may use this method and provide a risk-based pricing notice to each consumer who is not assigned to the top pricing tier or tiers. The number of tiers of consumers to whom the notice is required to be given depends upon the total number of tiers. For more information about the general rule and the alternative methods for determining which consumers must receive notices, see the discussion of § ____.72 in the Section-by-Section Analysis.

[2] The Board is placing the final regulations implementing section 311 in the part of their regulations that implements the FCRA—12 CFR part 222. For ease of reference, the discussion in the **SUPPLEMENTARY INFORMATION** section uses the numerical suffix of each of the Board's regulations. The FTC also is placing the final regulations and guidelines in the part of its regulations implementing the FCRA, specifically 16 CFR part 640. However, the FTC uses different numerical suffixes that equate to the numerical suffixes discussed in the **SUPPLEMENTARY INFORMATION** section as follows: suffix .70 = FTC suffix .1, suffix .71 = FTC suffix .2, suffix .72 = FTC suffix .3, suffix .73 = FTC suffix .4, suffix .74 = FTC suffix .5, and suffix .75 = FTC suffix .6.

[3] Under Regulation Z, which implements the Truth in Lending Act, 15 U.S.C. 1601 et seq., the annual percentage rate is a measure of the cost of credit, expressed as a yearly or annualized rate. *See* 12 CFR 226.14, 226.22. Regulation Z requires creditors to disclose accurately the cost of credit, including the annual percentage rate. *See* 12 CFR 226.5a(b)(1), 226.5b(d)(6) and (12), and 226.18(e).

Application of Rule to Credit Card Issuers

The final rules set forth a special test that a credit card issuer may use to identify the circumstances in which the issuer must provide a risk-based pricing notice to consumers, as an alternative to the options discussed above. If a credit card issuer uses this option, the issuer is required to provide a risk-based pricing notice to a consumer if the consumer applies for a credit card in connection with a multiple-rate offer and, based in whole or in part on a consumer report, is granted credit at an annual percentage rate referenced in § ____.71(n)(1)(ii) that is higher than the lowest annual percentage rate referenced in § ____.71(n)(1)(ii) available under that offer. The final rules assume that a consumer who applies for credit in response to a multiple-rate offer is applying for the best rate available. For more information about the application of the rule to credit card issuers, see the discussion of § ____.72 in the Section-by-Section Analysis.

Account Review

A creditor may periodically review the consumer report of a consumer with whom the creditor has an existing credit relationship as permitted under section 604 of the FCRA. If a consumer's credit history has deteriorated, the creditor may, pursuant to applicable account terms, increase the annual percentage rate applicable to that consumer's account. The final rules generally require the creditor to provide a risk-based pricing notice to the consumer if the creditor increases the consumer's annual percentage rate in an account review based in whole or in part on a consumer report, unless the creditor provides an adverse action notice to the consumer. For more information about the application of the general rule to account reviews, see the discussion of § ____.72 in the Section-by-Section Analysis.

Content of the Notice

In addition to the minimum content prescribed by section 615(h)(5) of the FCRA, the final rules require the risk-based pricing notice to include a statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories. The Agencies believe that including such a statement in the notice could encourage consumers to check their consumer reports for inaccuracies. The final rules also include special content requirements for the notice that must be provided in the context of account reviews. For more information about the content of the risk-based pricing notices, see the discussion of § ____.73 in the Section-by-Section Analysis.

Form of the Notice

The final rules require the risk-based pricing notice and account review notice to be clear and conspicuous and to be provided to the consumer in oral, written, or electronic form. The final rules also state that creditors are deemed to be in compliance with the provisions requiring risk-based pricing notices and account review notices through use of the appropriate model forms. Use of the forms is optional. For more information about the form of these notices, see the discussion of § ____.73 in the Section-by-Section Analysis.

Timing of the Notice

The final rules generally require a risk-based pricing notice to be provided to the consumer after the terms of credit have been set, but before the consumer becomes contractually obligated on the credit transaction. In the case of closed-end credit, the notice must be provided to the consumer before consummation of the transaction, but not earlier than the time the approval decision is communicated to the consumer. In the case of open-end credit, the notice must be provided to the consumer before the first transaction is made under the plan, but not earlier than the time the approval decision is communicated to the consumer. For account reviews, the notice must be provided at the time that the decision to increase the annual percentage rate is communicated to the consumer or, if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change (to the extent permitted by law), no later than five days after the effective date of the change in the annual percentage rate. The final rules explain how the required notices may be delivered in the case of certain automobile lending transactions and also include an exception to the general timing rules in the case of contemporaneous purchase credit (instant credit). For more information about the timing requirements, see the discussion of § ____.73 in the Section-by-Section Analysis.

Exceptions to the Risk-Based Pricing Notice Requirement

The final rules contain a number of exceptions to the risk-based pricing notice requirement. The final rules implement the statutory exceptions that apply: (i) When a consumer applies for, and receives, specific material terms; and (ii) when a consumer has been or will be provided a notice of adverse action under section 615(a) of the FCRA in connection with the transaction.

In addition, the Agencies have used their exception authority set forth in section 615(h)(6)(iii) of the FCRA to create exceptions for creditors that provide consumers who apply for credit with a notice consisting of their credit score and certain additional information, in lieu of the risk-based pricing notice. For credit secured by one to four units of residential real property, a creditor may provide consumers with a notice containing the credit score disclosure required by section 609(g) of the FCRA along with certain additional information that provides context for the credit score disclosure. This notice also describes the creditor's use of credit scores to set the terms of credit and explains how consumers can obtain their free annual consumer reports. In the case of credit that is not secured by one to four units of residential real property, a creditor similarly may provide consumers with a notice of their credit score and certain additional information specified in the final rules. The final rules also include optional model forms for use by creditors.

In some cases, a consumer's credit file may not contain sufficient information to permit a consumer reporting agency or other person to calculate a score for that individual. In those cases, a creditor using either of the credit score disclosure exceptions described above is permitted to comply with the rules by providing an alternate narrative notice that does not include a credit score to those consumers for whom a score is not available.

The final rules also include an exception for prescreened solicitations. Under this exception, a creditor is not required to provide a risk-based pricing notice if that creditor obtains a consumer report that is a prescreened list and uses that consumer report to make a firm offer of credit to consumers, regardless of how the material terms of that offer compare to the terms that the creditor includes in other firm offers of credit. For more information about the exceptions, see the discussion of § ____.74 in the Section-by-Section Analysis.

Free Consumer Report

Section 615(h)(5)(C) of the FCRA states that the risk-based pricing notice must contain a statement informing the consumer that he or she may obtain a copy of a consumer report, without charge, from the consumer reporting agency identified in the notice. The final rules are based on the Agencies' reading of section 615(h) as giving

consumers a right to a separate free consumer report upon receipt of a risk-based pricing notice.

The notices provided under the credit score disclosure exceptions are not risk-based pricing notices, and therefore do not give rise to the right to a free consumer report. Instead, a consumer who receives a credit score disclosure notice that identifies a consumer reporting agency or other third party as the source of the credit score could request the free annual consumer report that is available from each of the three nationwide consumer reporting agencies. For more information about the credit score disclosure exceptions, see the discussion of § ____.74 in the Section-by-Section Analysis.

One Notice per Credit Extension

The final rules contain a rule of construction to clarify that, in general, only one risk-based pricing notice is required to be provided per credit extension, except in the case of a notice provided in connection with an account review. The person to whom the obligation is initially payable must provide the risk-based pricing notice, or satisfy one of the exceptions, even if the loan is assigned to a third party or if that person is not the funding source for the loan. Although legal responsibility for providing the notice rests with the person to whom the obligation is initially payable, the various parties involved in a credit extension may determine by contract which party will send the notice. Generally, purchasers or assignees of credit contracts are not subject to the risk-based pricing notice requirements, except in the case of a notice provided in connection with an account review. For more information about the rules of construction, see the discussion of § ____.75 in the Section-by-Section Analysis.

Multiple Consumers

The final rules contain a rule of construction to clarify that in a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a risk-based pricing notice to each consumer. If the consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer.

For credit score disclosure exception notices, a person must provide a separate notice to each consumer in a transaction involving two or more consumers who are granted, extended, or otherwise provided credit. Whether the consumers have the same address or not, the person must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer. For more information about the rules of construction, see the discussion of § ____.75 in the Section-by-Section Analysis.

Model Forms

Section 615(h)(6)(B)(iv) requires the Agencies to provide a model notice that may be used to comply with the risk-based pricing rules. For each of the risk-based pricing notices and alternative credit score disclosures, the Agencies have finalized model forms that are appended to the final rules as Appendices H–1 through H–5 of the Board's rule and Appendices B–1 through B–5 of the Commission's rule. For more information, see the discussion of the model forms in the Section-by-Section Analysis.

IV. Section-by-Section Analysis

Section ____.70 Scope

Proposed § ____.70 set forth the scope of the Agencies' rules. Proposed paragraph (a)(1) generally tracked the statutory language from section 615(h)(1) of the FCRA, except that it limited coverage of the proposed rules to credit to a consumer that is primarily for a consumer's personal, family, or household purposes.

Proposed paragraph (a)(2) provided that the risk-based pricing rules do not apply to persons who use consumer reports in connection with an application for, or grant, extension, or other provision of, credit for business purposes. Section 615(h) of the FCRA does not explicitly state that it applies only to a person using a consumer report in connection with consumer purpose credit. However, the statute's repeated use of the term "consumer," which section 603(c) of the FCRA defines to mean "an individual," suggests that Congress intended for the risk-based pricing provisions to apply only to credit that is primarily for personal, family, or household purposes.

Business-purpose loans generally are made to partnerships or corporations, as well as to individual consumers in the case of sole proprietorships. The Agencies understand that business borrowers generally are more sophisticated than individual consumers. For business loans made to partnerships or corporations, a creditor may obtain consumer reports on the principals of the business who may serve as guarantors for the loan.[4] The credit is granted or extended to the business entity, however, based primarily on that entity's creditworthiness, and that entity is primarily responsible for the loan. In addition, credit is not granted, extended, or provided to a guarantor; rather a guarantor simply supports, and assumes liability for, the credit granted, extended, or provided to the consumer. Also, when a consumer report is used in connection with a small business loan, the report may factor into the underwriting process quite differently than a consumer report utilized in connection with a consumer purpose loan.

Most commenters agreed that the coverage of the proposed rule, including the exclusion of business purpose credit, was appropriate. Some commenters requested that the Agencies clarify that the rules do not apply to consumer leases. Consumer leases generally are not treated as "credit" under the Equal Credit Opportunity Act (ECOA) and the Board's Regulation B (12 CFR 202.1 *et seq.*), which implements the ECOA.[5] Thus, the rule does not apply to consumer lease transactions. The final rules retain paragraph (a) substantively as proposed.

Proposed paragraph (b) provided that compliance with either the Board's or the Commission's substantively identical risk-based pricing rules would be deemed to satisfy the requirements of the statute. The Board proposed to codify its risk-based pricing rules at 12 CFR 222.70 *et seq.,* and the Commission proposed to codify its risk-based pricing rules at 16 CFR 640 *et seq.* Proposed paragraph (c), consistent with the statutory language in section 615(h)(8), provided that the risk-based pricing rules would be enforced in accordance with sections 621(a) and (b) by the relevant federal agencies and officials identified in those sections, including state officials. Under the statute and proposed rules, the risk-based pricing provisions would not provide for a

[4] *See* FTC Staff Opinion Letter from Joel Winston to Julie L. Williams, J. Virgil Mattingly, William F. Kroener, III, and Carolyn Buck (June 22, 2001) (available at *http://www.ftc.gov/os/statutes/fcra/tatelbaumw.shtm*).

[5] In *Brothers* v. *First Leasing,* 724 F.2d 789 (9th Cir.), *cert. denied,* 105 S. Ct. 121 (1984), the U.S. Court of Appeals for the Ninth Circuit held that consumer leases as defined by the Consumer Leasing Act are subject to the ECOA. However, the Board believes Congress did not intend the ECOA to cover lease transactions unless the transaction results in a "credit sale" as defined in the TILA and Regulation Z. Congress has consistently viewed lease and credit transactions as distinct financial transactions and has treated them separately under the Consumer Credit Protection Act.

private right of action. The Agencies did not receive comments on proposed paragraphs (b) or (c). Therefore, paragraphs (b) and (c) are adopted substantively as proposed in the final rules, with minor changes for clarity.

Section ____.71 Definitions

Proposed § ____.71 contained definitions for the following terms: "annual percentage rate" (and the related terms "closed-end credit" and "open-end credit plan"), "credit," "creditor," "credit card," "credit card issuer," "credit score," "material terms" (and the related term "consummation"), and "materially less favorable." These definitions are retained in the final rules, with certain revisions as discussed below.

Annual Percentage Rate and Related Terms

Proposed paragraph (a) defined "annual percentage rate" by incorporating the definitions of "annual percentage rate" for open-end credit plans and closed-end credit set forth in sections 226.14(b) and 226.22 of Regulation Z, respectively (12 CFR 226.14(b), 12 CFR 226.22). Paragraph (b) of the proposal defined "closed-end credit" to have the same meaning as in Regulation Z (12 CFR 226.2(a)(10)). Paragraph (k) of the proposal defined "open-end credit plan" to have the same meaning as set forth in the Truth in Lending Act (TILA), as implemented by the Board in Regulation Z and the Official Staff Commentary to Regulation Z (15 U.S.C. 1602(i), 12 CFR 226.2(a)(20)).

The Agencies received one comment in support of the definition of "annual percentage rate" and no comments regarding "closed-end credit" and "open-end credit plan." The Agencies believe that use of the Regulation Z definitions promotes consistency among the rules pertaining to consumer credit, including the rules that implement the FCRA and the TILA. Therefore, the definitions of "annual percentage rate," "closed-end credit," and "open-end credit plan" are adopted as proposed in the final rules, but renumbered as paragraphs (b), (c), and (p), respectively.

Consummation

Proposed paragraph (c) defined the term "consummation" to mean the time that a consumer becomes contractually obligated on a credit transaction. The proposed definition was identical to the definition of "consummation" in Regulation Z. 12 CFR 226.2(a)(13). The Agencies received no comments on this definition. In the final rules, the definition of "consummation" is substantively the same as in the proposal, but the text has been revised (and redesignated as paragraph (e)) so that the term is defined to have the same meaning as in 12 CFR 226.2(a)(13). This is consistent with other definitions in the final rules that cross-reference existing definitions.

Credit, Creditor, Credit Card, Credit Card Issuer, and Credit Score

Proposed paragraphs (d), (e), (f), (g), and (h) incorporated the FCRA's statutory definitions of "credit," "creditor," "credit card," "credit card issuer," and "credit score." The Agencies received few comments on these definitions, all of which incorporate existing statutory definitions. They are adopted as proposed in the final rules as paragraphs (h), (i), (j), (k), and (l).

Material Terms

Proposed paragraph (i) contained three separate definitions of "material terms," depending on whether the credit (1) is extended under an open-end credit plan for which there is an annual percentage rate, (2) is closed-end credit for which there is an annual percentage rate, or (3) is credit for which there is no annual percentage rate. Proposed paragraph (i)(1) defined "material terms" for credit extended under an open-end credit plan as the annual percentage rate required to be disclosed in the account-opening disclosures required by Regulation Z. The definition excluded both any temporary initial rate that is lower than the rate that would apply after the temporary rate expires and any penalty rate that would apply upon the occurrence of one or more specific events, such as a late payment or extension of credit that exceeds the credit limit. For credit cards (other than those used to access a home equity line of credit), the proposal defined "material terms" as the annual percentage rate applicable to purchases ("purchase annual percentage rate"), and no other annual percentage rate.

Proposed paragraph (i)(2) defined "material terms" for closed-end credit as the annual percentage rate required to be disclosed prior to consummation under the provisions of Regulation Z regarding closed-end credit (12 CFR 226.17(c) and 226.18(e)). This definition did not address temporary initial rates or penalty rates because, for purposes of the closed-end provisions of Regulation Z, a penalty rate is not included in the calculation of the annual percentage rate and a temporary initial rate is but one component of a single annual percentage rate for the transaction.

Most commenters supported defining material terms as the annual percentage rate for credit extended under an open-end credit plan and closed-end credit and, in the case of credit cards, the purchase annual percentage rate. Some commenters, however, suggested that the definition should include certain additional terms, such as fees or a down payment, depending upon the particular loan product. A consumer group commenter suggested that the definition should not be limited to a single term, but instead should be defined as any change to a credit transaction that is based upon a consumer's credit history or credit score.

For practical and operational reasons, §§ ____.71(i)(1) and (i)(2) are adopted largely as proposed as renumbered §§ ____.71(n)(1) and (n)(2), but with certain substantive revisions as discussed below. The Agencies recognize that the pricing of credit products is complex and that the annual percentage rate is only one of the costs of consumer credit. However, the Agencies have adopted a definition of "material terms" that generally focuses on a single term in order to ensure that there is a feasible way for creditors to identify those consumers who must receive risk-based pricing notices. Based on the comments received, extensive outreach to interested parties, and their own analysis, the Agencies conclude that it would not be feasible for creditors to compare credit terms on the basis of multiple variables. For example, it is unclear how a creditor would compare one mortgage loan with a given combination of annual percentage rate, down payment, and points and fees to another such loan where all three variables differ, even for the same product, such as a 30-year fixed-rate loan.

Focusing on the annual percentage rate is appropriate because most consumer credit products have an annual percentage rate, and it has historically been a significant factor, and often the most significant factor, in the pricing of credit. The Agencies understand that the annual percentage rate is the primary term that varies as a result of risk-based pricing. For credit cards, which often have multiple annual percentage rates applicable to purchases, cash advances, and balance transfers, purchases are the most common type of transaction. The Agencies understand that the annual percentage rate applicable to purchases is the primary term that varies as a result of risk-based pricing. Thus, the Agencies conclude that, in most cases, defining "material terms" with reference to the annual percentage rate (or the purchase annual percentage rate, in the case of credit cards) will effectively

target those consumers who are likely to have received credit on terms that are materially less favorable than the terms offered to other consumers.

One commenter requested clarification regarding whether the definition of "material terms" for credit cards in § ____.71(n)(1)(ii) excludes the temporary initial annual percentage rate and penalty annual percentage rate, as are excluded in § ____.71(n)(1)(i), the definition applicable to credit extended under an open-end credit plan. Section ____.71(n)(1)(ii) is a specific application of the general definition of "material terms" for credit extended under an open-end credit plan to a specific type of product, credit cards, that frequently has multiple annual percentage rates applicable to different balances. Therefore, the exclusions in § ____.71(n)(1)(i) of the final rules apply to all credit extended under an open-end credit plan, including credit cards.

Upon further analysis, the Agencies also have added "any fixed annual percentage rate option for a home equity line of credit" as an additional exclusion from § ____.71(n)(1)(i). Most annual percentage rates for home equity lines of credit are variable. Some creditors, however, also offer a fixed annual percentage rate option, which may be exercised on some portion of the advances. In these arrangements, the variable annual percentage rate is the most significant pricing term. Therefore, the Agencies have excluded the fixed annual percentage rate option from the definition. Finally, the Agencies have changed the citations in § ____.71(n)(1)(i) of the final rules to reflect amendments to Regulation Z made subsequent to the proposed rule.[6]

In response to one commenter's suggestion, the Agencies have excluded charge cards from § ____.71(n)(1)(ii). Under Regulation Z, a "charge card" is defined as a credit card on an account for which no periodic rate is used to compute a finance charge. 12 CFR 226.2(a)(15). This exclusion reflects the fact that charge cards do not have an annual percentage rate. As discussed below, material terms of charge cards are addressed in paragraph (n)(3).

Another commenter suggested that the rule should account for situations where a credit card has no purchase annual percentage rate. The final rules provide that in those instances, material terms means "the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers." For example, if a credit card product does not permit purchases, but allows for balance transfers and cash advances, the material term would be whichever of the two annual percentage rates varies based on information in a consumer report and has the most significant impact on consumers.

Proposed paragraph (i)(3), renumbered as paragraph (n)(3) in the final rules, defined "material terms" for credit with no annual percentage rate as any monetary terms that the person varies based on information in a consumer report, such as the down payment or deposit. Some commenters agreed with the definition, but other commenters suggested that "any monetary terms" should be limited to a single monetary term. For the same operational concerns that led the Agencies to focus exclusively on the annual percentage rate, the Agencies agree that the third prong of the definition should focus on a single significant term. Thus, in the final rules, "material terms" for credit with no annual percentage rate is defined as "the financial term that varies based on information in a consumer report and that has the most significant financial impact on consumers." By way of example, the final rules clarify that, depending upon the creditor's business and pricing practices, a significant financial term may include a deposit required by a telephone company or utility or an annual membership fee required to obtain a charge card.

Materially Less Favorable Material Terms

Proposed paragraph (j) defined "materially less favorable," when applied to material terms, to mean that the terms granted, extended, or otherwise provided to a consumer differ from the terms granted or extended to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted or extended to the other consumer. This definition clarified that a comparison between one set of material terms and another set of material terms generally would be required to satisfy the general rule and to identify which consumers must receive the notice.

Some commenters stated that the definition of "materially less favorable" was generally appropriate, but other commenters believed the Agencies should define the term with more objective criteria. The Agencies believe the definition of "materially less favorable" provides sufficient guidance regarding how to determine whether a particular set of terms is materially less favorable. Thus, the Agencies are adopting the definition of "materially less favorable" substantively as proposed as renumbered paragraph (o), with some revisions for clarity. The phrase "or otherwise provided" has been added to the definition to track the language of the statute. As noted in the supplementary information to the proposal, factors relevant to determining the significance of a difference in the cost of credit include the type of credit product, the term of the credit extension, if any, and the extent of the difference between the material terms granted, extended, or otherwise provided to the consumer and the material terms granted, extended, or otherwise provided to the comparison group.

Suggested Definitions

Two commenters suggested that terms such as "consumer" should also be defined in the final rules. For clarity and consistency, the final rules add definitions of the following terms by reference to the FCRA's statutory definitions: "adverse action" is defined in paragraph (a); "consumer" is defined in paragraph (d); "consumer report" is defined in paragraph (f); "consumer reporting agency" is defined in paragraph (g); "firm offer of credit" is defined in paragraph (m); and "person" is defined in paragraph (q).

Section ____.72 General Requirements for Risk-Based Pricing Notices

General Rule

Proposed § ____.72 established the basic rules implementing the risk-based pricing notice requirement of section 615(h). Paragraph (a) stated the general requirement that a person must provide the consumer with a notice if that person both: (i) uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer that is primarily for personal, family, or household purposes; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer 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. This paragraph mirrored the language in proposed § ____.70(a) and generally tracked the statutory language. In the final rules, paragraph (a) is adopted as proposed.

The proposed rules did not define what constitutes "a substantial proportion" of consumers. Some commenters stated that this term was too subjective and should be defined. The Agencies, however, do not believe

[6] 74 FR 5244 (Jan. 29, 2009).

it is appropriate to define "a substantial proportion" because no definition of "a substantial proportion" could reflect the widely varying pricing practices of creditors. For example, one creditor may offer its most favorable material terms to ninety percent of its consumers and materially less favorable material terms to ten percent of its consumers, while another may offer its most favorable material terms to ten percent of its consumers and materially less favorable material terms to ninety percent of its consumers. A third creditor may offer its most favorable material terms to one percent of its consumers, slightly less favorable material terms to twenty percent of its consumers, and materially less favorable material terms to its remaining consumers.

While each creditor's "substantial proportion" determination is an individual decision, the Agencies expect that creditors will consider "a substantial proportion" as constituting more than a de minimis percentage, but that may or may not represent a majority. The Agencies caution that creditors should not automatically apply the proportions set forth in the proxy methods when determining what constitutes "a substantial proportion" for purposes of making a direct comparison. Rather, creditors should determine what constitutes "a substantial proportion" based on their own circumstances.

Although the statute would permit various interpretations of "from or through that person," the Agencies in the proposal interpreted the phrase to refer to the person to whom the obligation is initially payable, *i.e.,* the original creditor. Under this interpretation, the original creditor would be responsible for determining whether consumers received materially less favorable material terms and providing risk-based pricing notices to such consumers, whether or not that person is the source of funding for the loan. The Agencies recognized that this interpretation would exclude from the scope of the proposed rules brokers and other intermediaries who do not themselves grant, extend, or provide credit to consumers, but who, based in whole or in part on a consumer report, shop credit applications to creditors that offer less favorable rates than other creditors.

Many commenters generally agreed that it is appropriate to require the original creditor to provide the risk-based pricing notice, rather than a broker or other intermediary. Some commenters, however, suggested that the Agencies require intermediaries to provide the notices in certain contexts, such as automobile or mortgage lending, instead of the original creditor. Others recommended that the Agencies allow either the original creditor or the intermediary to provide the notice.

The Agencies continue to believe that it is appropriate to require the original creditor, but not a broker or other intermediary, to provide the risk-based pricing notice. An intermediary's decision regarding where to shop a consumer's credit application generally occurs before the material terms are set. Thus, at the time the application is shopped to various creditors, it is too early in the process to perform the direct comparison of material terms required by the statute, even if a consumer report influenced the intermediary's decision regarding where to shop the consumer's credit application. Moreover, a rule requiring intermediaries to provide notices when they shop applications to certain creditors would frequently result in the consumer receiving multiple risk-based pricing notices in connection with a single extension of credit. The Agencies believe that, in general, a consumer would not benefit from receiving more than one risk-based pricing notice in connection with a single extension of credit and requiring multiple notices would increase compliance burdens and costs.

In certain situations, automobile dealers serve as the original creditor, but extend credit contingent on the ability to assign the loan to a third-party—a process known as "three-party financing." A typical three-party automobile financing transaction involves an automobile dealer, a consumer, and a third-party creditor or financing source. In these transactions, the dealer sells a vehicle to a consumer, the consumer signs a retail installment sale contract with the dealer, and the dealer assigns the contract to a third-party financing source that has notified the dealer that it will purchase the consumer's contract on specified terms. The third-party financing source then services the debt directly with the customer.

Some commenters asserted that in three-party financing transactions, automobile dealers are not engaged in risk-based pricing and therefore should not be subject to the requirements of the rules. These commenters stated that, although the dealer obtains a consumer's credit report in a three-party financing transaction, it does so in order to determine which third-party creditors to send the consumer's credit application, and not to set the terms of the retail installment sale contract. According to these commenters, the rate offered to the consumer by the automobile dealer is not based on the consumer's credit-worthiness, but rather on the combination of the "buy" rate—the wholesale rate at which the third-party creditor has indicated it will purchase the consumer's loan (which is determined, in part, by the third-party creditor's underwriting standards)—and the retail margin the dealer has been able to negotiate with the consumer. These commenters stated that in such circumstances, the automobile dealer is not engaged in risk-based pricing because it is the third-party creditor, not the dealer, who analyzes the consumer's credit-worthiness.

The Agencies disagree with the commenters' contention that three-party financing does not involve risk-based pricing by the automobile dealer. In the examples provided by the commenters, the automobile dealer uses a consumer report in connection with an application for credit to determine which third-party financing source it will attempt to assign the retail installment sale contract, and on what material terms. The material terms of the sales contract—specifically the annual percentage rate of the automobile loan—are based, in part, on the "buy" rate offered or expected to be offered by the third-party financing source. The automobile dealer's use of a consumer report to determine which third-party financing source is likely to purchase the retail installment sale contract and at what "buy rate," and to set the annual percentage rate based in part on the "buy rate," is conduct that fits squarely within the description of risk-based pricing in § ____.72(a) of the final rules. Thus, automobile dealers that are original creditors in a three-party financing transaction must provide risk-based pricing notices to consumers, in accordance with the rules.

Commenters also suggested that the Agencies allow the original creditor to provide a risk-based pricing notice to all consumers who apply for credit, including those who did not receive materially less favorable terms. However, the statute's general rule does not suggest that a notice should be provided to every consumer who applies for credit. Moreover, the risk-based pricing notice requirement was designed to be a substitute for adverse action notices when a consumer received less favorable credit terms based on his or her consumer report, rather than being denied credit.[7] The

[7] S. Rept. No. 108–166 (Oct. 17, 2003) at 20 provides: "Under current law, a consumer is only provided an adverse action notice when the consumer does not qualify for credit or rejects a counteroffer made by a creditor. * * * [D]espite the many benefits of risk-based pricing, it has made the

Agencies believe that providing a notice to all consumers who apply for credit would diminish the impact of notifying a subset of consumers that they received credit on less than the best terms based on information in a consumer report. Providing a notice to all consumers who apply for credit would also have the effect of allowing consumers to receive a free consumer report whenever they applied for credit. For the foregoing reasons, the Agencies conclude that a person that uses a consumer report to grant, extend, or otherwise provide credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers is required to provide a risk-based pricing notice only to those consumers who receive materially less favorable terms.

Under the final rules, a person is required to provide notice only to consumers to whom it "grants, extends, or otherwise provides credit." Except as discussed below, this generally refers to any consumer who applies and is approved for credit. A person does not grant, extend, or otherwise provide credit to a consumer who merely acts as a guarantor, co-signer, surety, or endorser for another consumer who applies and is approved for credit. As noted above, a guarantor, co-signer, surety, or endorser simply supports, and assumes liability for, credit granted, extended, or provided to a consumer, but does not itself receive a grant, extension, or other provision of credit.

Some commenters requested that the Agencies clarify whether a notice is required when a person grants credit, but a consumer does not accept the credit. As explained below in the discussion of § ____.73(c), a person is generally only required to provide a notice before consummation in the case of closed-end credit and before the first transaction in the case of open-end credit. A person may grant credit to a consumer, and the consumer may reject the offer of credit before a notice is required to be provided. Thus, some consumers who are granted credit may not receive a notice if they decline that credit before they are given the notice. In practice, however, some of these consumers may receive risk-based pricing notices if creditors provide notices at the time the decision to grant, extend, or provide credit is communicated to the consumer.[8]

Determining Which Consumers Must Receive a Notice

The Agencies proposed three methods that a person could use to determine which consumers must receive a risk-based pricing notice. The proposed direct comparison method would permit a person to apply the statutory test and determine on a case-by-case basis whether a consumer received from the person materially less favorable terms than the terms a substantial proportion of consumers received from that person. The Agencies also proposed two proxy methods: the credit score proxy method and the tiered pricing method. Under the credit score proxy method, a person could comply with the rules by (i) determining the credit score that represents the point at which approximately 40 percent of its consumers have higher credit scores and approximately 60 percent of its consumers have lower credit scores, and (ii) providing a risk-based pricing notice to each consumer with a credit score below that cutoff score. Under the tiered pricing method, a person that sets the material terms of credit granted, extended, or otherwise provided to a consumer by placing the consumer within one of a discrete number of pricing tiers could comply with the rules by providing a risk-based pricing notice to those consumers who are not placed in the person's best pricing tier or tiers. Consumers identified by either of these two alternative methods would be deemed to have been granted, extended, or otherwise provided credit on materially less favorable material terms.

Commenters supported the Agencies' decision to provide several methods for determining which consumers must receive a risk-based pricing notice. Many commenters believed the three methods were appropriate.

One commenter suggested an alternative method for determining which consumers must receive a risk-based pricing notice. This commenter suggested that the Agencies permit a method whereby creditors would determine the median annual percentage rate of consumers who received a particular type of product over a period of time and provide the notice to those receiving an annual percentage rate less favorable than that median. This suggestion was not adopted because it poses certain practical difficulties. Because rates fluctuate over time, sometimes quite dramatically, the median would have to be recalculated and recalibrated relatively frequently to retain an accurate measure of the median annual percentage rate. This would likely be impractical in many cases.

Direct Comparisons and Materially Less Favorable Material Terms

Under the proposed rule, creditors could determine, on a case-by-case basis, whether a consumer had received materially less favorable terms than the terms a substantial proportion of consumers have received from or through that creditor. The Agencies acknowledged that when a creditor undertakes direct, consumer-to-consumer comparisons, such comparisons necessarily must take into account the unique aspects of that creditor's business. Creditors would have to compare the transaction at issue with past transactions of a similar type and control for changes in interest rates and other market conditions over time. In addition, the Agencies recognized that a particular method of comparison that is sensible and feasible for one creditor may not be sensible and feasible for another creditor. Thus, the Agencies did not propose a quantitative standard or specific methodology for determining whether a consumer is receiving materially less favorable terms.

Nevertheless, the Agencies stated that the determination should be made in a reasonable manner and outlined their expectations for creditors who use this method. The creditor would first need to identify the appropriate subset of its current or past consumers to compare to any given consumer. The subset would need to be an adequate sample of consumers who have applied for a specific type of credit product. The creditor also would need to tailor its comparison to disregard any underwriting criteria that do not depend upon consumer report information. Such a comparison also would have to account for changes in the creditor's customer base, product offerings, or underwriting criteria over time. Similarly, adjustments would have to be made if the terms offered to consumers in the past are not presently offered to consumers. The Agencies would expect that creditors would provide risk-based pricing notices to some, but fewer than all, of the consumers to whom they extend credit.

Many commenters believed the direct comparison method would likely be impractical for most creditors. Some stated that the method was too subjective. Commenters nevertheless recommended that the option should be retained in the final rules. Industry

current adverse action notification construct obsolete in certain circumstances. This is problematic in as much as the adverse action notice is the primary tool the FCRA contains to ensure that mistakes in credit reports are discovered."

[8] However, where a consumer applies for specific credit terms and the creditor makes a counteroffer which the consumer does not accept, the creditor must provide an adverse action notice to the consumer. *See* 12 CFR 202.2(c)(1)(i).

commenters also requested clarification regarding the phrases "similar types of transactions" and "given class of products." Some of those commenters suggested that the Agencies provide reasonable flexibility to creditors when classifying a "given class of products." They also suggested that the Agencies provide a better definition of the term. One commenter suggested that the Agencies use either the term "similar types of transactions" or "given class of products," rather than both terms.

In the final rules, § ____.72(b) is generally adopted as proposed, with certain changes. The Agencies have substituted the term "specific type of credit product" for the proposed terms "similar types of transactions" and "given class of products" in the final rules in order to eliminate ambiguity in the terminology. The final rules define the term "specific type of credit product" to mean "one or more credit products with similar features that are designed for similar purposes." The final rules also provide examples of what constitutes a specific type of credit product, such as student loans, new auto loans, used auto loan, and others. The Agencies have also made non-substantive changes for clarity.

The Agencies recognize that different creditors' consideration of various factors when making direct comparisons may result in two creditors reaching opposite conclusions about the materiality of the same difference in annual percentage rates. For example, a credit card issuer considering these factors may conclude that a one-quarter percentage point difference in the annual percentage rate is not material, whereas a mortgage lender may conclude that a one-quarter percentage point difference in the annual percentage rate is material. In assessing the extent of the difference between two sets of material terms, a creditor should consider how much the consumer's cost of credit would increase as a result of receiving the less favorable material terms and whether that difference is likely to be important to a reasonable consumer.

Creditors may use one of the alternative methods, set forth below, if they determine the direct comparison method is not practical. The Agencies note that although a person may use the alternative methods, for purposes of consistency a person must use the same method to evaluate all consumers who are granted, extended, or otherwise provided a specific type of credit product from or through that person. For example, if a creditor uses the credit score proxy method to evaluate consumers who obtain credit to finance the purchase of a new automobile, the creditor must use that method for all such consumers for new automobile loans. On the other hand, the Agencies recognize that the feasibility of these methods may vary for different types of credit products, and creditors may use different methods for different types of credit products.

Credit Score Proxy Method

Proposed § ____.72(b)(1) set forth the credit score proxy method for determining which consumers should receive risk-based pricing notices. That subsection discussed the credit score proxy method; how to determine the cutoff score when using this method and how to recalculate that cutoff score; how to determine the cutoff score when using two or more credit scores; and how to determine a cutoff score when a credit score is not available. In the final rules, the credit score proxy method is adopted generally as proposed. However, the final rules contain some modifications from the proposal, as discussed below, made in response to comments received and the Agencies' own analysis.

General Rule

Proposed paragraph (b)(1)(i) set forth the credit score proxy method. Under this method, a person that sets the material terms of credit granted, extended, or otherwise provided to a consumer, based in whole or in part on a credit score, would comply with the rules by (i) determining the credit score that represents the point at which approximately 40 percent of its consumers have higher credit scores and approximately 60 percent of its consumers have lower credit scores, and (ii) providing a risk-based pricing notice to each consumer with a credit score below that cutoff score.[9] A creditor using the credit score proxy method would not be required to consider the actual credit terms offered to each consumer. Rather, that creditor would only have to compare the credit score of a given consumer with the pre-calculated cutoff score to determine whether a notice is required.

The credit score proxy method focused on a single variable: the consumer's credit score. A credit score obtained from an entity regularly engaged in the business of selling credit scores is based on information in a consumer report. For a creditor that obtains such a credit score, the credit score proxy method generally would eliminate the influence of variables that are not derived from information in a consumer report, such as the consumer's income, the term of the loan, or the amount of any down payment. In effect, this method would substitute a comparison of the credit scores of different consumers as a proxy for a comparison of the material terms offered to different consumers.

Commenters' suggestions regarding an appropriate cutoff point varied, but many suggested that the Agencies modify the proposed 40 percent/60 percent cutoff score point. Many commenters generally believed the cutoff score should be at a point where less than 60 percent of consumers receive the risk-based pricing notice. For example, some commenters believed the point at which a cutoff score is set should be where 50 percent of consumers have higher credit scores and 50 percent have lower credit scores, such that only those 50 percent of consumers with lower credit scores receive the risk-based pricing notice. The Agencies continue to believe that setting the standard for the cutoff score at a point that requires notices to be provided to the approximately 60 percent of a creditor's consumers who have the lowest credit scores is appropriate and reasonable. For example, one major credit score developer has published a national distribution of its scores, which indicates that approximately 40 percent of consumers receive scores that would likely enable them to qualify for the most favorable terms available.[10] Thus, the final rules retain as the cutoff score the point at which approximately 40 percent of a creditor's consumers have higher credit scores and approximately 60 percent of its consumers have lower credit scores.

One commenter requested greater flexibility to determine the cutoff score where the creditor could demonstrate that the 40 percent/60 percent cutoff score did not reflect the creditor's own lending experience. In the final rules, a new § ____.72(b)(1)(ii) is adopted to address such situations and an example is added under § ____.72(b)(1)(v)(B) to demonstrate this alternative.

In the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, § ____.72(b)(1)(ii) of the final rules permits a person to set its cutoff score

[9] The proposed rules did not require precision in the calculation of the 40 percent/60 percent cutoff point. Depending on the available data set and the practices of the creditor, the cutoff point may be approximate.

[10] *See* Credit Basics: National Distribution of FICO Scores. Retrieved June 3, 2009. *http://www.myfico.com/CreditEducation/CreditScores.aspx* (showing that 40 percent of consumers have FICO scores of 750 or higher).

at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section. A creditor may determine the consumers who historically have been granted, extended, or provided credit on certain terms by using either the sampling approach or the secondary source approach in § ____.72(b)(1)(iii), as discussed below. For example, a credit card issuer may take a representative sample of consumers to whom it granted, extended, or provided credit over the preceding six months and determine that approximately 80 percent of those consumers received credit at its lowest annual percentage rate, and 20 percent received credit at a higher annual percentage rate. Approximately 80 percent of the sampled consumers have a credit score at or above 750 (on a scale of 350 to 850), and 20 percent have a credit score below 750. Accordingly, the card issuer selects 750 as its cutoff score. A creditor that acquires a credit portfolio as a result of a merger or acquisition also may apply this alternative approach using information it obtained from the party from which it acquired the portfolio regarding the percentage of consumers who historically received the most favorable material terms in that portfolio, as discussed below. A creditor is permitted, but not required, to use this alternative approach to the credit score proxy method. A creditor may always use the 40 percent/60 percent approach to determining its cutoff score, although, as noted above, the creditor must use the same approach to evaluate all consumers who are granted, extended, or otherwise provided a specific type of credit product from or through that person.

This alternative approach may reduce the number of risk-based pricing notices provided to consumers who are granted, extended, or provided credit on the most favorable material terms as compared with strictly applying the 40 percent/60 percent approach. In the example provided above, for instance, the creditor may provide notices only to the 20 percent of consumers who actually received credit on material terms other than the most favorable terms. If the same creditor had used the credit score proxy method, the creditor would have to provide notices to approximately 60 percent of consumers, many of whom likely would have received credit on the most favorable terms. The Agencies believe it is appropriate to minimize, where possible, the number of consumers who receive risk-based pricing notices and also receive the creditor's most favorable terms. However, to avoid undermining the basic purpose of the statute, the alternative approach does not permit risk-based pricing notices to be provided to more than approximately 60 percent of consumers. Thus, if credit has been granted, extended, or provided on the most favorable material terms to less than 40 percent of a creditor's consumers, a creditor may not use the alternative approach.

Finally, one commenter requested that the Agencies clarify that the appropriate population to consider when setting the cutoff score is "accepted applicants." The language in the final rules is revised to clarify the appropriate population to consider when setting the cutoff score in a manner that more closely tracks the language of the statute. Thus, the appropriate population to consider is consumers to whom the creditor grants, extends, or otherwise provides credit, regardless of whether those consumers decide to accept and use the credit.

Determining the Cutoff Score

Proposed paragraph (b)(1)(ii) described two methods for determining the cutoff score. In general, creditors would be required to use a sampling approach. Under this approach, a person that currently uses risk-based pricing with respect to the credit products it offers would calculate the cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted, extended, or otherwise provided credit. Where a creditor's customer base or underwriting standards varied significantly among different classes of credit products, such as mortgages, credit cards, automobile loans, and student loans, the proposal would have required creditors to calculate separate cutoff scores for different classes of products based on representative samples of consumers offered that type of credit.

The Agencies recognized that the sampling approach would not be feasible for some creditors, such as new entrants to the credit business, entities that introduce new credit products, or entities that have just started to use risk-based pricing and have not yet developed a representative sample of consumers. Thus, the Agencies proposed to allow such creditors initially to determine the appropriate cutoff score based on information from appropriate market research or relevant third-party sources for similar products, such as information from companies that develop credit scores. In addition, the Agencies proposed to permit a creditor that acquired a credit portfolio as a result of a merger or acquisition to determine the cutoff score based on information it received from the merged or acquired party.

The Agencies received few comments regarding these provisions, and they are generally adopted as proposed in renumbered paragraphs (b)(1)(iii)(A) and (b)(1)(iii)(B) in the final rules, with minor changes. An acquisition of a portfolio could be the result of a person either merging with or acquiring a party or acquiring a portfolio, but not the previous owner of the portfolio. Therefore, the language stating that a person may determine its cutoff score based on information from a "merged or acquired party" has been revised in the final rules to state that the cutoff score may be based on information from a "party which it acquired, with which it merged, or from which it acquired the portfolio."

The Agencies note that all of these approaches to determining the cutoff score apply to the 40 percent/60 percent cutoff score proxy method. A person using the alternative to the 40/60 percent cutoff score proxy method, however, may only make its determination of the cutoff score either using the sampling approach or, if a person acquires a credit portfolio as a result of a merger or acquisition, by basing its determination on information from the party which it acquired, with which it merged, or from which it acquired the portfolio.

Recalculation of Cutoff Scores

Proposed paragraph (b)(1)(ii)(C) addressed the recalculation of cutoff scores. As explained in the proposal, the Agencies understand that the distribution of credit scores for a creditor's customer base may shift over time. It is important to recalculate the cutoff score from time to time, but the time period between recalculations should be long enough so that the rule does not require continual sampling. On the other hand, the Agencies also indicated in the proposal that, to obtain a representative sample, the creditor must use an appropriate sampling period in order to minimize the risk of introducing distortions, such as seasonal variations, into the sampling. Therefore, the Agencies proposed to require persons using the sampling approach to recalculate their cutoff scores at least every two years.

As proposed, a person who used secondary sources to determine its cutoff score, however, generally would

be required to recalculate its cutoff score based on a representative sample of its own consumers within one year after it began using a cutoff score derived from market research, third-party data, or information from a merged or acquired party. If, however, a person using the secondary source approach did not grant, extend, or otherwise provide credit to a sufficient number of new consumers during that one-year period, and therefore lacked sufficient data with which to recalculate its cutoff score after one year, the proposal would have permitted the person to continue to use a cutoff score derived from secondary sources until it granted, extended, or otherwise provided credit to a sufficient number of new consumers and was able to collect sufficient data on which to base the recalculation.

Many commenters believed that re-assessing the cutoff score every two years, or every year when a cutoff score is derived from market research, third-party data, or information from a merged or acquired party, was appropriate. Commenters generally agreed with allowing the use of secondary sources to identify the cutoff score in the circumstances proposed, and some suggested that the Agencies allow creditors to use such secondary sources in all circumstances.

The general two-year reassessment requirement for cutoff scores is retained in the final rules. However, the final rules have been revised to reflect the language change discussed above regarding certain secondary sources, which provides that a person may determine its cutoff score based on information from a "party which it acquired, with which it merged, or from which it acquired a portfolio." The final rules also are revised with regard to situations where a person is permitted to use a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired a portfolio. In those situations, if a person does not grant, extend, or provide credit to new consumers during the one-year period such that the person lacks sufficient data with which to recalculate a cutoff score, the person may continue to use market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired a portfolio until it obtains sufficient data. However, the Agencies want to ensure that a creditor engaging in risk-based pricing for new customers does not continue to use a cutoff score based on market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired a portfolio for an indefinite period of time. Therefore, renumbered paragraph (b)(1)(iii)(C) of the final rules provides that if the person has granted, extended, or provided credit to some new consumers within two years, the person must recalculate the cutoff score using the sampling approach described in paragraph (b)(1)(iii)(A).

Use of Two or More Credit Scores

Proposed paragraph (b)(1)(ii)(D) addressed the situation where a creditor uses two or more credit scores in setting the material terms of credit. The proposal stated that if a person using the credit score proxy method generally used two or more scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, the person must determine the appropriate cutoff score based on how the person evaluates the multiple credit scores when making credit decisions. For example, if a creditor generally purchased two scores for each consumer and used the average of those two scores when setting the material terms of credit, the proposal would have required the creditor to use the average of its consumers' scores when calculating its cutoff score. In circumstances where creditors did not consistently use the same method for evaluating multiple scores, however, the proposed rules would have required the creditor to use a reasonable means for determining the appropriate cutoff score and provided a safe harbor for a creditor that used either a method that the creditor regularly used or the average credit score for each consumer as the means of calculating the cutoff score.

The Agencies received few comments regarding this paragraph, and it is generally adopted as proposed as renumbered paragraph (b)(1)(iii)(D), with minor changes.

Credit Score Not Available

For a consumer that does not have a credit score, proposed paragraph (b)(1)(iii) provided that the person using the credit score proxy method must assume that a consumer for whom a credit score is not available receives credit on material terms that are materially less favorable than the most favorable credit terms offered to a substantial proportion of consumers, and provide a risk-based pricing notice to that consumer.

A few commenters objected to the Agencies' assumption that consumers without credit scores are likely to receive less favorable terms and should receive a risk-based pricing notice, while one commenter believed the assumption was correct. Another commenter believed the Agencies should make an exception to the default rule in instances where the presumption is incorrect. The Agencies continue to believe the assumption regarding consumers without credit scores is appropriate. Initiatives undertaken to promote the use of non-traditional data, such as utility, telecommunications, and rental housing data, in consumer reports and credit scoring support the Agencies' belief that consumers who lack credit scores may have greater difficulty obtaining credit, or obtaining credit on the most favorable terms available. Although there may be isolated cases where a consumer without a credit score obtains the most favorable terms, the Agencies do not believe that an exception is warranted in such cases because the notice would provide information to the consumer that may be relevant to the consumer for future transactions, where the most favorable terms may not be offered if the consumer has no credit score. Thus, the substance of this provision is adopted as proposed in renumbered paragraph (b)(1)(iv) of the final rules, with a change in title and other non-substantive revisions.

The proposal included examples of how a credit card issuer and an auto lender could apply the credit score proxy method. The Agencies have retained these examples in the final rules, and added another example of a credit card issuer to illustrate the alternative approach discussed above.

Tiered Pricing Method

Proposed paragraph (b)(2) set forth the tiered pricing method for determining which consumers should receive a risk-based pricing notice. The general rule in proposed paragraph (b)(2)(i) provided that a person that sets the material terms of credit granted, extended, or otherwise provided to a consumer by placing the consumer within one of a discrete number of pricing tiers, based in whole or in part on a consumer report, may use the tiered pricing method. Pricing tiers could be reflected in a rate sheet that lists different rates available to the consumer depending upon information in a consumer report, such as the consumer's credit score, among other factors. For example, if a creditor offers automobile loans for which the annual percentage rate will be set at seven, nine, or eleven percent based in whole or in part on information from a consumer report, the creditor would only need to consider which annual percentage rate pricing tier applies to a consumer in order to determine whether the consumer should receive a risk-

based pricing notice, even if factors other than the consumer report influence the annual percentage rate received by the consumer.

Proposed paragraph (b)(2)(ii) described the application of the tiered pricing method when a person using this method has four or fewer pricing tiers. Proposed paragraph (b)(2)(iii) described the application of the tiered pricing method when a person using this method has five or more tiers. Each paragraph provided an example to illustrate the application of the tiered pricing method.

Some commenters suggested that the Agencies change the number of pricing tiers for which a notice must be sent. Those commenters generally believed that consumers falling into a greater number of the top, or lower-priced, tiers should not receive a risk-based pricing notice. Several commenters agreed with the Agencies' proposal to focus only on the number and percentage of tiers, rather than the number or percentage of consumers who are assigned to each tier. One commenter, however, suggested that the Agencies should allow creditors to consider the percentage of accepted consumers assigned to each tier and adjust the numbers of tiers receiving a notice accordingly.

In the proposal, the Agencies considered the possibility that creditors may attempt to circumvent the tiered pricing method by establishing an additional tier or tiers for which no consumers will likely qualify. The Agencies stated that a creditor using the tiered pricing method would not be permitted to consider tiers for which no consumers have qualified nor are reasonably expected to qualify, and requested comment on whether the proposed rules should be modified to prevent circumvention. Commenters generally did not believe creditors would seek to circumvent the tiered pricing method by establishing an additional tier or tiers for which no consumers will likely qualify.

Section ____.72(b)(2), the tiered pricing method, is generally adopted as proposed in the final rules, with some non-substantive changes. Under the final rules, where there are four or fewer pricing tiers, a person must provide a risk-based pricing notice to each consumer who does not qualify for the top, or lowest-priced, tier. Where there are five or more pricing tiers, a person using the tiered pricing method must send a risk-based pricing notice to each consumer who does not qualify for the top two (lowest-priced) tiers, plus any other tier that represents at least the top 30 percent but no more than the top 40 percent of the total number of tiers. As noted in the proposal, creditors may use different pricing tiers for different types of credit products, such as automobile loans and boat loans. If a creditor uses different pricing tiers for different products, a separate analysis is required for each product for which different tiers apply. If the same tiers apply regardless of the product, then a creditor need not distinguish between those products.

Credit Cards

Proposed paragraph (c) set forth special provisions applicable to credit card issuers. Proposed paragraph (c)(1) generally would have required a credit card issuer to provide a risk-based pricing notice to a consumer if: (i) the consumer applied for a credit card in connection with an application program, such as a direct-mail or take-one offer, or a pre-screened solicitation, for which more than a single possible purchase annual percentage rate may apply; and (ii) based in whole or in part on that consumer's consumer report, the card issuer provided a credit card to the consumer with a purchase annual percentage rate that is higher than the lowest purchase annual percentage rate available under that application or solicitation.

Proposed paragraph (c)(2) described those circumstances in which a credit card issuer would not have been required to provide a risk-based pricing notice. Under this provision, a credit card issuer would not be required to provide a risk-based pricing notice to a consumer if the consumer applied for a credit card for which the creditor provides a single purchase annual percentage rate (excluding temporary and penalty rates). In addition, a credit card issuer would not be required to provide a risk-based pricing notice to a consumer if the consumer is offered the lowest purchase annual percentage rate available under the credit card offer for which the consumer applied, even if a lower rate is available from that issuer under a different credit card offer. Proposed paragraph (c)(3) set forth an example of the application of the risk-based pricing rules to a credit card solicitation containing multiple possible purchase annual percentage rates.

The proposed rule was based on the assumption that when a credit card issuer offers a range of rates within a single solicitation or offer, the consumer applies for the best rate available under that offer. Some industry commenters challenged this assumption, stating that consumers are applying for the best rate for which they qualify within the range of rates in the offer of credit. However, if the Agencies were to adopt this suggestion, then no consumers who apply for credit cards would receive risk-based pricing notices. The Agencies do not believe this would be consistent with the purpose of the statute. Accordingly, the final rules are based on the assumption that a consumer applies for the best rate available under a credit card offer.

Some commenters requested that the Agencies clarify whether all of the risk-based pricing and exception notice options, including the credit score proxy and tiered pricing methods, would be available to credit card issuers. The final rules have been revised to clarify that credit card issuers may comply with the rules by using either the special method for credit card issuers or any of the other methods permitted by the rules. When using the special method for credit cards, a card issuer determines which consumers must receive a notice on an offer-by-offer basis. However, if a credit card issuer opts to use the credit score proxy method or the tiered pricing method, it must determine which consumers must receive a notice through an analysis of the issuer's entire portfolio, rather than on an offer-by-offer basis.

The Agencies have also revised the language that states that a credit card issuer using this option must make its determination regarding whether a risk-based pricing notice is required to be provided to a consumer based solely on a purchase annual percentage rate. There may be instances where an issuer offers a credit card that does not have a purchase annual percentage rate, such as credit cards that may only be used for cash advances or balance transfers. To clarify that credit card issuers may also apply these special provisions to credit cards that do not have a purchase annual percentage rate, the final rules refer to the "annual percentage rate referenced in § ____.71(n)(1)(ii)" rather than the "purchase annual percentage rate." The annual percentage rate to be applied in this provision, therefore, is either the purchase annual percentage rate or, in the case of a credit card that has no purchase annual percentage rate, the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers.

The special provisions applicable to credit cards are otherwise adopted as proposed in paragraph (c) of the final rules, with some non-substantive changes.

Account Review

Proposed paragraph (d) described how the risk-based pricing rules apply

to the account review process. Proposed paragraph (d)(1) provided that a person must provide a risk-based pricing notice to a consumer if it: (i) Uses a consumer report in connection with a review of credit that has been extended to the consumer; and (ii) based in whole or in part on that consumer report, increases the annual percentage rate. Proposed paragraph (d)(2) illustrated this provision's applicability to credit card accounts.

Industry commenters objected to this requirement, stating that account review is not covered by the statute. They also argued that the provision was not needed because adverse action notices were already provided when annual percentage rates are increased during account review.

Paragraph (d) of the final rules is adopted as proposed. The legislative history indicates that the statute was meant to apply to account reviews, as well as to new accounts.[11] Moreover, the Agencies acknowledge that there are circumstances where an adverse action notice is provided to the consumer in connection with an account review that results in a rate increase. In these circumstances, the exception for adverse action notices, discussed below, would apply and the creditor would not be required to provide the consumer with a risk-based pricing account review notice. However, if an adverse action notice is not provided to a consumer, a risk-based pricing account review notice must be provided to the consumer.

Section ____.73 Content, Form, and Timing of Risk-Based Pricing Notices

Proposed § ____.73 set forth the content, form, and timing requirements for risk-based pricing notices that would apply whether the creditor made the direct, consumer-to-consumer comparisons described in the general rule or used one of the proxy methods.

Content

Proposed paragraph (a)(1) stated the general content requirements for risk-based pricing notices (hereafter "general risk-based pricing notice"). Proposed paragraph (a)(2) set forth the content requirements for any risk-based pricing notice required to be given as a result of the use of a consumer report in an account review (hereafter "account review notice"). The proposal provided that the general risk-based pricing notice must include a statement that the person sending the notice has set the terms of credit offered, such as the annual percentage rate, based on information from a consumer report and a statement that those terms may be less favorable than the terms offered to consumers with better credit histories. Similarly, the proposal provided that the account review notice must include a statement that the person sending the notice has conducted a review of the account based in whole or in part on information from a consumer report and a statement that as a result of that review the annual percentage rate on the account has been increased. In connection with both the general risk-based pricing notice and the account review notice, the proposal also provided that the notices must: (i) State that a consumer report includes information about a consumer's credit history and the type of information included in that credit history; (ii) state that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report; (iii) state the identity of each consumer reporting agency that furnished a consumer report used in the credit decision or account review; (iv) state that federal law gives the consumer a right to obtain a free copy of his or her consumer report from that consumer reporting agency for 60 days after receipt of the notice; (v) inform the consumer how to obtain such a consumer report; and (vi) direct the consumer to the web sites of the Board and the Commission to obtain more information about consumer reports. Paragraphs (a)(1) and (a)(2) are adopted as proposed in the final rules, with minor revisions for clarity.

The proposed rules did not require the notice to state that the terms offered to the consumer "are" or "will be" less favorable than the terms offered to other consumers. The Agencies were concerned that such a statement would not be accurate in certain cases if the creditor could not precisely distinguish consumers who received the most favorable terms from those who did not. For example, if a creditor applies the credit score proxy method, some consumers may receive a risk-based pricing notice even if they receive the most favorable terms available from that creditor. This may occur, for instance, if factors other than the consumer report, such as income or down payment amount, influenced the pricing decision.

Proposed paragraph (a)(1)(iii) provided that the general risk-based pricing notice must state that the terms offered to the consumer may be less favorable than the terms offered to consumers with better credit histories. This statement related the general information about credit history and credit pricing contained in the notice to the specific consumer. Absent this statement, the Agencies were concerned that some consumers may assume that the general information had no relevance to them. This statement was designed to carry out the statutory purpose of prompting consumers to check their consumer reports for any errors.

Some commenters urged the Agencies to delete the statement in proposed paragraph (a)(1)(iii) because they believed it was negative, potentially confusing to customers, and potentially misleading. For example, one commenter believed that the statement erroneously implied that other creditors would offer better terms. These commenters suggested replacing this language with neutral language that encouraged consumers to shop for better credit terms. Other commenters, however, stated that the language was accurate and should be retained. In the final rules, the Agencies have retained the phrase "terms offered to you may be less favorable" because they continue to believe that it puts consumers on notice that they should check their consumer reports for errors and accurately depicts the reason why consumers are receiving the notice.

Proposed paragraphs (a)(1)(vi) and (a)(2)(vi) implemented the statutory requirement in paragraph 615(h)(5)(C) of the FCRA that the notices include a statement informing the consumer that the consumer may obtain a copy of a consumer report without charge from the consumer reporting agency identified in the risk-based pricing notice. These paragraphs stated that the notice must include a statement that federal law gives the consumer the right to obtain a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice. Although section 615(h) of the FCRA does not prescribe any time period within which the consumer may obtain a free consumer report, the 60-day time period was proposed for consistency with the time limit contained in the adverse action notice provisions in section 612(b) of the FCRA. Under section 612(b), any right to a free consumer report is valid for 60 days

[11] *See* S. Rep. No. 108–166, at 20–21 (Oct. 17, 2003) ("This section is intended to address the frequently occurring situation where creditors review consumers' credit reports and make risk-based adjustments to the credit terms they offer the consumer * * * The Committee believes that consumers should receive these notices when information in a credit report leads to a change in terms that significantly impacts the cost of the credit offer.")

after the consumer receives the notice that gives rise to that right. The Agencies believed that incorporating this 60-day time period into the rules was appropriate in light of their reading of the statute as giving consumers who receive a risk-based pricing notice the right to a free consumer report separate from the free annual report. For these reasons and those described below, these provisions are adopted as proposed.

Some industry commenters urged the Agencies to read the statute as not giving the consumer the right to a free consumer report upon receipt of a risk-based pricing notice, arguing that section 311 of the FACT Act did not create this right. These industry representatives stated that section 615(h) of the FCRA does not give the consumer a right to a separate free consumer report, but that the reference in that section to a free consumer report refers to the free annual consumer report described in section 612(a) of the FCRA. Consumer groups, on the other hand, stated that section 615(h) gives a consumer a right to a separate free consumer report upon receipt of a risk-based pricing notice. Several commenters noted that if the Agencies believe that receipt of a risk based pricing notice gives the consumer the right to a free consumer report, then the 60-day time period in which the consumer may obtain the report is appropriate.

The Agencies read the statute as creating the right to a free consumer report upon receipt of a risk-based pricing notice and believe 60 days is an appropriate time period in which the consumer can request the report. Section 612(b) of the FCRA provides for free consumer reports to consumers who have received a notification pursuant to "section 615" of the FCRA. Section 615 of the FCRA includes both the adverse action notice requirement (section 615(a)), the risk-based pricing notice provision (section 615(h)), and certain other requirements. Accordingly, the Agencies read the reference to the free consumer report in section 612(b) to apply equally when notices are given under section 615(a) and section 615(h)(5)(C), *i.e.,* to require in both of those cases a free report that is separate from the free annual report.

One commenter requested that the Agencies add a provision requiring a disclosure of each consumer's name and the date the notice was provided in each form. The Agencies are not requiring this information to be included in the notices. However, as discussed below, the Agencies have included among acceptable changes to the model forms "including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains." Therefore, a creditor may elect to add this information to its notice.

Several commenters requested that the Agencies add other disclosures to the notices. Some stated that the notice should contain a more complete statement regarding why the consumer is receiving the notice. For example, one commenter suggested the notice state that the notice is required by Federal law. Several commenters suggested that the notice should state that the consumer reporting agencies were not involved in the decision to extend credit. Some commenters asked the Agencies to add a statement to the notice to clarify that the terms of credit may have been established based on creditworthiness criteria other than a credit score, such as income or loan-to-value ratio. The Agencies do not believe that these suggested additions are critical pieces of information for the consumer. These statements also would add to the length of the notice and potentially detract from more important pieces of information conveyed in the notice. Therefore, these suggestions have not been adopted.

Form

Proposed paragraph (b) set forth the format requirements for risk-based pricing notices. Proposed paragraph (b)(1)(i) provided that risk-based pricing notices must be clear and conspicuous. Proposed paragraph (b)(1)(ii) specified that persons subject to the rule would be permitted to make the disclosures in writing, orally, or electronically.

Proposed paragraph (b)(2) referenced the model forms of the risk-based pricing notices required by §§ ____.72(a) and (c), and by § ____.72(d), which were contained in Appendices H–1 and H–2 of the Board's proposed rule and Appendices B–1 and B–2 of the Commission's proposed rule. Appropriate use of these model forms would be deemed to be a safe harbor for compliance with the risk-based pricing notice requirements. Use of these model forms would be optional.

The Agencies received relatively few comments regarding the format of the risk-based pricing notices. Most of the comments received were requests for clarification regarding how much the notices could deviate from the model forms while still retaining the protection of the safe harbor. The Agencies have adopted some of the suggestions made by commenters, which are discussed below in the Section-by-Section Analysis regarding the model forms.

Paragraph (b) is adopted as proposed.

Timing

Proposed paragraph (c) set forth the timing requirements for providing risk-based pricing notices in connection with extensions of closed-end and open-end credit, as well as credit account reviews. For closed-end transactions, the proposal provided that the notice must be provided to the consumer before consummation of the transaction, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit is communicated to the consumer by the person required to give the notice. For open-end credit, the proposal provided that the notice must be provided to the consumer before the first transaction is made under the plan, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of credit is communicated to the consumer. Finally, for account reviews, the proposal provided that the notice must be provided to the consumer at the time the decision to increase the annual percentage rate based on a consumer report is communicated to the consumer by the person required to give the notice, or if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change, no later than five days after the effective date of the change in the annual percentage rate.

The timing rules in paragraph (c) are generally adopted as proposed, with several minor changes for clarification. In the case of the provision in paragraph (c)(iii) addressing account reviews where no notice of an increase in annual percentage rate is provided, the final rules add the phrase "to the extent permitted by law" to clarify that the timing provision applies only when an increase in the annual percentage rate without prior notice is legally permissible.[12] In addition, as discussed below, two new timing provisions have been added to the final rules to address certain auto lending transactions and

[12] The Agencies recognize that the Credit Card Reform Act of 2009, and the Board's implementing regulations, require notice of an annual percentage rate increase prior to raising the rate. *See* 74 FR 36,077 (July 22, 2009) (interim final rule under Regulation Z). However, there may be products other than credit cards that permit an increase in annual percentage rate without notice. Thus, the Agencies are retaining this provision in the final rules, with the addition of the qualifier "to the extent provided by law," to account for potential situations or financial products, if any, that would permit persons to increase annual percentage rate during an account review with no notice.

contemporaneous purchase credit (instant credit).

General Comments

Two commenters believed the proposed timing requirements were appropriate. Other commenters, however, stated that because the statute allows for the notices to be given at the time of application, the Agencies should require a general educational notice at application rather than a personalized notice. Commenters also argued that this notice should contain a reminder to obtain a free annual consumer report, rather than create a right to a free consumer report in addition to the free annual consumer reports.

The Agencies considered whether to allow the risk-based pricing notice to be provided at the time of application, but have rejected that approach. Instead, the Agencies have concluded that the notice generally should be provided no earlier than the time when the decision to approve the credit is communicated to the consumer. The Agencies believe that requiring the notice to be provided later than the time of application gives effect to the statute's general rule by ensuring that risk-based pricing notices are provided only to those consumers who may receive materially less favorable material terms. The Agencies believe that a notice at the time of application is less likely to be noticed, read, and acted upon by consumers than a more targeted, personalized notice. The Agencies also believe that permitting the notice to be provided at the time of application would increase significantly the number of risk-based pricing notices provided to consumers compared to the number of notices that would be provided later in the credit process. The final rules are based on the Agencies' reading of section 615(h) as giving consumers a right to a separate free consumer report upon receipt of a risk-based pricing notice. Therefore, permitting application notices could greatly expand the number of free reports to which consumers may be entitled. This could be costly for all parties, and may result in costs being passed on to consumers.

Some commenters suggested that when a notice is provided upon account review, the Agencies should require that the notice be provided with the next periodic statement or at another later date. The Agencies continue to believe that providing the notice no later than five days after the effective date of the change in annual percentage rate is appropriate, because the effectiveness of the notice may be diminished if notice is not provided promptly after the decision to increase the rate is made. Accordingly, the timing requirements for the account review notice generally have been adopted as proposed, with the addition of the language "(to the extent permitted by law)," as discussed above.

Automobile Lending

Many commenters objected to the Agencies' timing requirements as applied to indirect automobile lending. These commenters stated that fulfilling the notice requirement at or prior to consummation would be impossible in instances where the creditor does not know that the dealer has placed a loan with the creditor until after the loan documents have been signed by the consumer. The commenters believed that the creditor should be permitted to send a notice after it receives necessary information or within a reasonable time after consummation, such as within 30 days or when the welcome letter is sent to the consumer. Alternatively, some commenters argued that the dealer arranging the loan should have the compliance responsibility.

In the final rules, the Agencies retained the general timing requirement for automobile lending. In some cases, the creditor directly communicates with the consumer about the transaction before consummation. For example, a consumer may obtain credit for an automobile purchase at a credit union or other financial institution prior to purchasing the vehicle. In these circumstances, the creditor should be able to provide a notice described in §§ ____.72(a), ____.74(e), or ____.74(f) to the consumer within the time periods set forth in paragraph (c)(1)(i) of this section, § ____.74(e)(3), or § ____.74(f)(4), as applicable.

The Agencies recognize, however, that the nature of indirect automobile lending may prevent creditors themselves from fulfilling their compliance responsibilities prior to consummation without relying upon the dealer or other party as an agent. In many cases, the creditor may approve and set the terms of credit for a particular consumer without any direct interaction with that consumer. In other circumstances, the creditor may not receive a completed application until after a consumer has already purchased the automobile. For example, a consumer may purchase a car from a dealer on a Saturday and sign the loan documents. The creditor, however, may not receive or have a chance to review the loan documents provided by the dealer until the creditor resumes business hours on Monday. The creditor would not have the opportunity to communicate with the consumer before it accepts or refuses the loan.

To account for such circumstances, the Agencies in the final rules have provided that when a person to whom a credit obligation is initially payable grants, extends, or otherwise provides credit to a consumer for the purpose of financing the purchase of an automobile from an auto dealer or other party that is not affiliated with the person, any requirement to provide a risk-based pricing notice pursuant to this subpart is satisfied if the person arranges to have the auto dealer or other party provide a notice described in §§ ____.72(a), ____.74(e), or ____.74(f) to the consumer on its behalf within the time periods set forth in paragraph (c)(1)(i) of this section, § ____.74(e)(3), or § ____.74(f)(4), as applicable, and maintains reasonable policies and procedures to verify that the auto dealer or other party provides such notice to the consumer within the applicable time periods.

The Agencies recognize that the auto dealer may not use the same credit score that the creditor uses. For example, the dealer may obtain a credit score from one consumer reporting agency, while the creditor obtains a credit score from a different consumer reporting agency. Because the auto dealer may not know which credit score the creditor will use, it is not feasible in these circumstances to require the dealer to disclose the same credit score that the creditor uses. Thus, the final rules provide that if the person to whom the credit obligation is initially payable arranges to have the auto dealer or other party provide a notice described in § ____.74(e), the person's obligation is satisfied if the consumer receives a notice containing a credit score obtained by the dealer or other party, even if a different credit score is obtained and used by the person on whose behalf the notice is provided. Moreover, because a dealer may provide a credit score on behalf of a creditor, the dealer, as agent of the creditor, may provide copies of any notice that it provides to a consumer, including a credit score disclosure, to the creditor without becoming a consumer reporting agency.

Contemporaneous Purchase Credit (Instant Credit)

Many commenters objected to the Agencies' proposed timing requirements as applied in the context of contemporaneous purchase credit (often referred to as "instant credit"). These commenters stated that providing a notice after approval but prior to the first transaction would be infeasible and costly and would substantially delay

transactions. Commenters argued that it would be difficult for employees in the retail context to provide risk-based pricing notices because retail employees are not trained to provide disclosures. In addition, cash registers are not capable of printing full-sized disclosures. Commenters also noted that providing notices at the point of sale could be embarrassing to consumers and would raise concerns about the disclosure of sensitive information. Some commenters suggested that the Agencies allow the notice to be provided within a reasonable time after the first transaction, such as when a credit card is mailed to a consumer or within 30 days after consummation. Other commenters suggested that the Agencies permit split notices, where the static portions of the notices are delivered at the time of application and the dynamic portions of the notice are delivered at a later time.

Although the Agencies generally believe that the notice is likely to have the greatest utility if it is provided early enough in a transaction to encourage a consumer to check his or her consumer report for inaccuracies, the Agencies also agree with many of the concerns raised by commenters. Accordingly, the Agencies have added a special timing provision in the final rules for certain instant credit scenarios. Under the final rules, when credit under an open-end credit plan is granted, extended, or provided to a consumer in person or by telephone for the purpose of financing the contemporaneous purchase of goods or services, any risk-based pricing notice required to be provided pursuant to this subpart (or the disclosures permitted under § ____.74(e) or (f)) may be provided at the earlier of: the time of the first mailing by the person to the consumer after the decision is made to approve the grant, extension, or other provision of open-end credit, such as in a mailing containing the account agreement or a credit card; or within 30 days after the decision to approve the grant, extension, or other provision of credit. This special provision applies only to contemporaneous purchase credit transactions by telephone or in person. The Agencies do not believe that the same operational and privacy concerns apply to online credit transactions. Therefore, in the final rules, the general timing requirements apply when providing risk-based pricing notices for online contemporaneous purchase credit transactions.

Section ____.74 Exceptions

Proposed § ____.74 set forth a number of exceptions to the general requirements regarding risk-based pricing notices. Each exception is discussed below.

Application for Specific Terms Exception

Proposed paragraph (a) provided that notice is not required if the consumer applied for specific material terms and was granted those terms. This exception does not apply if the specific material terms were specified by the person after the consumer applied for or requested credit and after the person obtained a consumer report. This exception implemented the statutory exception in FCRA section 615(h)(3)(A). The proposed exception clarified that "specific material terms" means a single material term or set of material terms, such as a single annual percentage rate, and not a range of alternatives, such as an offer that gives multiple annual percentage rates or a range of annual percentage rates. The example in proposed paragraph (a)(ii) explained that if a consumer received a firm offer of credit from a credit card issuer with a single rate, based in whole or in part on a consumer report, a risk-based pricing notice would not be required if the consumer applied for and received a credit card with that advertised rate. This would be the result because the creditor set the material terms of the offer before, not after, the consumer applied for or requested the credit.

Commenters believed that the proposed exception was appropriate. In the final rules, the application for specific terms exception in § ____.74(a) is adopted as proposed, with some non-substantive changes for clarity.

Adverse Action Exception

Proposed paragraph (b) provided that a risk-based pricing notice is not required if a creditor has provided or will provide an adverse action notice to the consumer under FCRA section 615(a) in connection with the transaction. This exception implemented the statutory exception in FCRA section 615(h)(3)(B). The proposed exception applied to any risk-based pricing notices otherwise required under the general rule, the rule applicable to credit card issuers, or the rule applicable upon account review, so long as an adverse action notice has been or will be provided to the consumer pursuant to section 615(a) of the FCRA.

Commenters believed that the proposed exception was appropriate. In the final rules, the adverse action exception in § ____.74(b) is adopted as proposed, with some non-substantive changes for clarity.

Prescreened Solicitations Exception

Proposed paragraph (c) provided an exception to the general risk-based pricing rule when consumer reports are used to set the terms in a prescreened solicitation (firm offer of credit). Proposed paragraph (c)(1) stated that a person is not required to provide a risk-based pricing notice if that person (i) obtains a consumer report that is a prescreened list as described in section 604(c)(2) of the FCRA, and (ii) uses that consumer report for the purpose of making a firm offer of credit to the consumer. The proposed exception applied regardless of the terms the creditor may offer to other consumers in other firm offers of credit. In other words, under the proposal, a creditor would not have been required to provide a risk-based pricing notice to a consumer to whom it sends a particular prescreened solicitation just because the creditor sends prescreened solicitations that offer more favorable material terms to another group of consumers.

The Agencies noted that this exception applied only when a consumer report is used to set the terms offered in a prescreened solicitation to a consumer at the pre-application stage, and did not eliminate the requirement to provide a risk-based pricing notice later in connection with the credit extension, pursuant to proposed § ____.72. For example, a firm offer of credit may contain several possible rates and, if a consumer applies in response to the offer and does not receive the lowest rate, the creditor generally would be required to provide a risk-based pricing notice to that consumer.

Commenters' views on the proposed exception varied. Some commenters believed this exception was appropriate. Other commenters believed this exception was unnecessary, arguing that because no credit is extended as part of a prescreened solicitation, those solicitations fall outside of the scope of the rule.

The Agencies continue to believe that requiring a notice in connection with prescreened solicitations would not significantly benefit consumers, but would impose substantial burdens on creditors and the credit reporting system. Prescreened solicitations typically are sent to many consumers who meet specific credit-granting criteria provided by a creditor. The Agencies understand that only about one half of one percent of consumers who receive prescreened solicitations respond to them. Therefore, for the vast majority of consumers who are not interested in obtaining credit via the

prescreened solicitation, a risk-based pricing notice would have no relevance.

This exception is consistent with the Agencies' determination that the appropriate time to provide a notice is no earlier than the time the decision to approve the credit application, or to grant, extend, or provide credit, is communicated to the consumer. At the time a creditor sends a prescreened solicitation, the consumer has not made an application or otherwise indicated any interest in the credit. The exception also is consistent with the rule of construction that consumers should receive only one risk-based pricing notice per credit transaction, as discussed below. Absent this exception, some consumers who respond to prescreened solicitations would receive multiple notices in connection with the transaction: the first when they receive the solicitation, and the second when they respond to the solicitation but do not receive the most favorable terms offered in that solicitation (*e.g.,* when the solicitation offers more than one possible annual percentage rate).

The Agencies also believe the prescreened solicitations exception provides an important clarification of the statutory requirements. Whether a prescreened solicitation is made "in connection with an application for, or a grant, extension, or other provision of credit"—and, thus, whether it is covered by section 615(h)—may depend on the circumstances of a particular solicitation, including whether a specific consumer actually applies for credit in response to the solicitation. Because the Agencies have created an exception for prescreened solicitations based on their finding, pursuant to section 615(h)(6)(B)(iii), that there is no significant benefit to consumers, the Agencies do not need to determine whether, and under what circumstances, such solicitations are "in connection with" an application for credit.

In the final rules, the prescreened solicitations exception in § ____.74(c) is adopted as proposed, with some non-substantive changes to better explain the purpose of the exception.

Credit Score Disclosure Exceptions

The Agencies proposed three exceptions to the risk-based pricing notice requirement for creditors that provide a credit score disclosure to consumers, which are described more fully below. The credit score disclosure generally would include the consumer's credit score, along with explanatory information regarding the score and information regarding the use of consumer reports and scores in the underwriting process. Under the proposed exceptions, a creditor would provide this disclosure to any consumer who requested an extension of credit. Thus, a creditor would not need to apply a test to determine which consumers likely were offered or received materially less favorable material terms. The Agencies also proposed an alternate form of the notice to be provided to consumers for whom credit scores are unavailable. As discussed below, these exceptions were proposed under section 615(h)(6)(iii) of the FCRA, which gives the Agencies the authority to create exceptions to the risk-based pricing notice requirement for classes of persons or transactions regarding which the Agencies determine that the notice would not significantly benefit consumers. Unlike a risk-based pricing notice given under proposed § ____.72, the notice provided with the credit score disclosure under these proposed exceptions would not give rise to an independent right to a free consumer report.

Proposed Credit Score Disclosure Exception for Credit Secured by Residential Real Property

Proposed paragraph (d) provided an exception to the risk-based pricing notice requirement for creditors offering loans secured by one to four units of residential real property. This exception would permit creditors offering loans to consumers that are secured by residential real property (purchase money mortgages, mortgage refinancings, home-equity lines of credit, and home-equity plans) to comply with the rules by adding certain supplemental disclosures regarding the use of consumer reports to the credit score disclosure they already are required to provide to consumers pursuant to section 609(g) of the FCRA. These creditors could provide this integrated notice to any consumer who requested credit in connection with loans secured by real property and would not be required to compare the terms offered to different consumers, as is required by the general rule.

Proposed paragraph (d)(1) set forth the requirements that a creditor would be required to meet to avail itself of the exception and stated that a creditor is not required to provide a risk-based pricing notice if it complies with this subsection. Paragraph (d)(1)(i) provided that in order to qualify for the exception, the credit requested by the consumer must involve an extension of credit secured by one to four units of residential real property.

Proposed paragraph (d)(1)(ii) set forth the contents of the notice that must be provided to the consumer in order for a creditor to qualify for the exception. Proposed paragraphs (d)(1)(ii)(A)–(d)(1)(ii)(C) would require disclosure of certain background information regarding consumer reports and credit scores, including: (i) A statement that a consumer report is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors; (ii) a statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history; and (iii) a statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be.

Proposed paragraph (d)(1)(ii)(D) would have required the notice to include all of the information required to be disclosed to the consumer pursuant to section 609(g) of the FCRA. Section 609(g) requires disclosure of: (i) The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated for a purpose related to the extension of credit; (ii) the date on which that score was created; (iii) the name of the person or entity that provided the credit score or credit file on which the credit score was created; (iv) the range of possible credit scores under the model used; and (v) up to four key factors that adversely affected the consumer's credit score (or up to five factors if the number of inquiries made with respect to that consumer report is one of the factors).

For many consumers, a disclosure of the credit score number alone would provide no indication of whether that credit score is favorable, unfavorable, or about average when compared to the credit scores of other consumers. Therefore, proposed paragraph (d)(1)(ii)(E) contained the additional requirement that the notice disclose by clear and readily understandable means either a distribution of credit scores (*i.e.,* the proportion of consumers who have scores within the specified ranges) or a statement about how the consumer's credit score compares to the scores of other consumers. The Agencies believed that this information would provide important context to help consumers understand their credit scores. Any distribution or comparison of scores should reflect the population of consumers who have been scored under the model used by the person providing the score. If that information was not available from the person providing the

score, or if the creditor disclosed a proprietary score, then the creditor could base the distribution or comparison on its own consumers who have been scored using the model.

Under the proposal, if a creditor chose to disclose the credit score distribution, this information could be presented in the form of a bar graph containing a minimum of six bars, or by a different form of graphical presentation that is clear and readily understandable. If a credit score has a range of 1 to 100, the distribution must be disclosed using that same 1 to 100 scale. For a creditor using the bar graph, each bar would have to illustrate the percentage of consumers with credit scores within the range of scores reflected by that bar. A creditor would not be required to prepare its own bar graph; use of a bar graph obtained from the person providing the credit score that meets the requirements of this paragraph would be deemed compliant.

Alternatively, the proposal would permit the notice to inform the consumer by clear and readily understandable means how his or her credit score compares to the scores of other consumers. As discussed more fully in the Model Forms section below, a concise narrative statement informing the consumer that his or her credit score ranks higher than a specified percentage of consumers would be a clear and readily understandable means of providing this information.

Proposed paragraph (d)(1)(ii)(F) would have required the notice to include a statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report.

Proposed paragraphs (d)(1)(ii)(G) and (d)(1)(ii)(H) would have required the credit score disclosure to provide the consumer with information about how to obtain his or her consumer report. The notice must state that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period, and provide contact information for the centralized source from which consumers can obtain their free annual reports. Finally, proposed paragraph (d)(1)(ii)(I) would have required the notice to include a statement directing the consumer to the Web sites of the Board and the Commission to obtain more information about consumer reports.

Proposed paragraph (d)(2) set forth the form that the credit score disclosure must take in order to satisfy the exception. Under the proposal, the notice must be clear and conspicuous, provided on or with the notice required by section 609(g) of the FCRA, and segregated from other information provided to the consumer. The notice would also be provided to the consumer in writing in a form retainable by the consumer. The requirement that the notice be in writing would be satisfied if it is provided in electronic form in accordance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

Proposed paragraph (d)(3) described the timing requirements for the notice that would satisfy the exception. The notice would be required to be provided to the consumer concurrently with the notice required by section 609(g) of the FCRA, 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. Section 609(g) of the FCRA states that the notice required by that subsection must be provided to the consumer "as soon as reasonably practicable." It was the Agencies' understanding that industry practice is generally to provide the credit score disclosure within three business days of obtaining a credit score and the Agencies would expect the integrated disclosure generally would be provided within the same timeframe.

Proposed paragraph (d)(4) stated that a model form of the notice described in proposed paragraph (d)(1)(ii), consolidated with the notice required by section 609(g) of the FCRA, is contained in Appendix H–3 of the Board's rules and Appendix B–3 of the Commission's rules. Under the proposal, appropriate use of this model form was deemed to be a safe harbor for compliance with the exception. Use of the model form was optional.

Proposed Credit Score Disclosure Exception for Non-Mortgage Credit

Proposed paragraph (e)(1) set forth a credit score disclosure exception for loans that are not secured by one to four units of residential real property, for which creditors are not required to provide the section 609(g) notice. This exception could be used, for example, by auto lenders, credit card issuers, and student loan companies. Creditors offering loans that are not secured by residential real property could comply with the rules by disclosing a consumer's credit score along with certain additional information.

This proposed exception was similar to the exception proposed for credit secured by residential real property. Consistent with the exception for credit secured by residential real property set forth in proposed paragraph (d), the Agencies proposed this exception under the authority conferred by FCRA section 615(h)(6)(iii). Creditors could provide this notice to any consumer who requested credit in connection with loans that are not secured by real property, without performing a comparison of the terms offered to different consumers.

Proposed paragraph (e)(1) set forth the requirements that a creditor must meet in order to satisfy the exception and stated that a person is not required to provide a risk-based pricing notice if it complies with this subsection. Proposed paragraph (e)(1)(i) stated that in order to qualify for the exception, the credit requested by the consumer must involve credit other than an extension of credit secured by one to four units of residential real property. Thus, a creditor that is obligated to give the notice required by FCRA section 609(g)(1) could not use this exception, but would need to use the exception described in proposed paragraph (d). Proposed paragraphs (e)(1)(ii)(A)–(e)(1)(ii)(C) would have required the notice to include contextual information identical to that set forth in proposed paragraphs (d)(1)(ii)(A)–(d)(1)(ii)(C) for credit secured by residential real property.

Proposed paragraph (e)(1)(ii)(D) would have required disclosure of the current credit score of the consumer or the most recent credit score of the consumer that was previously calculated for a purpose related to the extension of credit. As with the exception under proposed paragraph (d), a person using this exception generally would be required to provide a credit score that was used in connection with the credit decision, though a person that uses a credit score that was not created by a consumer reporting agency, such as a proprietary score, would be permitted to satisfy the exception either by providing the proprietary score to the consumer or by providing to the consumer a credit score and associated information it obtains from an entity regularly engaged in the business of selling credit scores. Similarly, a creditor that does not use a credit score in its credit evaluation process would be permitted to rely on this exception by purchasing and providing to the consumer a credit score and associated information it obtains

from an entity regularly engaged in the business of selling credit scores. Also consistent with proposed paragraph (d), proposed paragraph (e)(1)(ii)(E) would require disclosure of the range of possible credit scores under the model used to generate the credit score disclosed to the consumer.

Proposed paragraph (e)(1)(ii)(F) would have required that the notice disclose by clear and readily understandable means either a distribution of credit scores (*i.e.,* the proportion of consumers who have scores within the specified ranges) or a statement about how the consumer's credit score compares to the scores of other consumers. As with the exception in proposed paragraph (d), the distribution of credit scores could be presented in the form of a bar graph containing a minimum of six bars or by a different form of graphical presentation that is clear and readily understandable. Alternatively, the notice could inform the consumer by clear and readily understandable means how his or her credit score compares to the scores of other consumers. Consistent with what is required to be disclosed pursuant to section 609(g) for credit secured by residential real property, proposed paragraph (e)(1)(ii)(G) stated that the notice must contain the date on which the credit score was created and proposed paragraph (e)(1)(ii)(H) required the creditor to disclose the name of the consumer reporting agency or other person that provided the credit score.

Proposed paragraphs (e)(1)(ii)(I)–(e)(1)(ii)(L) are identical to proposed paragraphs (d)(1)(ii)(F)–(d)(1)(ii)(I) and would have required that the notice: contain a statement that the consumer is encouraged to verify the accuracy of the consumer report information and has the right to dispute any inaccurate information in the consumer report; provide the consumer with information about how to obtain his or her consumer report; and include a statement directing the consumer to the Web sites of the Board and the Commission to obtain more information about consumer reports. Unlike the notice required by section 609(g), the Agencies did not propose to require this notice to contain up to four key factors that adversely affected the credit score. The Agencies believe that the notice provides sufficient information to enable a consumer to evaluate his or her credit score without including the key factors.

Proposed paragraph (e)(2) set forth the form that the credit score notice must take in order to satisfy the exception. These requirements are the same as the form prescribed for the exception in proposed paragraph (d), except that the form is not provided on or with the notice required by section 609(g) of the FCRA. Proposed paragraph (e)(3) described the timing requirements for the notice that would satisfy the exception, which were also consistent with the timing requirement for the exception for loans secured by residential real property. Proposed paragraph (e)(4) stated that a model form of the notice described in paragraph (e)(1)(ii) is contained in Appendix H–4 of the Board's rules and Appendix B–4 of the Commission's rules. As with the exception for loans secured by residential real property, appropriate use of this model form is deemed to be a safe harbor for compliance with the exception, and use of the model form is optional.

Final Credit Score Disclosure Exceptions for Credit Secured by Residential Real Property and Non-Mortgage Credit

Many commenters supported the two credit score disclosure exceptions. These comments stated that the exceptions would be effective and should be retained in the final rules. Some commenters believed the credit score disclosure exceptions were burdensome, would cause confusion, and exceed the Agencies' statutory authority.

The Agencies continue to believe the credit score disclosure exceptions are appropriate as an alternative means of complying with the rules. The credit score disclosure provides to the consumer free of charge his or her credit score, which is an important piece of individualized information about the consumer's credit history. The notice integrates the score disclosure with additional information that will provide consumers with context for understanding how their credit scores may affect the terms of the offer and how their credit scores compare with the credit scores of other consumers. A consumer who discovers that his or her credit score ranks less favorably than the credit scores of other consumers may have a greater motivation to check his or her consumer report for errors than a consumer who receives the more generic information about consumer reports that will be included in a risk-based pricing notice. By providing a consumer with such specific information about his or her own credit history and how it compares to the credit histories of other consumers, the credit score disclosure and notice likely will provide consumers with equal or greater value than the more generic information a consumer will receive in a risk-based pricing notice. Furthermore, a consumer will obtain this valuable information without having to take action to request a consumer report from a consumer reporting agency. Finally, this specific information can be provided to consumers without the need for creditors to determine whether the terms of some offers are materially less favorable than the terms of other offers. Accordingly, the credit score disclosure exceptions are retained in the final rules as proposed, with certain revisions as discussed below.

Commenters supported the Agencies' conclusion that receipt of an exception notice does not trigger a free consumer report under section 612(b) of the FCRA. When a consumer receives an exception notice, the consumer receives a free credit score as well as specific information to enable the consumer to compare his or her credit score to the credit scores of other consumers. Moreover, consumers who receive free credit scores have other opportunities to obtain free consumer reports, such as the free annual reports.

Some commenters requested that the Agencies clarify in the final rules that a credit score disclosure exception should only be given to those consumers who would otherwise receive a risk-based pricing notice. The credit score disclosure exceptions were created to provide an alternative to the risk-based pricing notices that was potentially simpler for compliance purposes, but that also would provide consumers with information of equal or greater value than the information a consumer would receive in a risk-based pricing notice. Requiring creditors to provide credit score disclosure exception notices only to those who would otherwise receive the risk-based pricing notices would not be consistent with the Agencies' intent to provide a simpler alternative that could reduce the cost and burden associated with determining which consumers must receive notices. Thus, the final rules retain the requirement that in order to use these exceptions to the risk-based pricing disclosure requirements, a person must provide an exception notice to every consumer requesting an extension of credit for a product for which the person uses risk-based pricing, even those who would not otherwise receive a risk-based pricing notice. To clarify this, paragraph (d)(1)(ii) in the final rules is revised to replace the phrase "the consumer" with the phrase "each consumer described in paragraph (d)(1)(i) of this section." Similarly, paragraph (e)(1)(ii) in the final rules is revised to replace the phrase "the consumer" with the phrase

"each consumer described in paragraph (e)(1)(i) of this section," where "each consumer" is each one who requests an extension of credit.

One commenter believed that the Agencies' statement that a creditor must provide a credit score disclosure exception notice to "all" consumers was too broad, noting that some consumers may not be entitled to receive any type of notice under the rules. The Agencies agree that some consumers would not receive an exception notice. For instance, some consumers may fall outside of the scope of the rule completely, such as consumers who apply for business credit or who apply for a type of credit for which risk-based pricing is not used.

Creditors also do not need to provide an exception notice to a consumer if one of the other exceptions applies. For example, consumers who apply for and receive a specific rate or who receive an adverse action notice pursuant to the exceptions under § ____.74(a) and § ____.74(b), respectively, are not entitled to a notice. The Agencies note, however, that reliance on the other exceptions may not be possible in certain cases because the timing rules require the credit score disclosure exception notices to be provided to the consumer as soon as reasonably practicable after the credit score is obtained. For example, a mortgage lender may obtain a consumer's credit score and, in order to meet the timing requirements, provide an exception notice to the consumer within several days. However, the lender may ultimately determine after a more lengthy credit underwriting process, that it will not extend credit to the consumer and therefore provide an adverse action notice to the consumer.

The Agencies note that for purposes of providing credit score disclosure exception notices to a consumer as soon as reasonably practicable after a credit score is obtained, what is a reasonably practicable time period may be different depending on the circumstances of the transaction and the type of credit. For example, while it may be reasonably practicable to provide a notice to a consumer in several days in the mortgage lending context, what is reasonably practicable in other forms of credit may be a shorter or longer time period.

Some commenters asked the Agencies to clarify the exception notice requirements in circumstances where more than one credit score is used in making a credit decision. Some commenters urged the Agencies to permit creditors to disclose a single credit score, while another commenter suggested the Agencies permit creditors to disclose either a single credit score or all of the credit scores used in connection with the credit decision.

In the final rules, new §§ ____.74(d)(4) and (e)(4) have been adopted to clarify the credit score disclosure exception requirements in circumstances where creditors use multiple credit scores to make a credit decision. When a creditor obtains two or more credit scores from consumer reporting agencies, and uses one of those credit scores in setting the material terms of credit granted, extended, or provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraphs (d)(1)(ii) or (e)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a creditor obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (d)(1)(ii) or (e)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. At the creditor's option, the notice may include more than one credit score along with the additional information specified in § ____.74(d)(1)(ii) or (e)(1)(ii) for each credit score disclosed.

For example, a creditor that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That creditor must disclose the low score in the notice described in paragraph (d)(1)(ii). A creditor that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That creditor may choose one of these scores to include in the notice described in paragraph (d)(1)(ii).

The Agencies believe it is appropriate to require disclosure of only a single credit score because requiring disclosure of multiple scores would unnecessarily increase the complexity of the notices and increase the compliance burden for creditors. Requiring disclosure of multiple scores in these circumstances also would require disclosure of accompanying information for each score, which would increase the length of the notices, especially if the creditor disclosed how the consumer's score compared to other consumers' scores in the form of bar graphs. Moreover, the Agencies believe consumers may not benefit from this additional information, could be confused by the disclosure of multiple scores, and could be less likely to read a longer form.

Many commenters asked for clarification regarding the requirement to disclose the distribution of credit scores among consumers or how the credit score of the consumer receiving the notice compares to the scores of other consumers, whether in the form of a bar graph or a narrative. Some commenters suggested the Agencies should allow for a general disclosure about how a credit score statistically compares with others, rather than performing the comparison for each consumer. Some commenters mistakenly believed that both the bar graph and the narrative comparisons were required to be included in the notices. Other commenters suggested that the Agencies clarify how often either the bar graph or narrative must be updated. Commenters also asked Agencies to clarify where creditors could obtain information to make the appropriate comparisons. Alternatively, they asked the Agencies to publish this information.

The final rules, like the proposal, require that creditors disclose how a consumer compares to other consumers either in bar graph or in a narrative, but not in both forms. While creditors may obtain the information used to make a comparison from any source, the Agencies expect that many creditors will obtain the information from the person from whom the credit score is obtained. The final rules do not specify how frequently this information must be updated. Rather, the Agencies expect that the persons providing the information to the creditors will update the information periodically as necessary. Accordingly, the final rules retain the requirement to compare a consumer's credit score to the credit scores of other consumers generally as proposed, but with some changes for clarification. Sections ____.74(d)(1)(E) and (e)(1)(F) have been revised to clarify that the consumers who should be considered when determining the distribution of credit scores are those who are scored under the same scoring model that is used to generate the consumer's credit score.

A few commenters requested clarification regarding whether creditors

may use the credit score disclosure exception for credit secured by residential real property when providing a notice involving a transaction for a cooperative unit, regardless of whether the property is characterized as real property under state law. For these types of transactions, the Agencies will deem a creditor to be in compliance with the final rules if the creditor uses either the credit score disclosure exception for credit secured by residential real property or the credit score disclosure exception for non-mortgage credit.

One commenter asked the Agencies to clarify that any contractual prohibitions imposed by consumer reporting agencies are void. Section 609(g)(2)(A) of the FCRA specifically provides that any contract provision that prohibits the disclosure of a credit score by a person who makes or arranges loans or by a consumer reporting agency is void. The Agencies note that section 609(g)(2)(A) is not expressly limited to residential real property loans. Moreover, California law requires automobile dealers that use a consumer's credit score in connection with an application for credit to disclose that credit score to the consumer. The Agencies understand that contract provisions prohibiting credit score disclosures have not been invoked by consumer reporting agencies or other persons to prevent automobile dealers from disclosing credit scores to satisfy the requirements of California law. Similarly, the Agencies would not expect that contractual provisions would be invoked to prevent non-mortgage creditors from providing credit score disclosure exception notices for non-mortgage credit.

One commenter stated that permitting creditors to disclose a credit score from a consumer reporting agency, rather than the proprietary score used to make the credit decision, was appropriate. Two commenters requested that the Agencies address whether using a credit score obtained from a consumer reporting agency is permissible both for the credit score disclosure exception for credit secured by residential real property and the credit score disclosure exception for non-mortgage credit.

A person relying upon one of the exceptions set forth in §§ ____.74(d) or (e) generally would be required to provide to the consumer a credit score that was used in connection with the credit decision. If, however, the person uses a credit score that was not created by a consumer reporting agency, such as a proprietary score, that person is permitted to satisfy the exception by providing to the consumer either the proprietary score or a credit score and associated information it obtains from an entity regularly engaged in the business of selling credit scores. In addition, a person that uses a consumer report, but not a credit score, in its credit evaluation process is permitted to rely on this exception by purchasing and providing to the consumer a credit score and associated information it obtains from an entity regularly engaged in the business of selling credit scores.

Some commenters believed that requiring disclosure of the credit score creation date was appropriate and would be useful to consumers. Other commenters believed such a requirement would impose undue burdens. The credit score creation date is required to be disclosed to the consumer pursuant to section 609(g) of the FCRA, and this requirement has been incorporated into the disclosure requirements for the exception for credit secured by residential real property to ensure that the exception notice satisfies the requirements of section 609(g). Therefore, the Agencies have determined that it is appropriate, and not unduly burdensome, to retain the credit score creation date requirement for both the exception for credit secured by residential real property and the exception for non-mortgage credit.

One commenter requested that the Agencies allow creditors to use a credit score disclosure exception notice in lieu of an account review disclosure. The Agencies do not believe that the reasons for permitting exception notices in lieu of risk-based pricing notices apply in the case of account review notices. Account review notices do not require the creditor to make comparisons with other consumers using the direct comparison method or one of the alternative proxy methods. The Agencies have crafted a simple test for determining which consumers must receive risk-based pricing notices in the context of account reviews. Therefore, the Agencies find no compelling need to mitigate compliance burdens in the case of account reviews. Moreover, account review notices provide a very precise statement of the reason the consumer is receiving the notice. Unlike a risk-based pricing notice that can only generalize that the consumer "may" have received less favorable credit terms because of information in the consumer's consumer report, the account review notice is precise in its disclosure that the consumer did in fact receive less favorable terms. The account review disclosures also provide for free consumer reports. Thus, the exception notices do not provide as good or better information than the account review notice, and this suggestion has not been adopted in the final rules.

Proposed Credit Score Disclosure Exception—No Credit Score Available

In the proposal, the Agencies recognized that a creditor may not be able to obtain a credit score for each consumer for whom it obtains a consumer report. This might occur, for example, when a creditor obtains the consumer report for an individual who has only a limited credit history with few trade lines. A consumer report that contains such limited data may not produce sufficient information to permit the computation of a score.

Proposed paragraph (f) created an exception to the risk-based pricing notice requirement for creditors that regularly use one of the credit score disclosure exceptions in proposed paragraph (d) or (e), but are unable to provide the notices described in those paragraphs to a consumer because a credit score is not available for that consumer. To take advantage of this exception, the creditor would be required to provide a notice meeting the requirements of paragraph (f)(1)(ii).

Proposed paragraph (f)(1) set forth the requirements for the exception that applies when no credit score is available. Proposed paragraph (f)(1)(i) stated that in order to qualify for the exception, the person must regularly obtain credit scores from a consumer reporting agency and provide credit score disclosures to consumers in accordance with the exceptions in paragraphs (d) or (e) of this section, but be unable to obtain a credit score for the particular consumer from the consumer reporting agency from which the person regularly obtains credit scores. Proposed paragraph (f)(1)(ii) clarified that a person may qualify for this exception only if that person does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or otherwise providing credit to the consumer. A person would not be required, however, to seek a credit score from another consumer reporting agency if the consumer reporting agency from which that person regularly obtains credit scores did not provide a credit score for a particular consumer. In addition, a person that regularly requests a particular type of credit score from a consumer reporting agency to provide to consumers to satisfy the requirements of paragraphs (d) or (e) of this section would not need to obtain or seek to obtain a different type of credit score if the score that it regularly obtains is not available. For example, a person that regularly requests a credit score from a

consumer reporting agency that is based on traditional forms of data, such as credit card, mortgage, and installment loan accounts, would not have to request a different score that takes into consideration non-traditional forms of data, such as rental payment history, telephone service payment history, and utility service payment history.

Proposed paragraph (f)(1)(iii) set forth the specific content of the notice to be provided to the consumer. The notice would be required to include: (i) A statement that the person was not able to obtain a credit score about the consumer from a consumer reporting agency, which must be identified by name, and that this is generally due to insufficient information regarding the consumer's credit history; (ii) a statement that a consumer report includes information about a consumer's credit history; (iii) a statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time if the consumer's credit history changes; (iv) a statement that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms; and (v) a statement that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be. The notice also would be required to include a statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report, and provide the consumer with information about how to obtain his or her consumer report. The notice would inform the consumer that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period, and must give contact information for the centralized source from which consumers can obtain their free annual reports. Finally, the notice would include a statement directing the consumer to the Web sites of the Board and the Commission to obtain more information about consumer reports.

This notice, like the two credit score disclosure exception notices, would not give rise to an independent right to a free consumer report because it is not a risk-based pricing notice provided under section 615(h) of the FCRA. A consumer who received this personalized notice containing specific information regarding his or her limited credit history would not receive a separate risk-based pricing notice.

Proposed paragraph (f)(2) illustrated this exception with an example. The example described a person that uses consumer reports to set the material terms of non-mortgage credit provided to consumers, and who regularly requests credit scores from a particular consumer reporting agency and provides those credit scores to consumers to satisfy the exception set forth in proposed paragraph (e). The consumer reporting agency provides a consumer report on a particular consumer that contains one trade line, but does not provide a credit score on that consumer. If the creditor does not obtain a credit score from another consumer reporting agency and, based in whole or in part on information in a consumer report, extends credit to the consumer, the creditor may provide the notice described under paragraph (f)(1)(iii) in order to satisfy its obligations under this subsection. If, however, the person obtains a credit score from another consumer reporting agency in connection with offering credit to the consumer, that person could not rely on the exception in proposed paragraph (f) of this section, but must satisfy the requirements of paragraph (e) and disclose the score obtained.

Proposed paragraph (f)(3) set forth the form that the notice must take in order to satisfy the exception for circumstances where a credit score is not available. Proposed paragraph (f)(4) described the timing requirements for the notice that will satisfy the exception. Proposed paragraph (f)(5) stated that a model form of the notice described in paragraph (f)(1)(iii) is contained in Appendix H–5 of the Board's rules and Appendix B–5 of the Commission's rules. These requirements were intended to be consistent with the comparable requirements for the exceptions in proposed paragraphs (d) and (e).

Final Credit Score Disclosure Exception—No Credit Score Available

Commenters generally believed the credit score disclosure exception for circumstances where no credit score is available was appropriate. The Agencies conclude that consumers with limited credit histories will benefit from receiving a notice indicating that they do not have a credit score because there is insufficient information in their consumer reports. The Agencies continue to believe that a creditor that otherwise uses the credit score disclosure exception should not be required to use a different analysis for those consumers for whom no credit score is available. Therefore, paragraph (f) of the final rules is adopted as proposed, with several non-substantive changes.

Other Suggested Exceptions

Finally, commenters requested the inclusion of certain other exceptions in the final rules. A few commenters believed there should be an exception for credit extended in connection with a private banking relationship available only to high net worth consumers. One commenter also believed accommodation loans made to owners and executives of commercial accounts should be excepted because such loans are made to more sophisticated borrowers who would derive little benefit from the risk-based pricing notice. Two commenters believed there should be an exception for non-residential mortgage transactions with amounts financed in excess of $50,000. Another commenter suggested the Agencies create an exception for situations where a consumer withdraws a credit application before the creditor has provided a notice.

The Agencies have determined that it is not appropriate to provide exceptions from the final rules for certain transactions based on the financial condition of a consumer or the value of the transaction. It is challenging to define appropriate metrics to differentiate consumers and consumer transactions based on the perceived financial sophistication of the participating consumer. Moreover, such metrics tend to become obsolete over time. In instances where a consumer withdraws an application before a creditor has provided a notice, no exception is necessary because a creditor generally is only required to provide a risk-based pricing notice before consummation or the first transaction under an open-end plan. For the foregoing reasons, no further exceptions have been added to the final rules.

Section ____.75 Rules of Construction

Proposed § ____.75 set forth two rules of construction. Proposed paragraph (a) stated that a consumer generally is entitled to no more than one risk-based pricing notice under proposed § ____.72(a) or (c) or one notice under proposed § ____.74(d), (e), or (f), for each grant, extension, or other provision of credit. Because the statute focuses on the material terms granted or extended to a consumer, and consumers receive only a single material term or set of material terms in each extension of credit, the Agencies generally did not

interpret the statute as requiring the consumer to receive more than one risk-based pricing notice in connection with a single extension of credit. The Agencies also did not believe that consumers would benefit by receiving multiple notices or multiple free consumer reports in connection with a single credit extension. Rather, the Agencies believed that one notice would be sufficient to encourage a consumer to check his or her consumer report for any errors. However, even if a consumer had previously received a risk-based pricing notice, another notice would be required as a result of an account review, if the conditions set forth in proposed § ____.72(d) have been met.

Commenters generally believed that requiring only one notice per credit extension is appropriate. Many commenters, however, believed the Agencies should also clarify how the rule applies to transactions involving multiple consumers, such as joint applicants. Some commenters suggested that the Agencies require creditors to give one notice to the primary consumer, if a primary consumer is readily apparent, as is required with adverse action notices under Regulation B. Other commenters suggested requiring that notice be given only to the consumer whose credit score served as the basis for the loan terms. Others suggested the Agencies require that a separate notice be given to each consumer when individual credit scores are disclosed.

The one-notice-per-transaction rule of construction is adopted as proposed in paragraph (a) of the final rules. New paragraph (c), however, has been added to the final rules to address transactions involving multiple consumers. Paragraph (c) clarifies that for risk-based pricing notices, in a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a notice to each consumer. If the two consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer. For credit score disclosure exception notices, a person must provide a separate notice to each consumer who is granted, extended, or otherwise provided credit in a transaction involving two or more consumers. Whether the consumers have the same address or not, the person must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer. The final rules include examples to illustrate the notice requirements for multiple consumers.

Proposed paragraph (b) set forth the rules governing multi-party transactions. Proposed paragraph (b)(1) stated that the person to whom the loan obligation is initially payable must provide a risk-based pricing notice under § ____.72 or comply with the notice requirements of the exceptions under § ____.74, even if that person immediately assigns the loan to a third party and is not the source of funding for the loan. Correspondingly, proposed paragraph (b)(2) clarified that a purchaser or assignee of a credit contract with a consumer is not required to provide the risk-based pricing notice or satisfy the conditions for one of the exceptions, even if that purchaser or assignee provides the funding for the loan. Proposed paragraph (b)(3) illustrated the rules of construction with several examples pertaining to auto finance transactions.

Commenters generally supported requiring the initial creditor, rather than a purchaser or assignee, to provide the notice. However, as discussed above in § ____.72, some commenters disagreed with this approach in the context of auto lending, since contracts for auto loans are often assigned immediately after the credit is extended.

The Agencies continue to believe it is appropriate for the initial creditor to provide a notice. Therefore, the provision requiring the person to whom the loan obligation is initially payable to provide a risk-based pricing notice, when appropriate, is adopted as proposed in paragraph (b) of the final rules.

Model Forms

Proposed Appendix H of the Board's rules and Appendix B of the Commission's rules contained model forms that the Agencies prepared to facilitate compliance with the rules. Two of the model forms were for risk-based pricing notices, and three of the model forms were for the credit score disclosure exceptions. Each of the model forms was designated for use in a particular set of circumstances as indicated by the title of that model form. Model forms H–1 and B–1 were for use in complying with the general risk-based pricing notice requirements in § ____.72. Model forms H–2 and B–2 were for risk-based pricing notices given in connection with account review. Model forms H–3 and B–3 were for use in connection with the credit score disclosure exception for loans secured by residential real property. Model forms H–4 and B–4 were for use in connection with the credit score disclosure exception for loans that are not secured by residential real property. Model forms H–5 and B–5 were for use in connection with the credit score disclosure exception when no credit score is available for a consumer. Each form, including its format, language, and other elements, was designed to communicate key information in a clear and readily understandable manner.

Although the Agencies did not test the proposed model forms with consumers, the design of the model forms was informed by consumer testing undertaken in connection with the interagency short-form privacy notice project and the Board's review of its credit card disclosure rules under the TILA.[13] In addition, the Agencies tested the proposed model forms using two widely available readability tests, the Flesch reading ease test and the Flesch-Kincaid grade level test, each of which generates a readability score.[14]

Several commenters believed the model forms were appropriate to ensure consistency and simplify compliance with the rules. One commenter believed the Agencies should allow creditors to provide notices in any "clear and conspicuous" manner while still retaining the safe harbor and substitute model clauses for model forms. Other commenters believed the model forms should be shorter and more succinct.

The Agencies believe the provision for model forms is appropriate, and that the length of the forms is appropriate in light of the content that must be communicated to the consumer. A creditor is permitted to change the forms by rearranging the format without modifying the substance of the disclosures and still rely upon the safe harbor. However, as the Agencies learned from consumer testing on privacy notices and credit card disclosures, format changes can have a significant effect on consumer comprehension.[15] Therefore, rearrangement of the model forms must not be so extensive as to affect materially the substance, clarity, comprehensibility, or meaningful

[13] *See* 72 FR 32,948, 32,951 (June 14, 2007) (Truth in Lending); 72 FR 14,940, 14,944 (Mar. 29, 2007) (Privacy).

[14] The Flesch reading ease test generates a score between zero and 100, where the higher score correlates with improved readability. The Flesch-Kincaid grade level test generates a numerical assessment of the grade-level at which the text is written. The Flesch-Kincaid readability tests are widely used by government agencies to evaluate readability levels of consumer communications.

[15] *See* 74 FR 5,244 (Jan. 29, 2009) (final revisions to credit card disclosures); 72 FR 14,940 (March 29, 2007) (proposed short-form privacy notice).

sequence of the forms. Creditors making revisions with that effect will lose the benefit of the safe harbor for appropriate use of Appendix H or Appendix B model forms. On the other hand, some format changes will not have a material adverse effect on the model forms, and may even enhance consumer comprehension. A creditor is permitted to use different colors or shading in its notice, include graphics or icons in its notice, such as a corporate logo or insignia, or make corrections or updates to telephone numbers, mailing addresses, or Web site addresses that may change over time.

Some commenters supported providing flexibility with regard to the content of the model forms, but asked the Agencies to clarify further the ways in which creditors could modify the notices, while still retaining the safe harbor. Some commenters suggested specific changes to the model forms that the Agencies should deem permissible without losing the safe harbor.

The Agencies agree that creditors should have some additional flexibility to modify the content of the model forms, while still retaining the safe harbor. Language has been added to the final rules to clarify that technical modifications to the language of the forms are permitted. More examples also have been added to the list of examples of acceptable changes to the model forms: substitution of the words "credit" and "creditor" or "finance" and "finance company" for the terms "loan" and "lender"; including pre-printed lists of the sources of consumer reports or consumer reporting agencies in a "check-the-box" format; and including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains. The final rules also specifically state that unacceptable changes to the model forms include: providing model forms on register receipts or interspersed with other disclosures and eliminating empty lines and extra spaces between sentences within the same section.

Some commenters asked the Agencies to clarify whether creditors must disclose in both bar graph and narrative form the distribution of credit scores and how a consumer's credit score compares to those scores. A creditor is permitted to use any clear and readily understandable means to convey this information and that information must only be disclosed using one format. A creditor may use the bar graph set forth in model forms H–3 and H–4 of the Board's rules and B–3 and B–4 of the Commission's rules to disclose the distribution of credit scores. Other clear and readily understandable means could include a different form of graphical presentation of the distribution. Alternatively, a creditor could include a short narrative statement such as that set forth in model forms H–3 and H–4 of the Board's rules and B–3 and B–4 of the Commission's rules to disclose how a consumer's credit score compares to the scores of other consumers. This statement must be simple and concise; a paragraph-length narrative description about the credit score distribution, such as a narrative description of the information represented in the bar graph set forth in the model forms, does not satisfy the clear and readily understandable standard.

The model forms are adopted generally as proposed, with revisions to address appropriate modifications that can be made to the model forms without losing the safe harbor and other revisions for clarification. Use of the model forms by creditors is optional. If a creditor uses an appropriate Appendix H or Appendix B model form, or modifies a form in accordance with the rules or the instructions to the appendix, that creditor is deemed to be acting in compliance with the provisions of §§ ____.72, ____.73, or ____.74, as applicable, of the final rules. Appropriate use of model form H–3 or model form B–3 is also intended to be compliant with the disclosure that may be required under section 609(g) of the FCRA.

Implementation Date

Industry commenters requested that the Agencies provide a sufficient period of time to implement the final rules. These commenters noted that they would have to develop and update systems and procedures to comply with the final rules. Appropriate implementation periods suggested by various commenters were two years, 18 months, and one year.

The Agencies have determined that 12 months is the appropriate implementation period. The Agencies believe that this provides a sufficient amount of time for creditors to implement the final rules. It will allow creditors to determine the method of disclosure they will use to implement the final rules and adjust their systems and make other changes accordingly. Moreover, for creditors who elect to use the credit score proxy method, this implementation period will also allow for time to take a sample and calculate a corresponding cutoff score. At the same time, this implementation period balances the need for creditors to have a sufficient period of time to prepare for implementation of the final rules with the Agencies' goal of providing disclosures based on risk-based pricing to consumers in a timely manner.

V. Regulatory Analysis

A. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506; 5 CFR part 1320, Appendix A.1), the Board and the Commission (the Agencies) have reviewed the final rules and determined that they contain collections of information subject to the PRA. The collections of information required by these rules are found in 12 CFR 222.72(a), (c), and (d); 12 CFR 222.74(d), (e), and (f); 16 CFR 640.72(a), (c), and (d); and 16 CFR 640.74(d), (e), and (f).

An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The Commission submitted the information collection requirements contained in these joint final rules to OMB for review and approval under the PRA; OMB withheld formal action on the rule pending its further review of the joint final rule. The Board, under its delegated authority from OMB, has approved the implementation of this information collection; OMB control number is 7100–0308.[16]

The final rules generally require a creditor to provide a risk-based pricing notice to a consumer when the creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. The final rules also provide for two alternative means by which creditors can determine when they are offering credit on material terms that are materially less favorable. The final rules also include certain exceptions to the general rule, including exceptions for creditors that provide a consumer with a disclosure of the consumer's credit score in conjunction with additional information that provides context for the credit score disclosure.

In the proposal, the Agencies estimated that respondents potentially affected by the new notice and

[16] The information collections (ICs) in this rule will be incorporated with the Board's Disclosure Requirements Associated with Regulation V (OMB No. 7100–0308). The burden estimates provided in this rule pertain only to the ICs associated with this proposed rulemaking. The current OMB inventory for Regulation V is available at: *http://www.reginfo.gov/public/do/PRAMain.*

disclosure requirements would take, on average, 40 hours (one business week) to reprogram and update systems, provide employee training, and modify model notices with respondent information to comply with proposed requirements. In addition, the Agencies estimated that, on a continuing basis, respondents would take five hours per month to modify and distribute notices to consumers. The Agencies recognized that the amount of time needed for any particular creditor subject to the proposed requirements may be higher or lower, but believed that this average figure was a reasonable estimate.

Comments Received:

The Agencies received two comments, one from a bank and another from a banking trade association, in response to the PRA section of the proposal. The commenters asserted that the time needed to update database systems may exceed the 40 hours estimated by the Agencies. The commenters, however, did not provide specific alternatives to this estimate.

Burden Statement:

The Agencies continue to believe that 40 hours is a reasonable estimate of the average amount of time to modify existing database systems. The Agencies have provided two alternative methods which creditors could use to determine which consumers must receive a risk-based pricing notice. The methods are intended to simplify compliance with the risk-based pricing requirement when it is not operationally feasible to make direct comparisons between consumers. Moreover, the Agencies have provided exceptions to the final rule, whereby creditors may fulfill their compliance obligation by providing credit score disclosures to consumers who apply for and are granted credit. Because creditors may provide credit score disclosures to consumers without regard to the terms offered, supplying these disclosures would eliminate the need for a creditor to perform an analysis to determine which consumers must receive a disclosure. The Agencies also believe that the availability of model notices may significantly reduce the cost of compliance with the final rules.

Frequency of Response: On occasion.

Affected Public: Any creditor that engages in risk-based pricing and uses a consumer report to set the terms on which credit is extended to consumers.

Board:

The Board is estimating the burden for entities regulated by the Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, and the U.S. Department of Housing and Urban Development (collectively, the "federal financial regulatory agencies") pursuant to the FCRA. Such entities are identified in section 621(b)(1)–(3) of the FCRA (15 U.S.C. 1681s(b)(1)–(3)) and may include, among others, state member banks, national banks, insured nonmember banks, savings associations, federally-chartered credit unions, and other mortgage lending institutions.

Number of Respondents: 18,173.

Estimated Time per Response: 40 hours (one business week) to reprogram and update systems, provide employee training, and modify model notices with respondent information to comply with final requirements. Five hours per month to modify and distribute notices to consumers on a continuing basis.

Total Estimated Annual Burden: 1,817,300 hours.[17]

Commission:

For purposes of the PRA, the Commission is estimating the burden for entities that extend credit to consumers for personal, household, or family purposes, and that are subject to the Commission's administrative enforcement pursuant to section 621(a)(1) of the FCRA (15 U.S.C. 1681s(a)(1)). These businesses include, among others, nonbank mortgage lenders, consumer lenders, utilities, state-chartered credit unions, and automobile dealers and retailers that directly extend credit to consumers for personal, non-business uses.

Number of Respondents: 199,500.[18]

Estimated Time per Response: 40 hours (1 business week) to reprogram and update systems, provide employee training, and modify model notices with respondent information to comply with final requirements. Five hours per month to modify and distribute notices to consumers on a continuing basis.

Total Estimated Annual Burden: 14,630,000 hours (rounded). The estimated annual labor cost associated with this burden is $252,048,000 (rounded).

Total Estimated Cost Burden: Commission staff derived labor costs by applying appropriate estimated hourly cost figures to the burden hours described above. It is difficult to calculate with precision the labor costs associated with the final rules, as they entail varying compensation levels of clerical, management, and/or technical staff among companies of different sizes. In calculating the cost figures, Commission staff assumes that managerial and/or professional technical personnel will develop procedures for conducting the risk-based pricing analyses, adapt the written notices as necessary, and train staff. In the NPRM analysis, Commission staff estimated labor cost for such employees to be at an hourly rate of $38.93, based on 2006 Bureau of Labor Statistics (BLS) data for management occupations. However, based on more current available BLS data, the Commission is revising upward the prior estimate to $42.15.[19] Commission staff assumes that personnel involved in sales and similar responsibilities will update and distribute the notices. In the NPRM analysis, Commission staff used 2006 BLS data to estimate labor costs for these employees to be at an hourly rate of $11.14. However, based on more current BLS data, the Commission is revising upward the prior estimate to $11.69.[20]

Based on the above estimates and assumptions, the estimated average annual labor cost for all categories of covered entities under the final rules is $252,048,000 (rounded to the nearest thousand) [{(40 hours × $42.15) + (180 hours × $11.69)} × 199,500 ÷ 3], or $1,263 per covered entity.[21]

[17] The increase of 1,380 hours corrects a mathematical error caused by a transposition of 1,815,980 hours published in the proposed rules.

[18] This estimate derives in part from an analysis of the figures obtained from the North American Industry Classification System (NAICS) Association's database of U.S. businesses. *See http://www.naics.com/search.htm.* Commission staff identified categories of entities under its jurisdiction that also directly provide credit to consumers. Those categories include retail, vehicle dealers, consumer lenders, and utilities. The estimate also includes state-chartered credit unions, which are subject to the Commission's jurisdiction. *See* 15 U.S.C. 1681s. For the latter category, Commission staff relied on estimates from the Credit Union National Association for the number of non-federal credit unions. *See http://www.ncua.gov/news/quick_facts/Facts2007.pdf.* For the purpose of estimating the burden, Commission staff made the conservative assumption that all of the included entities engage in risk-based pricing.

[19] This cost is derived from the median hourly wage for management occupations found in the May 2009 National Occupational Employment and Wage Estimates of the Bureau of Labor Statistics, Table 1.

[20] This cost is derived from the median hourly wage for sales and related occupations found in the May 2009 National Occupational Employment and Wage Estimates of the Bureau of Labor Statistics, Table 1.

[21] One commenter asserted that the rule was too costly. As noted above, however, the cost per covered entity is relatively low, particularly in comparison with the rule's benefits. These benefits include (1) educating consumers about the role that their consumer reports play in the pricing of credit; and (2) alerting consumers to the existence of potentially negative information in their consumer reports so that they may check their reports and correct any inaccurate information. If more consumers check their credit reports, as expected, the rule may also improve the accuracy of credit reports generally. Thus, the Commission believes that the benefits of the rule substantially outweigh the costs to those engaged in risk-based pricing.

Commission staff does not anticipate that compliance with the final rules will require any new capital or other non-labor expenditures.

The Agencies have a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to:

Board: Comments, identified by *R–1316,* may be submitted by any of the following methods:

• *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments on the *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.

• *FAX:* 202–452–3819 or 202–452–3102.

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

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

Commission: Comments should refer to "FACT ACT Risk-Based Pricing Rule: Project No. R411009" and may be submitted by any of the following methods. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled "Confidential." [22]

• *Web site:* Comments filed in electronic form should be submitted by clicking on the following Web link: *https://secure.commentworks.com/ftc-RiskBasedPricing* and following the instructions on the Web-based form. To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at *https://secure.commentworks.com/ftc-RiskBasedPricing.*

• *Federal eRulemaking Portal:* If this notice appears at *http://www.regulations.gov,* you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

• *Mail or Hand Delivery:* A comment filed in paper form should include "FACT ACT Risk-Based Pricing Rule: Project No. R411009," both in the text and on the envelope and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–135 (Annex M), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The Commission is requesting that any comment filed in paper form be sent by courier or overnight service, if possible.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the PRA should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–5167 because U.S. postal mail at the OMB is subject to delays due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the Commission's Web site, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.htm.* As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the Commission's Web site. More information, including routine uses permitted by the Privacy Act, may be found in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

B. Regulatory Flexibility Act

Board:

The Board prepared an initial regulatory flexibility analysis as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) (RFA) in connection with the proposed rule. Under section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. The rules cover certain banks, other depository institutions, and non-bank entities that extend credit to consumers. The Small Business Administration (SBA) establishes size standards that define which entities are small businesses for purposes of the RFA.[23] The size standard to be considered a small business is: $175 million or less in assets for banks and other depository institutions; and $7.0 million or less in annual revenues for the majority of non-bank entities that are likely to be subject to the rules. Based on its analysis and for the reasons stated below, the Board certifies that these final rules will not have a significant economic impact on a substantial number of small entities.

1. Reasons for the Final Rule

Section 311 of the FACT Act (which amends section 615 of the FCRA by adding a new subsection (h)) requires the Agencies to prescribe rules jointly to implement the duty of users of consumer reports to provide risk-based pricing notices in certain circumstances. Specifically, the rules must address, but are not limited to, the following aspects of section 615(h) of the FCRA: (i) The form, content, time, and manner of delivery of any risk-based pricing notice; (ii) clarification of the meaning of terms used in section 615(h), including what credit terms are material, and when credit terms are materially less favorable; (iii) exceptions to the risk-based pricing notice requirement for classes of persons or transactions regarding which the Agencies determine that notice would not significantly benefit consumers; (iv) a model notice that may be used to comply with section 615(h); and (v) the timing of the risk-based pricing notice, including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report. The Agencies are issuing the rules to fulfill their statutory duty to implement the risk-based

[22] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[23] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

pricing notice provisions of section 615(h) of the FCRA.

The **SUPPLEMENTARY INFORMATION** above contains information on the objectives of the final rules.

2. Summaries of Issues Raised by Commenters

In connection with the proposed rule to implement the risk-based pricing provisions in section 311 of the FACT Act, the Board sought information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the rule to small institutions. The Board received comments from a credit union and from trade associations that represent both banks and credit unions. The commenters asserted that compliance with the final rules would increase costs. They also believed that performing an analysis to determine which consumers must receive risk-based pricing notices would be too burdensome and could result in small creditors providing risk-based pricing notices to all consumers who apply for credit. These comments, however, did not contain specific information about costs that will be incurred or changes in operating procedures that will be required to comply with the final rule. In general, the comments discussed the impact of statutory requirements rather than any impact that the Board's proposed rules themselves would generate. The Board continues to believe that the final rules will not have a significant impact on a substantial number of small entities.

3. Description of Small Entities to Which the Rules Apply

The rules apply to any person that both (i) uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer that is primarily for personal, family, or household purposes; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to the consumer 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. The rules do not apply to any person that uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit primarily for a business purpose.

The total number of small entities likely to be affected by the final rules is unknown because the Agencies do not have data on the number of small entities that use consumer reports for risk-based pricing in connection with consumer credit. The risk-based pricing provisions of the FACT Act have broad applicability to persons who use consumer reports and engage in risk-based pricing in connection with the provision of consumer credit. Based on estimates compiled by the Board and other federal bank and thrift regulatory agencies,[24] there are approximately 10,268 depository institutions that could be considered small entities and that are potentially subject to the final rules.[25] The available data are insufficient to estimate the number of non-bank entities that would be subject to the final rules and that are small as defined by the SBA. Such entities would include non-bank mortgage lenders, auto finance companies, automobile dealers, other non-bank finance companies, telephone companies, and utility companies.

It also is unknown how many of these small entities that meet the SBA's size standards and are potentially subject to the rules engage in risk-based pricing based in whole or in part on consumer reports. The rules do not impose any requirements on small entities that do not use consumer reports or that do not engage in risk-based pricing of consumer credit on the basis of consumer reports.

4. Projected Reporting, Recordkeeping and Other Compliance Requirements

The compliance requirements of the rules are described in detail in the **SUPPLEMENTARY INFORMATION** above.

The rules generally require a person to provide a risk-based pricing notice to a consumer when that person uses a consumer report to grant or extend credit to the consumer 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. A person can identify consumers to whom it must provide the notice by directly comparing the material terms offered to its consumers or by using one of two alternative methods specified in the rules. The rules also include several exceptions to the general rule, including exceptions that would allow a person otherwise subject to the risk-based pricing notice requirement to provide a consumer with a credit score disclosure in conjunction with additional information that provides context for the credit score disclosure.

A person must determine if it engages in risk-based pricing, based in whole or in part on consumer reports, in connection with the provision of consumer credit. A person that does engage in such risk-based pricing must analyze the rules. Subject to the exceptions set forth in the final rule, the person generally would need to establish procedures for identifying those consumers to whom it must provide risk-based pricing notices. These procedures could involve either applying the general rule and performing a direct comparison among the terms offered to the person's consumers or utilizing one of the alternative methods set forth in the rules. Persons required to provide risk-based pricing notices also must design, generate, and provide those notices to the consumers that they have identified. Alternatively, a person that complies with the rules by providing notices that meet the requirements of any of the credit score disclosure exceptions would need to design, generate, and provide those notices to its consumers. In the case of automobile lending transactions, it may also be necessary for a person to arrange to have an auto dealer or other party provide risk-based pricing notices or credit score disclosures to consumers on its behalf and maintain reasonable policies and procedures to verify that the auto dealer or other party provides such notices to consumers within applicable time periods.

5. Steps Taken To Minimize the Economic Impact on Small Entities

The Board has sought to minimize the economic impact on small entities by adopting rules that are consistent with those adopted by the Commission; providing creditors with potentially less burdensome alternatives to the direct comparison method; permitting creditors to fulfill their compliance obligation by providing credit score disclosures to consumers who apply for and are granted credit; and providing model notices to ease creditors' compliance burden.

Commission:

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601–612, requires that the Commission provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule and a Final Regulatory Flexibility Analysis (FRFA) with the final rule, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of entities. *See* 5 U.S.C. 603–605.

[24] The Office of the Comptroller of the Currency, Board, Federal Deposit Insurance Corporation, and Office of Thrift Supervision.

[25] The estimate includes 1,444 institutions regulated by the Board and 4,357 federally-chartered credit unions, as determined by the Board. The estimate also includes 676 national banks, 3,400 FDIC-insured state nonmember banks, and 391 savings associations. *See* 74 FR 31484, 31506–31508 (Jul. 1, 2009).

The Commission hereby certifies that the final rule will not have a significant economic impact on a substantial number of small business entities. The Commission recognizes that the final rule will affect some small business entities; however we do not expect that a substantial number of small businesses will be affected or that the final rule will have a significant economic impact on them.

The Commission continues to believe that a precise estimate of the number of small entities that fall under the final rule is not feasible. The Commission did not receive any comments relating to the number of small entities which would be affected by the final rule. Nor did we receive any comments on the cost and burden on small entities of complying with the final rule. However, based on the Commission's own experience and knowledge of industry practices, the Commission continues to believe that the cost and burden to small entities of complying with the final rule are minimal. Accordingly, this document serves as notice to the Small Business Administration of the agency's certification of no effect. Nonetheless, the Commission has decided to publish a FRFA with the final rule. Therefore, the Commission has prepared the following analysis:

1. Need for and Objectives of the Rule

The FTC is charged with enforcing the requirements of section 311 of the FACT Act (which amends section 615 of the FCRA by adding a new subsection (h)) which requires that a risk-based pricing notice be provided to consumers in certain circumstances. The rule is generally intended to improve the accuracy of consumer reports by alerting consumers to the existence of potentially negative information in their consumer reports so that consumers may check their reports for accuracy and correct any inaccurate information. In addition, section 311 requires the Agencies jointly to prescribe rules to implement the duty of users of consumer reports to provide risk-based pricing notices in certain circumstances. Specifically, the rules must address, but are not limited to, the following aspects of section 615(h) of the FCRA: (i) The form, content, time, and manner of delivery of any risk-based pricing notice; (ii) clarification of the meaning of terms used in section 615(h), including what credit terms are material, and when credit terms are materially less favorable; (iii) exceptions to the risk-based pricing notice requirement for classes of persons or transactions regarding which the Agencies determine that notice would not significantly benefit consumers; (iv) a model notice that may be used to comply with section 615(h); and (v) the timing of the risk-based pricing notice, including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report. In this action, the FTC promulgates final rules that would implement these requirements of the FACT Act.

2. Significant Issues Received by Public Comment

The Commission received a number of comments in response to the proposed rule. Some of the comments addressed the effect of the proposed rule on businesses generally, but none identified small businesses as a particular category.

Two commenters suggested that the FTC staff has underestimated the amount of time and effort it would take businesses of all sizes to comply with the proposed rule. However, these commenters did not explain why they felt the Commission's estimate that compliance with the rule would take businesses on average 40 hours (1 business week) during the first year, and 5 hours per month on a continuing basis thereafter, was too low. These comments also did not offer any alternate time estimates. As explained in the PRA section, the Commission continues to believe that these time estimates are accurate and they remain unchanged in the final rule.

3. Small Entities to Which the Final Rule Will Apply

The total number of small entities likely to be affected by the final rule is unknown, because the Commission does not have data on the number of small entities that use consumer reports for risk-based pricing in connection with consumer credit. Moreover, the entities under the Commission's jurisdiction are so varied that there is no way to identify them in general and, therefore, no way to know how many of them qualify as small businesses. Generally, the entities under the Commission's jurisdiction that also are covered by section 311 include state-chartered credit unions, non-bank mortgage lenders, auto dealers, and utility companies. The available data, however, is not sufficient for the Commission to realistically estimate the number of small entities, as defined by the U.S. Small Business Administration (SBA), that the Commission regulates and that would be subject to the proposed rule.[26] The Commission did not receive any comments to the IRFA on the number of small entities that will be affected by the final rule. The final rule does not impose any requirements on small entities that do not use consumer reports or that do not engage in risk-based pricing of consumer credit on the basis of consumer reports.

4. Projected Reporting, Recordkeeping and Other Compliance Requirements

The final rule is a disclosure rule that generally requires a creditor to provide a risk-based pricing notice to a consumer when that creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. A creditor can identify consumers to whom it must provide the notice by directly comparing the material terms offered to its consumers or by using one of the two alternative methods specified in the final rule. The final rule also includes several exceptions to the general rule, including exceptions that would allow a creditor otherwise subject to the risk-based pricing notice requirement to provide a consumer with a credit score disclosure in conjunction with additional information that provides context for the credit score disclosure.

The final rule will involve some expenditure of time and resources for entities to comply, although Commission staff anticipates that the costs per entity will not be significant. Most of the costs will be incurred initially as entities develop systems for determining which of their consumers should receive risk-based pricing notices and as they train staff to comply with the rule. In calculating these costs, Commission staff assumes that for all entities managerial and/or professional technical personnel will handle the initial aspects of compliance with the proposed rule, and that sales associates or administrative personnel will handle any ongoing responsibilities. Cost estimates for compliance with the final

[26] Under the SBA's size standards, many creditors, including the majority of non-bank entities that are likely to be subject to the proposed regulations and are subject to the Commission's jurisdiction, are considered small if their average annual receipts do not exceed $6.5 million. Auto dealers have a higher size standard of $26.5 million in average annual receipts for new car dealers and $21 million in average annual receipts for used car dealers. A list of the SBA's size standards for all industries can be found in the SBA's Table of Small Business Size Standards Matched to North American Industry Classification Codes, which is available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

rule are described in detail in the PRA section of this Notice.

To minimize these costs, the final rule offers several different ways that businesses can perform a risk-based pricing analysis, allowing businesses to choose the method that is least burdensome and best-suited to their particular business model. Additionally, Commission staff believes that, as creditors, most of the covered entities are familiar already with the existing provisions of section 615 of the FCRA, which require specific disclosures in connection with adverse action notices whenever a creditor uses a credit report to deny credit. Commission staff anticipates that many businesses already have systems in place to handle the existing requirements under section 615 and that they will be able to incorporate the risk-based pricing notice requirements into those systems. As for any continuing costs such as those involved in preparing and distributing the notices, the final rule provides a model risk-based pricing notice, thereby significantly limiting the ongoing time and effort required by businesses to comply with the rule.

For these reasons, Commission staff does not expect that the costs associated with the final rule will place a significant burden on small entities.

5. Steps Taken To Minimize Significant Economic Impact of the Rule on Small Entities

The Commission considered whether any significant alternatives, consistent with the purposes of the FACT Act, could further minimize the final rule's impact on small entities. The FTC asked for comment on this issue and received none. The final rule provides flexibility so that a covered entity, regardless of its size, may tailor its practices to its individual needs. For example, the rule identifies several different ways that an entity can perform a risk-based pricing analysis, allowing each entity to choose the approach that fits best with its business model. A small business may find it easiest to make individual, consumer-to-consumer comparisons. If it uses a tiered system to determine a consumer's interest rate, however, then it may prefer to use the tiered pricing method to conduct the risk-based pricing analysis. Alternatively, a business may find the credit score disclosure notice to be least burdensome, and opt for that approach to comply with the rule. A business may prefer to deliver these notices electronically. By providing a range of options, the Agencies have sought to help businesses of all sizes reduce the burden or inconvenience of complying with the final rule.

Similarly, the final rule provides model notices and model credit score disclosures to facilitate compliance. By using these model notices, businesses qualify for a safe harbor. They are not required to use the model notices, however, as long as they provide a notice that effectively conveys the required information; these businesses simply would not receive the benefit of the safe harbor. Having this option, again, provides businesses of all sizes flexibility in how to comply with the final rule.

Some commenters requested that the FTC delay implementation of the final rule for up to two years in order that businesses may update software, develop and implement risk-based pricing procedures, and adequately train staff on the new rule. The agencies have set a compliance deadline that gives all affected entities one year in which to implement the final regulations. The Commission believes that one year is an adequate amount of time for businesses to reprogram and update systems to incorporate these new notice requirements, to provide employee training, and to modify model notices with respondent information to comply with the final rule.

List of Subjects

12 CFR Part 222

Banks, Banking, Consumer protection, Fair Credit Reporting Act, Holding companies, Privacy, Reporting and recordkeeping requirements, State member banks.

16 CFR Part 640

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Trade practices.

16 CFR Part 698

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Trade practices.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

■ For the reasons discussed in the joint preamble, the Board of Governors of the Federal Reserve System amends chapter II of title 12 of the Code of Federal Regulations by amending 12 CFR part 222 as follows:

PART 222—FAIR CREDIT REPORTING (REGULATION V)

■ 1. The authority citation for part 222 is revised to read as follows:

Authority: 15 U.S.C. 1681b, 1681c, 1681m and 1681s; Secs. 3, 214, and 216, Pub. L. 108–159, 117 Stat. 1952.

■ 2. Add Subpart H to part 222 to read as follows:

Subpart H—Duties of Users Regarding Risk-Based Pricing

Sec.
222.70 Scope.
222.71 Definitions.
222.72 General requirements for risk-based pricing notices.
222.73 Content, form, and timing of risk-based pricing notices.
222.74 Exceptions.
222.75 Rules of construction.

Subpart H—Duties of Users Regarding Risk-Based Pricing

§ 222.70 Scope.

(a) *Coverage*—(1) *In general.* This subpart applies to any person that both—

(i) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer that is primarily for personal, family, or household purposes; and

(ii) Based in whole or in part on the 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 person.

(2) *Business credit excluded.* This subpart does not apply to an application for, or a grant, extension, or other provision of, credit to a consumer or to any other applicant primarily for a business purpose.

(b) *Relation to Federal Trade Commission rules.* These rules are substantively identical to the Federal Trade Commission's (Commission's) risk-based pricing rules in 16 CFR 640. Both rules apply to the covered person described in paragraph (a) of this section. Compliance with either the Board's rules or the Commission's rules satisfies the requirements of the statute (15 U.S.C. 1681m(h)).

(c) *Enforcement.* The provisions of this subpart will be enforced in accordance with the enforcement authority set forth in sections 621(a) and (b) of the FCRA.

§ 222.71 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Adverse action* has the same meaning as in 15 U.S.C. 1681a(k)(1)(A).

(b) *Annual percentage rate* has the same meaning as in 12 CFR 226.14(b) with respect to an open-end credit plan and as in 12 CFR 226.22 with respect to closed-end credit.

(c) *Closed-end credit* has the same meaning as in 12 CFR 226.2(a)(10).

(d) *Consumer* has the same meaning as in 15 U.S.C. 1681a(c).

(e) *Consummation* has the same meaning as in 12 CFR 226.2(a)(13).

(f) *Consumer report* has the same meaning as in 15 U.S.C. 1681a(d).

(g) *Consumer reporting agency* has the same meaning as in 15 U.S.C. 1681a(f).

(h) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(i) *Creditor* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(j) *Credit card* has the same meaning as in 15 U.S.C. 1681a(r)(2).

(k) *Credit card issuer* has the same meaning as in 15 U.S.C. 1681a(r)(1)(A).

(l) *Credit score* has the same meaning as in 15 U.S.C. 1681g(f)(2)(A).

(m) *Firm offer of credit* has the same meaning as in 15 U.S.C. 1681a(l).

(n) *Material terms* means—

(1) (i) Except as otherwise provided in paragraphs (n)(1)(ii) and (n)(3) of this section, in the case of credit extended under an open-end credit plan, the annual percentage rate required to be disclosed under 12 CFR 226.6(a)(1)(ii) or 12 CFR 226.6(b)(2)(i), excluding any temporary initial rate that is lower than the rate that will apply after the temporary rate expires, any penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, and any fixed annual percentage rate option for a home equity line of credit;

(ii) In the case of a credit card (other than a credit card that is used to access a home equity line of credit or a charge card), the annual percentage rate required to be disclosed under 12 CFR 226.6(b)(2)(i) that applies to purchases ("purchase annual percentage rate") and no other annual percentage rate, or in the case of a credit card that has no purchase annual percentage rate, the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers;

(2) In the case of closed-end credit, the annual percentage rate required to be disclosed under 12 CFR 226.17(c) and 226.18(e); and

(3) In the case of credit for which there is no annual percentage rate, the financial term that varies based on information in a consumer report and that has the most significant financial impact on consumers, such as a deposit required in connection with credit extended by a telephone company or utility or an annual membership fee for a charge card.

(o) *Materially less favorable* means, when applied to material terms, that the terms granted, extended, or otherwise provided to a consumer differ from the terms granted, extended, or otherwise provided to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted, extended, or otherwise provided to the other consumer. For purposes of this definition, factors relevant to determining the significance of a difference in cost include the type of credit product, the term of the credit extension, if any, and the extent of the difference between the material terms granted, extended, or otherwise provided to the two consumers.

(p) *Open-end credit plan* has the same meaning as in 15 U.S.C. 1602(i), as interpreted by the Board of Governors of the Federal Reserve System in Regulation Z (12 CFR part 226) and the Official Staff Commentary to Regulation Z (Supplement I to 12 CFR Part 226).

(q) *Person* has the same meaning as in 15 U.S.C. 1681a(b).

§ 222.72 General requirements for risk-based pricing notices.

(a) *In general.* Except as otherwise provided in this subpart, a person must provide to a consumer a notice ("risk-based pricing notice") in the form and manner required by this subpart if the person both—

(1) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer that is primarily for personal, family, or household purposes; and

(2) Based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that 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 person.

(b) *Determining which consumers must receive a notice.* A person may determine whether paragraph (a) of this section applies by directly comparing the material terms offered to each consumer and the material terms offered to other consumers for a specific type of credit product. For purposes of this section, a "specific type of credit product" means one or more credit products with similar features that are designed for similar purposes. Examples of a specific type of credit product include student loans, unsecured credit cards, secured credit cards, new automobile loans, used automobile loans, fixed-rate mortgage loans, and variable-rate mortgage loans. As an alternative to making this direct comparison, a person may make the determination by using one of the following methods:

(1) *Credit score proxy method*—(i) *In general.* A person that sets the material terms of credit granted, extended, or otherwise provided to a consumer, based in whole or in part on a credit score, may comply with the requirements of paragraph (a) of this section by—

(A) Determining the credit score (hereafter referred to as the "cutoff score") that represents the point at which approximately 40 percent of the consumers to whom it grants, extends, or provides credit have higher credit scores and approximately 60 percent of the consumers to whom it grants, extends, or provides credit have lower credit scores; and

(B) Providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit whose credit score is lower than the cutoff score.

(ii) *Alternative to the 40/60 cutoff score determination.* In the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, a person may, at its option, set its cutoff score at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section.

(iii) *Determining the cutoff score*—(A) *Sampling approach.* A person that currently uses risk-based pricing with respect to the credit products it offers must calculate the cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted, extended, or provided credit for a specific type of credit product.

(B) *Secondary source approach in limited circumstances.* A person that is a new entrant into the credit business, introduces new credit products, or starts to use risk-based pricing with respect to the credit products it currently offers may initially determine the cutoff score based on information derived from appropriate market research or relevant third-party sources for a specific type of credit product, such as research or data from companies that develop credit scores. A person that acquires a credit

portfolio as a result of a merger or acquisition may determine the cutoff score based on information from the party which it acquired, with which it merged, or from which it acquired the portfolio.

(C) *Recalculation of cutoff scores.* A person using the credit score proxy method must recalculate its cutoff score(s) no less than every two years in the manner described in paragraph (b)(1)(iii)(A) of this section. A person using the credit score proxy method using market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as permitted by paragraph (b)(1)(iii)(B) of this section generally must calculate a cutoff score(s) based on the scores of its own consumers in the manner described in paragraph (b)(1)(iii)(A) of this section within one year after it begins using a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio. If such a person does not grant, extend, or provide credit to new consumers during that one-year period such that it lacks sufficient data with which to recalculate a cutoff score based on the credit scores of its own consumers, the person may continue to use a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as provided in paragraph (b)(1)(iii)(B) until it obtains sufficient data on which to base the recalculation. However, the person must recalculate its cutoff score(s) in the manner described in paragraph (b)(1)(iii)(A) of this section within two years, if it has granted, extended, or provided credit to some new consumers during that two-year period.

(D) *Use of two or more credit scores.* A person that generally uses two or more credit scores in setting the material terms of credit granted, extended, or provided to a consumer must determine the cutoff score using the same method the person uses to evaluate multiple scores when making credit decisions. These evaluation methods may include, but are not limited to, selecting the low, median, high, most recent, or average credit score of each consumer to whom it grants, extends, or provides credit. If a person that uses two or more credit scores does not consistently use the same method for evaluating multiple credit scores (*e.g.,* if the person sometimes chooses the median score and other times calculates the average score), the person must determine the cutoff score using a reasonable means. In such cases, use of any one of the methods that the person regularly uses or the average credit score of each consumer to whom it grants, extends, or provides credit is deemed to be a reasonable means of calculating the cutoff score.

(iv) *Credit score not available.* For purposes of this section, a person using the credit score proxy method who grants, extends, or provides credit to a consumer for whom a credit score is not available must assume that the consumer receives credit on material terms that are materially less favorable than the most favorable credit terms offered to a substantial proportion of consumers from or through that person and must provide a risk-based pricing notice to the consumer.

(v) *Examples.* (A) A credit card issuer engages in risk-based pricing and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The credit card issuer takes a representative sample of the credit scores of consumers to whom it issued credit cards within the preceding three months. The credit card issuer determines that approximately 40 percent of the sampled consumers have a credit score at or above 720 (on a scale of 350 to 850) and approximately 60 percent of the sampled consumers have a credit score below 720. Thus, the card issuer selects 720 as its cutoff score. A consumer applies to the credit card issuer for a credit card. The card issuer obtains a credit score for the consumer. The consumer's credit score is 700. Since the consumer's 700 credit score falls below the 720 cutoff score, the credit card issuer must provide a risk-based pricing notice to the consumer.

(B) A credit card issuer engages in risk-based pricing, and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The credit card issuer takes a representative sample of the consumers to whom it issued credit cards over the preceding six months. The credit card issuer determines that approximately 80 percent of the sampled consumers received credit at its lowest annual percentage rate, and 20 percent received credit at a higher annual percentage rate. Approximately 80 percent of the sampled consumers have a credit score at or above 750 (on a scale of 350 to 850), and 20 percent have a credit score below 750. Thus, the card issuer selects 750 as its cutoff score. A consumer applies to the credit card issuer for a credit card. The card issuer obtains a credit score for the consumer. The consumer's credit score is 740. Since the consumer's 740 credit score falls below the 750 cutoff score, the credit card issuer must provide a risk-based pricing notice to the consumer.

(C) An auto lender engages in risk-based pricing, obtains credit scores from one of the nationwide consumer reporting agencies, and uses the credit score proxy method to determine which consumers must receive a risk-based pricing notice. A consumer applies to the auto lender for credit to finance the purchase of an automobile. A credit score about that consumer is not available from the consumer reporting agency from which the lender obtains credit scores. The lender nevertheless grants, extends, or provides credit to the consumer. The lender must provide a risk-based pricing notice to the consumer.

(2) *Tiered pricing method*—(i) *In general.* A person that sets the material terms of credit granted, extended, or provided to a consumer by placing the consumer within one of a discrete number of pricing tiers for a specific type of credit product, based in whole or in part on a consumer report, may comply with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer who is not placed within the top pricing tier or tiers, as described below.

(ii) *Four or fewer pricing tiers.* If a person using the tiered pricing method has four or fewer pricing tiers, the person complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top tier (that is, the lowest-priced tier). For example, a person that uses a tiered pricing structure with annual percentage rates of 8, 10, 12, and 14 percent would provide the risk-based pricing notice to each consumer to whom it grants, extends, or provides credit at annual percentage rates of 10, 12, and 14 percent.

(iii) *Five or more pricing tiers.* If a person using the tiered pricing method has five or more pricing tiers, the person complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top two tiers (that is, the two lowest-priced tiers) and any other tier that, together with the top tiers, comprise no less than the top 30 percent but no more than the top 40 percent of the total number of tiers. Each consumer placed within the remaining tiers must receive a risk-

based pricing notice. For example, if a person has nine pricing tiers, the top three tiers (that is, the three lowest-priced tiers) comprise no less than the top 30 percent but no more than the top 40 percent of the tiers. Therefore, a person using this method would provide a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who is placed within the bottom six tiers.

(c) *Application to credit card issuers*—(1) *In general.* A credit card issuer subject to the requirements of paragraph (a) of this section may use one of the methods set forth in paragraph (b) of this section to identify consumers to whom it must provide a risk-based pricing notice. Alternatively, a credit card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to a consumer when—

(i) A consumer applies for a credit card either in connection with an application program, such as a direct-mail offer or a take-one application, or in response to a solicitation under 12 CFR 226.5a, and more than a single possible purchase annual percentage rate may apply under the program or solicitation; and

(ii) Based in whole or in part on a consumer report, the credit card issuer provides a credit card to the consumer with an annual percentage rate referenced in § 222.71(n)(1)(ii) that is greater than the lowest annual percentage rate referenced in § 222.71(n)(1)(ii) available in connection with the application or solicitation.

(2) *No requirement to compare different offers.* A credit card issuer is not subject to the requirements of paragraph (a) of this section and is not required to provide a risk-based pricing notice to a consumer if—

(i) The consumer applies for a credit card for which the card issuer provides a single annual percentage rate referenced in § 222.71(n)(1)(ii), excluding a temporary initial rate that is lower than the rate that will apply after the temporary rate expires and a penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit; or

(ii) The credit card issuer offers the consumer the lowest annual percentage rate referenced in § 222.71(n)(1)(ii) available under the credit card offer for which the consumer applied, even if a lower annual percentage rate referenced in § 222.71(n)(1)(ii) is available under a different credit card offer issued by the card issuer.

(3) *Examples.* (i) A credit card issuer sends a solicitation to the consumer that discloses several possible purchase annual percentage rates that may apply, such as 10, 12, or 14 percent, or a range of purchase annual percentage rates from 10 to 14 percent. The consumer applies for a credit card in response to the solicitation. The card issuer provides a credit card to the consumer with a purchase annual percentage rate of 12 percent based in whole or in part on a consumer report. Unless an exception applies under § 222.74, the card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to the consumer because the consumer received credit at a purchase annual percentage rate greater than the lowest purchase annual percentage rate available under that solicitation.

(ii) The same facts as in the example in paragraph (c)(3)(i) of this section, except that the card issuer provides a credit card to the consumer at a purchase annual percentage rate of 10 percent. The card issuer is not required to provide a risk-based pricing notice to the consumer even if, under a different credit card solicitation, that consumer or other consumers might qualify for a purchase annual percentage rate of 8 percent.

(d) *Account review*—(1) *In general.* Except as otherwise provided in this subpart, a person is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to a consumer in the form and manner required by this subpart if the person—

(i) Uses a consumer report in connection with a review of credit that has been extended to the consumer; and

(ii) Based in whole or in part on the consumer report, increases the annual percentage rate (the annual percentage rate referenced in § 222.71(n)(1)(ii) in the case of a credit card).

(2) *Example.* A credit card issuer periodically obtains consumer reports for the purpose of reviewing the terms of credit it has extended to consumers in connection with credit cards. As a result of this review, the credit card issuer increases the purchase annual percentage rate applicable to a consumer's credit card based in whole or in part on information in a consumer report. The credit card issuer is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to the consumer.

§ 222.73 Content, form, and timing of risk-based pricing notices.

(a) *Content of the notice*—(1) *In general.* The risk-based pricing notice required by § 222.72(a) or (c) must include:

(i) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;

(ii) A statement that the terms offered, such as the annual percentage rate, have been set based on information from a consumer report;

(iii) A statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the credit decision;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; and

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Account review.* The risk-based pricing notice required by § 222.72(d) must include:

(i) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that credit history;

(ii) A statement that the person has conducted a review of the account using information from a consumer report;

(iii) A statement that as a result of the review, the annual percentage rate on the account has been increased based on information from a consumer report;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the account review;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer

reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; and

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(b) *Form of the notice*—(1) *In general.* The risk-based pricing notice required by § 222.72(a), (c), or (d) must be:

(i) Clear and conspicuous; and

(ii) Provided to the consumer in oral, written, or electronic form.

(2) *Model forms.* A model form of the risk-based pricing notice required by § 222.72(a) and (c) is contained in Appendix H–1 of this part. Appropriate use of Model Form H–1 is deemed to comply with the content and form requirements of paragraphs (a)(1) and (b) of this section. A model form of the risk-based pricing notice required by § 222.72(d) is contained in Appendix H–2 of this part. Appropriate use of Model Form H–2 is deemed to comply with the content and form requirements of paragraphs (a)(2) and (b) of this section. Use of the model forms is optional.

(c) *Timing*—(1) *General.* Except as provided in paragraph (c)(3) of this section, a risk-based pricing notice must be provided to the consumer—

(i) In the case of a grant, extension, or other provision of closed-end credit, before consummation of the transaction, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit, is communicated to the consumer by the person required to provide the notice;

(ii) In the case of credit granted, extended, or provided under an open-end credit plan, before the first transaction is made under the plan, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit is communicated to the consumer by the person required to provide the notice; or

(iii) In the case of a review of credit that has been extended to the consumer, at the time the decision to increase the annual percentage rate (annual percentage rate referenced in § 222.71(n)(1)(ii) in the case of a credit card) based on a consumer report is communicated to the consumer by the person required to provide the notice, or if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change in the annual percentage rate (to the extent permitted by law), no later than five days after the effective date of the change in the annual percentage rate.

(2) *Application to certain automobile lending transactions.* When a person to whom a credit obligation is initially payable grants, extends, or provides credit to a consumer for the purpose of financing the purchase of an automobile from an auto dealer or other party that is not affiliated with the person, any requirement to provide a risk-based pricing notice pursuant to this subpart is satisfied if the person:

(i) Provides a notice described in §§ 222.72(a), 222.74(e), or 222.74(f) to the consumer within the time periods set forth in paragraph (c)(1)(i) of this section, § 222.74(e)(3), or § 222.74(f)(4), as applicable; or

(ii) Arranges to have the auto dealer or other party provide a notice described in §§ 222.72(a), 222.74(e), or 222.74(f) to the consumer on its behalf within the time periods set forth in paragraph (c)(1)(i) of this section, § 222.74(e)(3), or § 222.74(f)(4), as applicable, and maintains reasonable policies and procedures to verify that the auto dealer or other party provides such notice to the consumer within the applicable time periods. If the person arranges to have the auto dealer or other party provide a notice described in § 222.74(e), the person's obligation is satisfied if the consumer receives a notice containing a credit score obtained by the dealer or other party, even if a different credit score is obtained and used by the person on whose behalf the notice is provided.

(3) *Timing requirements for contemporaneous purchase credit.* When credit under an open-end credit plan is granted, extended, or provided to a consumer in person or by telephone for the purpose of financing the contemporaneous purchase of goods or services, any risk-based pricing notice required to be provided pursuant to this subpart (or the disclosures permitted under § 222.74(e) or (f)) may be provided at the earlier of:

(i) The time of the first mailing by the person to the consumer after the decision is made to approve the grant, extension, or other provision of open-end credit, such as in a mailing containing the account agreement or a credit card; or

(ii) Within 30 days after the decision to approve the grant, extension, or other provision of credit.

§ 222.74 Exceptions.

(a) *Application for specific terms*—(1) *In general.* A person is not required to provide a risk-based pricing notice to the consumer under § 222.72(a) or (c) if the consumer applies for specific material terms and is granted those terms, unless those terms were specified by the person using a consumer report after the consumer applied for or requested credit and after the person obtained the consumer report. For purposes of this section, "specific material terms" means a single material term, or set of material terms, such as an annual percentage rate of 10 percent, and not a range of alternatives, such as an annual percentage rate that may be 8, 10, or 12 percent, or between 8 and 12 percent.

(2) *Example.* A consumer receives a firm offer of credit from a credit card issuer. The terms of the firm offer are based in whole or in part on information from a consumer report that the credit card issuer obtained under the FCRA's firm offer of credit provisions. The solicitation offers the consumer a credit card with a single purchase annual percentage rate of 12 percent. The consumer applies for and receives a credit card with an annual percentage rate of 12 percent. Other customers with the same credit card have a purchase annual percentage rate of 10 percent. The exception applies because the consumer applied for specific material terms and was granted those terms. Although the credit card issuer specified the annual percentage rate in the firm offer of credit based in whole or in part on a consumer report, the credit card issuer specified that material term *before,* not *after,* the consumer applied for or requested credit.

(b) *Adverse action notice.* A person is not required to provide a risk-based pricing notice to the consumer under § 222.72(a), (c), or (d) if the person provides an adverse action notice to the consumer under section 615(a) of the FCRA.

(c) *Prescreened solicitations*—(1) *In general.* A person is not required to provide a risk-based pricing notice to the consumer under § 222.72(a) or (c) if the person:

(i) Obtains a consumer report that is a prescreened list as described in section 604(c)(2) of the FCRA; and

(ii) Uses the consumer report for the purpose of making a firm offer of credit to the consumer.

(2) *More favorable material terms.* This exception applies to any firm offer of credit offered by a person to a consumer, even if the person makes other firm offers of credit to other

consumers on more favorable material terms.

(3) *Example.* A credit card issuer obtains two prescreened lists from a consumer reporting agency. One list includes consumers with high credit scores. The other list includes consumers with low credit scores. The issuer mails a firm offer of credit to the high credit score consumers with a single purchase annual percentage rate of 10 percent. The issuer also mails a firm offer of credit to the low credit score consumers with a single purchase annual percentage rate of 14 percent. The credit card issuer is not required to provide a risk-based pricing notice to the low credit score consumers who receive the 14 percent offer because use of a consumer report to make a firm offer of credit does not trigger the risk-based pricing notice requirement.

(d) *Loans secured by residential real property—credit score disclosure.* (1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 222.72(a) or (c) if:

(i) The consumer requests from the person an extension of credit that is or will be secured by one to four units of residential real property; and

(ii) The person provides to each consumer described in paragraph (d)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The information required to be disclosed to the consumer pursuant to section 609(g) of the FCRA;

(E) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (d)(1)(ii)(E) is deemed to comply with this requirement;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (d)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Provided on or with the notice required by section 609(g) of the FCRA;

(iii) Segregated from other information provided to the consumer, except for the notice required by section 609(g) of the FCRA; and

(iv) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (d)(1)(ii) of this section must be provided to the consumer at the time the disclosure required by section 609(g) of the FCRA is provided to the consumer, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In General.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (d)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (d)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraph (d)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* (A) A person that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That person must disclose the low score in the notice described in paragraph (d)(1)(ii) of this section.

(B) A person that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That person may choose one of these scores to include in the notice described in paragraph (d)(1)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (d)(1)(ii) of this section consolidated with the notice required by section 609(g) of the FCRA is contained in Appendix H–3 of this part. Appropriate use of Model Form H–3 is deemed to comply with the requirements of § 222.74(d). Use of the model form is optional.

(e) *Other extensions of credit—credit score disclosure*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 222.72(a) or (c) if:

(i) The consumer requests from the person an extension of credit other than credit that is or will be secured by one to four units of residential real property; and

(ii) The person provides to each consumer described in paragraph (e)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time

to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the consumer reporting agency for a purpose related to the extension of credit;

(E) The range of possible credit scores under the model used to generate the credit score;

(F) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar, or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (e)(1)(ii)(F) is deemed to comply with this requirement;

(G) The date on which the credit score was created;

(H) The name of the consumer reporting agency or other person that provided the credit score;

(I) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(J) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(K) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(L) A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (e)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (e)(1)(ii) of this section must be provided to the consumer as soon as reasonably practicable after the credit score has been obtained, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In General.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (e)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (e)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraph (e)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* The manner in which multiple credit scores are to be disclosed under this section are substantially identical to the manner set forth in the examples contained in paragraph (d)(4)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (e)(1)(ii) of this section is contained in Appendix H–4 of this part. Appropriate use of Model Form H–4 is deemed to comply with the requirements of § 222.74(e). Use of the model form is optional.

(f) *Credit score not available*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 222.72(a) or (c) if the person:

(i) Regularly obtains credit scores from a consumer reporting agency and provides credit score disclosures to consumers in accordance with paragraphs (d) or (e) of this section, but a credit score is not available from the consumer reporting agency from which the person regularly obtains credit scores for a consumer to whom the person grants, extends, or provides credit;

(ii) Does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or providing credit to the consumer; and

(iii) Provides to the consumer a notice that contains the following—

(A) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time in response to changes in the consumer's credit history;

(C) A statement that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms;

(D) A statement that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(E) A statement that a credit score about the consumer was not available from a consumer reporting agency, which must be identified by name, generally due to insufficient information regarding the consumer's credit history;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) The contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Example.* A person that uses consumer reports to set the material terms of non-mortgage credit granted, extended, or provided to consumers regularly requests credit scores from a particular consumer reporting agency and provides those credit scores and additional information to consumers to satisfy the requirements of paragraph (e) of this section. That consumer reporting agency provides to the person a consumer report on a particular consumer that contains one trade line,

but does not provide the person with a credit score on that consumer. If the person does not obtain a credit score from another consumer reporting agency and, based in whole or in part on information in a consumer report, grants, extends, or provides credit to the consumer, the person may provide the notice described in paragraph (f)(1)(iii) of this section. If, however, the person obtains a credit score from another consumer reporting agency, the person may not rely upon the exception in paragraph (f) of this section, but may satisfy the requirements of paragraph (e) of this section.

(3) *Form of the notice.* The notice described in paragraph (f)(1)(iii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(4) *Timing.* The notice described in paragraph (f)(1)(iii) of this section must be provided to the consumer as soon as reasonably practicable after the person has requested the credit score, but in any event not later than consummation of a transaction in the case of closed-end credit or when the first transaction is made under an open-end credit plan.

(5) *Model form.* A model form of the notice described in paragraph (f)(1)(iii) of this section is contained in Appendix H–5 of this part. Appropriate use of Model Form H–5 is deemed to comply with the requirements of § 222.74(f). Use of the model form is optional.

§ 222.75 Rules of construction.

For purposes of this subpart, the following rules of construction apply:

(a) *One notice per credit extension.* A consumer is entitled to no more than one risk-based pricing notice under § 222.72(a) or (c), or one notice under § 222.74(d), (e), or (f), for each grant, extension, or other provision of credit. Notwithstanding the foregoing, even if a consumer has previously received a risk-based pricing notice in connection with a grant, extension, or other provision of credit, another risk-based pricing notice is required if the conditions set forth in § 222.72(d) have been met.

(b) *Multi-party transactions*—(1) *Initial creditor.* The person to whom a credit obligation is initially payable must provide the risk-based pricing notice described in § 222.72(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 222.74(d), (e), or (f), even if that person immediately assigns the credit agreement to a third party and is not the source of funding for the credit.

(2) *Purchasers or assignees.* A purchaser or assignee of a credit contract with a consumer is not subject to the requirements of this subpart and is not required to provide the risk-based pricing notice described in § 222.72(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 222.74(d), (e), or (f).

(3) *Examples.* (i) A consumer obtains credit to finance the purchase of an automobile. If the auto dealer is the person to whom the loan obligation is initially payable, such as where the auto dealer is the original creditor under a retail installment sales contract, the auto dealer must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted above), even if the auto dealer immediately assigns the loan to a bank or finance company. The bank or finance company, which is an assignee, has no duty to provide a risk-based pricing notice to the consumer.

(ii) A consumer obtains credit to finance the purchase of an automobile. If a bank or finance company is the person to whom the loan obligation is initially payable, the bank or finance company must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted above) based on the terms offered by that bank or finance company only. The auto dealer has no duty to provide a risk-based pricing notice to the consumer. However, the bank or finance company may comply with this rule if the auto dealer has agreed to provide notices to consumers before consummation pursuant to an arrangement with the bank or finance company, as permitted under § 222.73(c).

(c) *Multiple consumers*—(1) *Risk-based pricing notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a notice to each consumer to satisfy the requirements of § 222.72(a) or (c). If the consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer.

(2) *Credit score disclosure notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a separate notice to each consumer to satisfy the exceptions in § 222.74(d), (e), or (f). Whether the consumers have the same address or not, the person must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer.

(3) *Examples.* (i) Two consumers jointly apply for credit with a creditor. The creditor grants credit to the consumers on material terms that are materially less favorable than the most favorable terms available to other consumers from the creditor. The two consumers reside at different addresses. The creditor provides risk-based pricing notices to satisfy its obligations under this subpart. The creditor must provide a risk-based pricing notice to each consumer at the address where each consumer resides.

(ii) Two consumers jointly apply for credit with a creditor. The two consumers reside at the same address. The creditor obtains credit scores on each of the two consumer applicants. The creditor grants credit to the consumers. The creditor provides credit score disclosure notices to satisfy its obligations under this subpart. Even though the two consumers reside at the same address, the creditor must provide a separate credit score disclosure notice to each of the consumers. Each notice must contain only the credit score of the consumer to whom the notice is provided.

■ 3. In Part 222, Appendix H is added to read as follows:

Appendix H—Model Forms for Risk-Based Pricing and Credit Score Disclosure Exception Notices

1. This appendix contains two model forms for risk-based pricing notices and three model forms for use in connection with the credit score disclosure exceptions. Each of the model forms is designated for use in a particular set of circumstances as indicated by the title of that model form.

2. Model form H–1 is for use in complying with the general risk-based pricing notice requirements in § 222.72. Model form H–2 is for risk-based pricing notices given in connection with account review. Model form H–3 is for use in connection with the credit score disclosure exception for loans secured by residential real property. Model form H–4 is for use in connection with the credit score disclosure exception for loans that are not secured by residential real property. Model form H–5 is for use in connection with the credit score disclosure exception when no credit score is available for a consumer. All forms contained in this appendix are models; their use is optional.

3. A person may change the forms by rearranging the format or by making technical modifications to the language of the forms, in each case without modifying the substance of

the disclosures. Any such rearrangement or modification of the language of the model forms may not be so extensive as to materially affect the substance, clarity, comprehensibility, or meaningful sequence of the forms. Persons making revisions with that effect will lose the benefit of the safe harbor for appropriate use of Appendix H model forms. A person is not required to conduct consumer testing when rearranging the format of the model forms.

a. Acceptable changes include, for example:

i. Corrections or updates to telephone numbers, mailing addresses, or Web site addresses that may change over time.

ii. The addition of graphics or icons, such as the person's corporate logo.

iii. Alteration of the shading or color contained in the model forms.

iv. Use of a different form of graphical presentation to depict the distribution of credit scores.

v. Substitution of the words "credit" and "creditor" or "finance" and "finance company" for the terms "loan" and "lender."

vi. Including pre-printed lists of the sources of consumer reports or consumer reporting agencies in a "check-the-box" format.

vii. Including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains.

viii. Including the name of an agent, such as an auto dealer or other party, when providing the "Name of the Entity Providing the Notice."

b. Unacceptable changes include, for example:

i. Providing model forms on register receipts or interspersed with other disclosures.

ii. Eliminating empty lines and extra spaces between sentences within the same section.

4. If a person uses an appropriate Appendix H model form, or modifies a form in accordance with the above instructions, that person shall be deemed to be acting in compliance with the provisions of § 222.73 or § 222.74, as applicable, of this regulation. It is intended that appropriate use of Model Form H–3 also will comply with the disclosure that may be required under section 609(g) of the FCRA.

H–1 Model form for risk-based pricing notice.

H–2 Model form for account review risk-based pricing notice.

H–3 Model form for credit score disclosure exception for credit secured by one to four units of residential real property.

H–4 Model form for credit score disclosure exception for loans not secured by residential real property.

H–5 Model form for credit score disclosure exception for loans where credit score is not available.

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H-1. Model form for risk-based pricing notice

[Name of Entity Providing the Notice]
Your Credit Report[s] and the Price You Pay for Credit

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment]. The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact **[insert name of CRA(s)]**, which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact **[insert name of CRA(s)]**: *By telephone:* Call toll-free: 1-877-xxx-xxxx *By mail:* Mail your written request to: **[Insert address]** *On the web:* Visit **[insert web site address]**
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

H-2. Model form for account review risk-based pricing notice

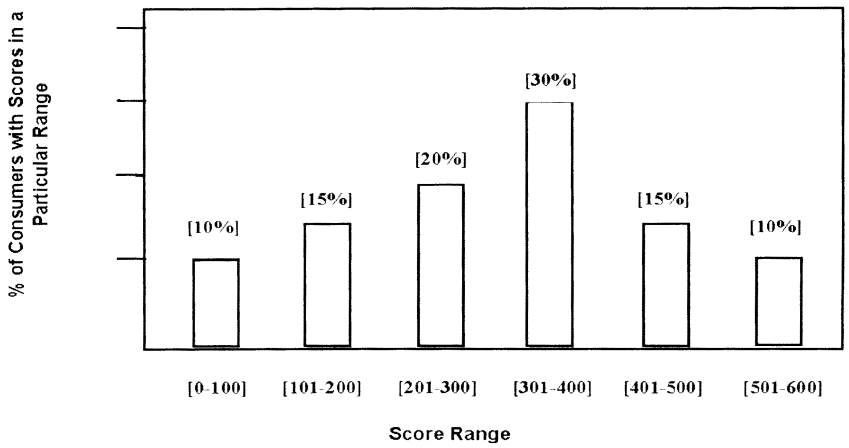
[Name of Entity Providing the Notice]
Your Credit Report[s] and the Pricing of Your Account

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We have used information from your credit report[s] to review the terms of your account with us. Based on our review of your credit report[s], we have increased the annual percentage rate on your account.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact **[insert name of CRA(s)]**, which [is/are] [a consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact **[insert name of CRA(s)]**: *By telephone:* Call toll-free: 1-877-xxx-xxxx *By mail:* Mail your written request to: **[Insert address]** *On the web:* Visit **[insert web site address]**
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

H-3. Model form for credit score disclosure exception for loans secured by one to four units of residential real property

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	**[Insert credit score]** Source: **[Insert source]** Date: **[Insert date score was created]**

Understanding Your Credit Score	
What you should know about credit scores	Your credit score is a number that reflects the information in your credit report. Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. Your credit score can change, depending on how your credit history changes.
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.
The range of scores	Scores range from a low of **[Insert bottom number in the range]** to a high of **[Insert top number in the range]**. Generally, the higher your score, the more likely you are to be offered better credit terms.
How your score compares to the scores of other consumers	 **[or]** [Your credit score ranks higher than [X] percent of U.S. consumers.]

Understanding Your Credit Score (continued)	
Key factors that adversely affected your credit score	**[Insert first factor]** **[Insert second factor]** **[Insert third factor]** **[Insert fourth factor]** **[Insert fifth factor, if applicable]**

Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/ bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

Notice to the Home Loan Applicant

In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

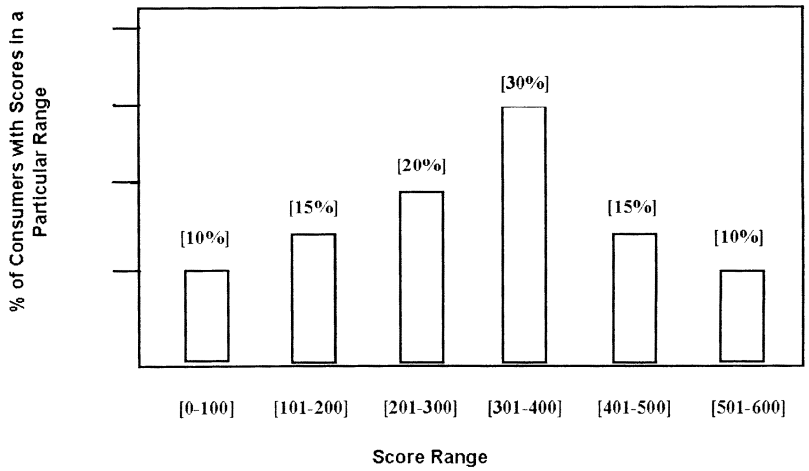
If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

If you have questions concerning the terms of the loan, contact the lender.

H-4. Model form for credit score disclosure exception for loans not secured by residential real property

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	**[Insert credit score]** Source: **[Insert source]** Date: **[Insert date score was created]**

Understanding Your Credit Score	
What you should know about credit scores	Your credit score is a number that reflects the information in your credit report. Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. Your credit score can change, depending on how your credit history changes.
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.
The range of scores	Scores range from a low of **[Insert bottom number in the range]** to a high of **[Insert top number in the range]**. Generally, the higher your score, the more likely you are to be offered better credit terms.
How your score compares to the scores of other consumers	 **[or]** [Your credit score ranks higher than [X] percent of U.S. consumers.]

Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/ bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

H-5. Model form for loans where credit score is not available

[Name of Entity Providing the Notice]
Credit Scores and the Price You Pay for Credit

Your Credit Score	
Your credit score	Your credit score is not available from [**Insert name of CRA**], which is a consumer reporting agency, because they may not have enough information about your credit history to calculate a score.
What you should know about credit scores	A credit score is a number that reflects the information in a credit report. A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. A credit score can change, depending on how a consumer's credit history changes.
Why credit scores are important	Credit scores are important because consumers who have higher credit scores generally will get more favorable credit terms. Not having a credit score can affect whether you can get a loan and how much you will have to pay for that loan.
Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

BILLING CODE C

Federal Trade Commission

16 CFR Chapter I

Authority and Issuance

■ For the reasons discussed in the joint preamble, the Federal Trade Commission amends chapter I, title 16, Code of Federal Regulations, as follows:

■ 1. Add a new part 640 to read as follows:

PART 640—DUTIES OF CREDITORS REGARDING RISK-BASED PRICING

Sec.
640.1 Scope.
640.2 Definitions.
640.3 General requirements for risk-based pricing notices.
640.4 Content, form, and timing of risk-based pricing notices.
640.5 Exceptions.
640.6 Rules of construction.

Authority: Pub. L. 108–159, sec. 311; 15 U.S.C. 1681m(h).

§ 640.1 Scope.

(a) *Coverage*—(1) *In general.* This part applies to any person that both—

(i) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer that is primarily for personal, family, or household purposes; and

(ii) Based in whole or in part on the 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 person.

(2) *Business credit excluded.* This part does not apply to an application for, or a grant, extension, or other provision of, credit to a consumer or to any other applicant primarily for a business purpose.

(b) *Relation to Board of Governors of the Federal Reserve System rules.* The rules in this part were developed jointly with the Board of Governors of the Federal Reserve System (Board) and are substantively identical to the Board's risk-based pricing rules in 12 CFR part 222. Both rules apply to the covered person described in paragraph (a) of this section. Compliance with either the Board's rules or the Commission's rules satisfies the requirements of the statute (15 U.S.C. 1681m(h)).

(c) *Enforcement.* The provisions of this part will be enforced in accordance with the enforcement authority set forth in sections 621(a) and (b) of the FCRA.

§ 640.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Adverse action* has the same meaning as in 15 U.S.C. 1681a(k)(1)(A).

(b) *Annual percentage rate* has the same meaning as in 12 CFR 226.14(b) with respect to an open-end credit plan and as in 12 CFR 226.22 with respect to closed-end credit.

(c) *Closed-end credit* has the same meaning as in 12 CFR 226.2(a)(10).

(d) *Consumer* has the same meaning as in 15 U.S.C. 1681a(c).

(e) *Consummation* has the same meaning as in 12 CFR 226.2(a)(13).

(f) *Consumer report* has the same meaning as in 15 U.S.C. 1681a(d).

(g) *Consumer reporting agency* has the same meaning as in 15 U.S.C. 1681a(f).

(h) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(i) *Creditor* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(j) *Credit card* has the same meaning as in 15 U.S.C. 1681a(r)(2).

(k) *Credit card issuer* has the same meaning as in 15 U.S.C. 1681a(r)(1)(A).

(l) *Credit score* has the same meaning as in 15 U.S.C. 1681g(f)(2)(A).

(m) *Firm offer of credit* has the same meaning as in 15 U.S.C. 1681a(l).

(n) *Material terms* means—

(1) (i) Except as otherwise provided in paragraphs (n)(1)(ii) and (n)(3) of this section, in the case of credit extended under an open-end credit plan, the annual percentage rate required to be disclosed under 12 CFR 226.6(a)(1)(ii) or 12 CFR 226.6(b)(2)(i), excluding any temporary initial rate that is lower than the rate that will apply after the temporary rate expires, any penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, and any fixed annual percentage rate option for a home equity line of credit;

(ii) In the case of a credit card (other than a credit card that is used to access a home equity line of credit or a charge card), the annual percentage rate required to be disclosed under 12 CFR 226.6(b)(2)(i) that applies to purchases ("purchase annual percentage rate") and no other annual percentage rate, or in the case of a credit card that has no purchase annual percentage rate, the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers;

(2) In the case of closed-end credit, the annual percentage rate required to be disclosed under 12 CFR 226.17(c) and 226.18(e); and

(3) In the case of credit for which there is no annual percentage rate, the financial term that varies based on information in a consumer report and that has the most significant financial impact on consumers, such as a deposit required in connection with credit extended by a telephone company or utility or an annual membership fee for a charge card.

(o) *Materially less favorable* means, when applied to material terms, that the terms granted, extended, or otherwise provided to a consumer differ from the terms granted, extended, or otherwise provided to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted, extended, or otherwise provided to the other consumer. For purposes of this definition, factors relevant to determining the significance of a difference in cost include the type of credit product, the term of the credit extension, if any, and the extent of the difference between the material terms granted, extended, or otherwise provided to the two consumers.

(p) *Open-end credit plan* has the same meaning as in 15 U.S.C. 1602(i), as interpreted by the Board in Regulation Z and the Official Staff Commentary to Regulation Z.

(q) *Person* has the same meaning as in 15 U.S.C. 1681a(b).

§ 640.3 General requirements for risk-based pricing notices.

(a) *In general.* Except as otherwise provided in this part, a person must provide to a consumer a notice ("risk-based pricing notice") in the form and manner required by this part if the person both—

(1) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer that is primarily for personal, family, or household purposes; and

(2) Based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that 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 person.

(b) *Determining which consumers must receive a notice.* A person may determine whether paragraph (a) of this section applies by directly comparing the material terms offered to each consumer and the material terms offered to other consumers for a specific type of credit product. For purposes of this section, a "specific type of credit product" means one or more credit products with similar features that are designed for similar purposes. Examples of a specific type of credit product include student loans, unsecured credit

cards, secured credit cards, new automobile loans, used automobile loans, fixed-rate mortgage loans, and variable-rate mortgage loans. As an alternative to making this direct comparison, a person may make the determination by using one of the following methods:

(1) *Credit score proxy method*—(i) *In general.* A person that sets the material terms of credit granted, extended, or otherwise provided to a consumer, based in whole or in part on a credit score, may comply with the requirements of paragraph (a) of this section by—

(A) Determining the credit score (hereafter referred to as the "cutoff score") that represents the point at which approximately 40 percent of the consumers to whom it grants, extends, or provides credit have higher credit scores and approximately 60 percent of the consumers to whom it grants, extends, or provides credit have lower credit scores; and

(B) Providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit whose credit score is lower than the cutoff score.

(ii) *Alternative to the 40/60 cutoff score determination.* In the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, a person may, at its option, set its cutoff score at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section.

(iii) *Determining the cutoff score*—(A) *Sampling approach.* A person that currently uses risk-based pricing with respect to the credit products it offers must calculate the cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted, extended, or provided credit for a specific type of credit product.

(B) *Secondary source approach in limited circumstances.* A person that is a new entrant into the credit business, introduces new credit products, or starts to use risk-based pricing with respect to the credit products it currently offers may initially determine the cutoff score based on information derived from appropriate market research or relevant third-party sources for a specific type of credit product, such as research or data from companies that develop credit scores. A person that acquires a credit portfolio as a result of a merger or acquisition may determine the cutoff score based on information from the party which it acquired, with which it merged, or from which it acquired the portfolio.

(C) *Recalculation of cutoff scores.* A person using the credit score proxy method must recalculate its cutoff score(s) no less than every two years in the manner described in paragraph (b)(1)(iii)(A) of this section. A person using the credit score proxy method using market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as permitted by paragraph (b)(1)(iii)(B) of this section generally must calculate a cutoff score(s) based on the scores of its own consumers in the manner described in paragraph (b)(1)(iii)(A) of this section within one year after it begins using a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio. If such a person does not grant, extend, or provide credit to new consumers during that one-year period such that it lacks sufficient data with which to recalculate a cutoff score based on the credit scores of its own consumers, the person may continue to use a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as provided in paragraph (b)(1)(iii)(B) until it obtains sufficient data on which to base the recalculation. However, the person must recalculate its cutoff score(s) in the manner described in paragraph (b)(1)(iii)(A) of this section within two years, if it has granted, extended, or provided credit to some new consumers during that two-year period.

(D) *Use of two or more credit scores.* A person that generally uses two or more credit scores in setting the material terms of credit granted, extended, or provided to a consumer must determine the cutoff score using the same method the person uses to evaluate multiple scores when making credit decisions. These evaluation methods may include, but are not limited to, selecting the low, median, high, most recent, or average credit score of each consumer to whom it grants, extends, or provides credit. If a person that uses two or more credit scores does not consistently use the same method for evaluating multiple credit scores (*e.g.,* if the person sometimes chooses the median score and other times calculates the average score), the person must determine the cutoff score using a reasonable means. In such cases, use of any one of the methods that the person regularly uses or the average credit score of each consumer to whom it grants, extends, or provides credit is deemed to be a reasonable means of calculating the cutoff score.

(iv) *Credit score not available.* For purposes of this section, a person using the credit score proxy method who grants, extends, or provides credit to a consumer for whom a credit score is not available must assume that the consumer receives credit on material terms that are materially less favorable than the most favorable credit terms offered to a substantial proportion of consumers from or through that person and must provide a risk-based pricing notice to the consumer.

(v) *Examples.* (A) A credit card issuer engages in risk-based pricing and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The credit card issuer takes a representative sample of the credit scores of consumers to whom it issued credit cards within the preceding three months. The credit card issuer determines that approximately 40 percent of the sampled consumers have a credit score at or above 720 (on a scale of 350 to 850) and approximately 60 percent of the sampled consumers have a credit score below 720. Thus, the card issuer selects 720 as its cutoff score. A consumer applies to the credit card issuer for a credit card. The card issuer obtains a credit score for the consumer. The consumer's credit score is 700. Since the consumer's 700 credit score falls below the 720 cutoff score, the credit card issuer must provide a risk-based pricing notice to the consumer.

(B) A credit card issuer engages in risk-based pricing, and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The credit card issuer takes a representative sample of the consumers to whom it issued credit cards over the preceding six months. The credit card issuer determines that approximately 80 percent of the sampled consumers received credit at its lowest annual percentage rate, and 20 percent received credit at a higher annual percentage rate. Approximately 80 percent of the sampled consumers have a credit score at or above 750 (on a scale of 350 to 850), and 20 percent have a credit score below 750. Thus, the card issuer selects 750 as its cutoff score. A consumer applies to the credit card issuer for a credit card. The card issuer obtains a credit score for the consumer. The consumer's credit score is 740. Since the consumer's 740 credit score falls below the 750 cutoff score, the credit card

issuer must provide a risk-based pricing notice to the consumer.

(C) An auto lender engages in risk-based pricing, obtains credit scores from one of the nationwide consumer reporting agencies, and uses the credit score proxy method to determine which consumers must receive a risk-based pricing notice. A consumer applies to the auto lender for credit to finance the purchase of an automobile. A credit score about that consumer is not available from the consumer reporting agency from which the lender obtains credit scores. The lender nevertheless grants, extends, or provides credit to the consumer. The lender must provide a risk-based pricing notice to the consumer.

(2) *Tiered pricing method*—(i) *In general.* A person that sets the material terms of credit granted, extended, or provided to a consumer by placing the consumer within one of a discrete number of pricing tiers for a specific type of credit product, based in whole or in part on a consumer report, may comply with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer who is not placed within the top pricing tier or tiers, as described below.

(ii) *Four or fewer pricing tiers.* If a person using the tiered pricing method has four or fewer pricing tiers, the person complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top tier (that is, the lowest-priced tier). For example, a person that uses a tiered pricing structure with annual percentage rates of 8, 10, 12, and 14 percent would provide the risk-based pricing notice to each consumer to whom it grants, extends, or provides credit at annual percentage rates of 10, 12, and 14 percent.

(iii) *Five or more pricing tiers.* If a person using the tiered pricing method has five or more pricing tiers, the person complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top two tiers (that is, the two lowest-priced tiers) and any other tier that, together with the top tiers, comprise no less than the top 30 percent but no more than the top 40 percent of the total number of tiers. Each consumer placed within the remaining tiers must receive a risk-based pricing notice. For example, if a person has nine pricing tiers, the top three tiers (that is, the three lowest-priced tiers) comprise no less than the top 30 percent but no more than the top 40 percent of the tiers. Therefore, a person using this method would provide a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who is placed within the bottom six tiers.

(c) *Application to credit card issuers*—(1) *In general.* A credit card issuer subject to the requirements of paragraph (a) of this section may use one of the methods set forth in paragraph (b) of this section to identify consumers to whom it must provide a risk-based pricing notice. Alternatively, a credit card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to a consumer when—

(i) A consumer applies for a credit card either in connection with an application program, such as a direct-mail offer or a take-one application, or in response to a solicitation under 12 CFR 226.5a, and more than a single possible purchase annual percentage rate may apply under the program or solicitation; and

(ii) Based in whole or in part on a consumer report, the credit card issuer provides a credit card to the consumer with an annual percentage rate referenced in § 640.2(n)(1)(ii) that is greater than the lowest annual percentage rate referenced in § 640.2(n)(1)(ii) available in connection with the application or solicitation.

(2) *No requirement to compare different offers.* A credit card issuer is not subject to the requirements of paragraph (a) of this section and is not required to provide a risk-based pricing notice to a consumer if—

(i) The consumer applies for a credit card for which the card issuer provides a single annual percentage rate referenced in § 640.2(n)(1)(ii), excluding a temporary initial rate that is lower than the rate that will apply after the temporary rate expires and a penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit; or

(ii) The credit card issuer offers the consumer the lowest annual percentage rate referenced in § 640.2(n)(1)(ii) available under the credit card offer for which the consumer applied, even if a lower annual percentage rate referenced in § 640.2(n)(1)(ii) is available under a different credit card offer issued by the card issuer.

(3) *Examples.* (i) A credit card issuer sends a solicitation to the consumer that discloses several possible purchase annual percentage rates that may apply, such as 10, 12, or 14 percent, or a range of purchase annual percentage rates from 10 to 14 percent. The consumer applies for a credit card in response to the solicitation. The card issuer provides a credit card to the consumer with a purchase annual percentage rate of 12 percent based in whole or in part on a consumer report. Unless an exception applies under § 640.5, the card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to the consumer because the consumer received credit at a purchase annual percentage rate greater than the lowest purchase annual percentage rate available under that solicitation.

(ii) The same facts as in the example in paragraph (c)(3)(i) of this section, except that the card issuer provides a credit card to the consumer at a purchase annual percentage rate of 10 percent. The card issuer is not required to provide a risk-based pricing notice to the consumer even if, under a different credit card solicitation, that consumer or other consumers might qualify for a purchase annual percentage rate of 8 percent.

(d) *Account review*—(1) *In general.* Except as otherwise provided in this part, a person is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to a consumer in the form and manner required by this part if the person—

(i) Uses a consumer report in connection with a review of credit that has been extended to the consumer; and

(ii) Based in whole or in part on the consumer report, increases the annual percentage rate (the annual percentage rate referenced in § 640.2(n)(1)(ii) in the case of a credit card).

(2) *Example.* A credit card issuer periodically obtains consumer reports for the purpose of reviewing the terms of credit it has extended to consumers in connection with credit cards. As a result of this review, the credit card issuer increases the purchase annual percentage rate applicable to a consumer's credit card based in whole or in part on information in a consumer report. The credit card issuer is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to the consumer.

§ 640.4 Content, form, and timing of risk-based pricing notices.

(a) *Content of the notice*—(1) *In general.* The risk-based pricing notice required by § 640.3(a) or (c) must include:

(i) A statement that a consumer report (or credit report) includes information

about the consumer's credit history and the type of information included in that history;

(ii) A statement that the terms offered, such as the annual percentage rate, have been set based on information from a consumer report;

(iii) A statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the credit decision;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; and

(viii) A statement directing consumers to the Web sites of the Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Account review.* The risk-based pricing notice required by § 640.3(d) must include:

(i) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that credit history;

(ii) A statement that the person has conducted a review of the account using information from a consumer report;

(iii) A statement that as a result of the review, the annual percentage rate on the account has been increased based on information from a consumer report;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the account review;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; and

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(b) *Form of the notice*—(1) *In general.* The risk-based pricing notice required by § 640.3(a), (c), or (d) must be:

(i) Clear and conspicuous; and

(ii) Provided to the consumer in oral, written, or electronic form.

(2) *Model forms.* A model form of the risk-based pricing notice required by § 640.3(a) and (c) is contained in 16 CFR Part 698, Appendix B. Appropriate use of Model Form B–1 is deemed to comply with the content and form requirements of paragraphs (a)(1) and (b) of this section. A model form of the risk-based pricing notice required by § 640.3(d) is also contained in Appendix B of that part. Appropriate use of Model Form B–2 is deemed to comply with the content and form requirements of paragraphs (a)(2) and (b) of this section. Use of the model forms is optional.

(c) *Timing*—(1) *General.* Except as provided in paragraph (c)(3) of this section, a risk-based pricing notice must be provided to the consumer—

(i) In the case of a grant, extension, or other provision of closed-end credit, before consummation of the transaction, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit, is communicated to the consumer by the person required to provide the notice;

(ii) In the case of credit granted, extended, or provided under an open-end credit plan, before the first transaction is made under the plan, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit is communicated to the consumer by the person required to provide the notice; or

(iii) In the case of a review of credit that has been extended to the consumer, at the time the decision to increase the annual percentage rate (annual percentage rate referenced in § 640.2(n)(1)(ii) in the case of a credit card) based on a consumer report is communicated to the consumer by the person required to provide the notice, or if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change in the annual percentage rate (to the extent permitted by law), no later than five days after the effective date of the change in the annual percentage rate.

(2) *Application to certain automobile lending transactions.* When a person to whom a credit obligation is initially payable grants, extends, or provides credit to a consumer for the purpose of financing the purchase of an automobile from an auto dealer or other party that is not affiliated with the person, any requirement to provide a risk-based pricing notice pursuant to this part is satisfied if the person:

(i) Provides a notice described in §§ 640.3(a), 640.5(e), or 640.5(f) to the consumer within the time periods set forth in paragraph (c)(1)(i) of this section, § 640.5(e)(3), or § 640.5(f)(4), as applicable; or

(ii) Arranges to have the auto dealer or other party provide a notice described in §§ 640.3(a), 640.5(e), or 640.5(f) to the consumer on its behalf within the time periods set forth in paragraph (c)(1)(i) of this section, § 640.5(e)(3), or § 640.5(f)(4), as applicable, and maintains reasonable policies and procedures to verify that the auto dealer or other party provides such notice to the consumer within the applicable time periods. If the person arranges to have the auto dealer or other party provide a notice described in § 640.5(e), the person's obligation is satisfied if the consumer receives a notice containing a credit score obtained by the dealer or other party, even if a different credit score is obtained and used by the person on whose behalf the notice is provided.

(3) *Timing requirements for contemporaneous purchase credit.* When credit under an open-end credit plan is granted, extended, or provided to a consumer in person or by telephone for the purpose of financing the contemporaneous purchase of goods or services, any risk-based pricing notice required to be provided pursuant to this part (or the disclosures permitted under § 640.5(e) or (f)) may be provided at the earlier of:

(i) The time of the first mailing by the person to the consumer after the decision is made to approve the grant, extension, or other provision of open-end credit, such as in a mailing containing the account agreement or a credit card; or

(ii) Within 30 days after the decision to approve the grant, extension, or other provision of credit.

§ 640.5 Exceptions.

(a) *Application for specific terms*—(1) *In general.* A person is not required to provide a risk-based pricing notice to the consumer under § 640.3(a) or (c) if the consumer applies for specific material terms and is granted those terms, unless those terms were specified by the person using a consumer report after the consumer applied for or requested credit and after the person obtained the consumer report. For purposes of this section, "specific material terms" means a single material term, or set of material terms, such as an annual percentage rate of 10 percent, and not a range of alternatives, such as an annual percentage rate that may be 8, 10, or 12 percent, or between 8 and 12 percent.

(2) *Example.* A consumer receives a firm offer of credit from a credit card issuer. The terms of the firm offer are based in whole or in part on information from a consumer report that the credit card issuer obtained under the FCRA's firm offer of credit provisions. The solicitation offers the consumer a credit card with a single purchase annual percentage rate of 12 percent. The consumer applies for and receives a credit card with an annual percentage rate of 12 percent. Other customers with the same credit card have a purchase annual percentage rate of 10 percent. The exception applies because the consumer applied for specific material terms and was granted those terms. Although the credit card issuer specified the annual percentage rate in the firm offer of credit based in whole or in part on a consumer report, the credit card issuer specified that material term *before*, not *after*, the consumer applied for or requested credit.

(b) *Adverse action notice.* A person is not required to provide a risk-based pricing notice to the consumer under § 640.3(a), (c), or (d) if the person provides an adverse action notice to the consumer under section 615(a) of the FCRA.

(c) *Prescreened solicitations*—(1) *In general.* A person is not required to provide a risk-based pricing notice to the consumer under § 640.3(a) or (c) if the person:

(i) Obtains a consumer report that is a prescreened list as described in section 604(c)(2) of the FCRA; and

(ii) Uses the consumer report for the purpose of making a firm offer of credit to the consumer.

(2) *More favorable material terms.* This exception applies to any firm offer of credit offered by a person to a consumer, even if the person makes other firm offers of credit to other consumers on more favorable material terms.

(3) *Example.* A credit card issuer obtains two prescreened lists from a consumer reporting agency. One list includes consumers with high credit scores. The other list includes consumers with low credit scores. The issuer mails a firm offer of credit to the high credit score consumers with a single purchase annual percentage rate of 10 percent. The issuer also mails a firm offer of credit to the low credit score consumers with a single purchase annual percentage rate of 14 percent. The credit card issuer is not required to provide a risk-based pricing notice to the low credit score consumers who receive the 14 percent offer because use of a consumer report to make a firm offer of credit does not trigger the risk-based pricing notice requirement.

(d) *Loans secured by residential real property—credit score disclosure*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if:

(i) The consumer requests from the person an extension of credit that is or will be secured by one to four units of residential real property; and

(ii) The person provides to each consumer described in paragraph (d)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The information required to be disclosed to the consumer pursuant to section 609(g) of the FCRA;

(E) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (d)(1)(ii)(E) is deemed to comply with this requirement;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the web sites of the Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (d)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Provided on or with the notice required by section 609(g) of the FCRA;

(iii) Segregated from other information provided to the consumer, except for the notice required by section 609(g) of the FCRA; and

(iv) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (d)(1)(ii) of this section must be provided to the consumer at the time the disclosure required by section 609(g) of the FCRA is provided to the consumer, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In general.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (d)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores

obtained, the notice described in paragraph (d)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraph (d)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* (A) A person that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That person must disclose the low score in the notice described in paragraph (d)(1)(ii) of this section.

(B) A person that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That person may choose one of these scores to include in the notice described in paragraph (d)(1)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (d)(1)(ii) of this section consolidated with the notice required by section 609(g) of the FCRA is contained in 16 CFR Part 698, Appendix B. Appropriate use of Model Form B–3 is deemed to comply with the requirements of § 640.5(d). Use of the model form is optional.

(e) *Other extensions of credit—credit score disclosure*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if:

(i) The consumer requests from the person an extension of credit other than credit that is or will be secured by one to four units of residential real property; and

(ii) The person provides to each consumer described in paragraph (e)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the consumer reporting agency for a purpose related to the extension of credit;

(E) The range of possible credit scores under the model used to generate the credit score;

(F) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar, or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (e)(1)(ii)(F) is deemed to comply with this requirement;

(G) The date on which the credit score was created;

(H) The name of the consumer reporting agency or other person that provided the credit score;

(I) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(J) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(K) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(L) A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (e)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (e)(1)(ii) of this section must be provided to the consumer as soon as reasonably practicable after the credit score has been obtained, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In General.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (e)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (e)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraph (e)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* The manner in which multiple credit scores are to be disclosed under this section are substantially identical to the manner set forth in the examples contained in paragraph (d)(4)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (e)(1)(ii) of this section is contained in 16 CFR Part B, Appendix B. Appropriate use of Model Form B–4 is deemed to comply with the requirements of § 640.5(e). Use of the model form is optional.

(f) *Credit score not available*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if the person:

(i) Regularly obtains credit scores from a consumer reporting agency and provides credit score disclosures to consumers in accordance with paragraphs (d) or (e) of this section, but a credit score is not available from the consumer reporting agency from which the person regularly obtains credit scores for a consumer to whom the

person grants, extends, or provides credit;

(ii) Does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or providing credit to the consumer; and

(iii) Provides to the consumer a notice that contains the following—

(A) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time in response to changes in the consumer's credit history;

(C) A statement that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms;

(D) A statement that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(E) A statement that a credit score about the consumer was not available from a consumer reporting agency, which must be identified by name, generally due to insufficient information regarding the consumer's credit history;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) The contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the web sites of the Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Example.* A person that uses consumer reports to set the material terms of non-mortgage credit granted, extended, or provided to consumers regularly requests credit scores from a particular consumer reporting agency and provides those credit scores and additional information to consumers to satisfy the requirements of paragraph (e) of this section. That consumer reporting agency provides to the person a consumer report on a particular consumer that contains one trade line, but does not provide the person with a credit score on that consumer. If the person does not obtain a credit score from another consumer reporting agency and, based in whole or in part on information in a consumer report, grants, extends, or provides credit to the consumer, the person may provide the notice described in paragraph (f)(1)(iii) of this section. If, however, the person obtains a credit score from another consumer reporting agency, the person may not rely upon the exception in paragraph (f) of this section, but may satisfy the requirements of paragraph (e) of this section.

(3) *Form of the notice.* The notice described in paragraph (f)(1)(iii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(4) *Timing.* The notice described in paragraph (f)(1)(iii) of this section must be provided to the consumer as soon as reasonably practicable after the person has requested the credit score, but in any event not later than consummation of a transaction in the case of closed-end credit or when the first transaction is made under an open-end credit plan.

(5) *Model form.* A model form of the notice described in paragraph (f)(1)(iii) of this section is contained in 16 CFR Part 698, Appendix B. Appropriate use of Model Form B–5 is deemed to comply with the requirements of § 640.5(f). Use of the model form is optional.

§ 640.6 Rules of construction.

For purposes of this part, the following rules of construction apply:

(a) *One notice per credit extension.* A consumer is entitled to no more than one risk-based pricing notice under § 640.3(a) or (c), or one notice under § 640.5(d), (e), or (f), for each grant, extension, or other provision of credit. Notwithstanding the foregoing, even if a consumer has previously received a risk-based pricing notice in connection with a grant, extension, or other provision of credit, another risk-based pricing notice is required if the conditions set forth in § 640.3(d) have been met.

(b) *Multi-party transactions*—(1) *Initial creditor.* The person to whom a credit obligation is initially payable must provide the risk-based pricing notice described in § 640.3(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 640.5(d), (e), or (f), even if that person immediately assigns the credit agreement to a third party and is not the source of funding for the credit.

(2) *Purchasers or assignees.* A purchaser or assignee of a credit contract with a consumer is not subject to the requirements of this part and is not required to provide the risk-based pricing notice described in § 640.3(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 640.5(d), (e), or (f).

(3) *Examples.* (i) A consumer obtains credit to finance the purchase of an automobile. If the auto dealer is the person to whom the loan obligation is initially payable, such as where the auto dealer is the original creditor under a retail installment sales contract, the auto dealer must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted above), even if the auto dealer immediately assigns the loan to a bank or finance company. The bank or finance company, which is an assignee, has no duty to provide a risk-based pricing notice to the consumer.

(ii) A consumer obtains credit to finance the purchase of an automobile. If a bank or finance company is the person to whom the loan obligation is initially payable, the bank or finance company must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted above) based on the terms offered by that bank or finance company only. The auto dealer has no duty to provide a risk-based pricing notice to the consumer. However, the bank or finance company may comply with this rule if the auto dealer has agreed to provide notices to consumers before consummation pursuant to an arrangement with the bank or finance company, as permitted under § 640.4(c).

(c) *Multiple consumers*—(1) *Risk-based pricing notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a notice to each consumer to satisfy the requirements of § 640.3(a) or (c). If the consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer.

(2) *Credit score disclosure notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a separate notice to each consumer to satisfy the exceptions in § 640.5(d), (e), or (f). Whether the consumers have the same address or

not, the person must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer.

(3) *Examples.* (i) Two consumers jointly apply for credit with a creditor. The creditor grants credit to the consumers on material terms that are materially less favorable than the most favorable terms available to other consumers from the creditor. The two consumers reside at different addresses. The creditor provides risk-based pricing notices to satisfy its obligations under this part. The creditor must provide a risk-based pricing notice to each consumer at the address where each consumer resides.

(ii) Two consumers jointly apply for credit with a creditor. The two consumers reside at the same address. The creditor obtains credit scores on each of the two consumer applicants. The creditor grants credit to the consumers. The creditor provides credit score disclosure notices to satisfy its obligations under this part. Even though the two consumers reside at the same address, the creditor must provide a separate credit score disclosure notice to each of the consumers. Each notice must contain only the credit score of the consumer to whom the notice is provided.

PART 698—MODEL FORMS AND DISCLOSURES

■ 2. Revise the authority citation in part 698 to read as follows:

Authority: 15 U.S.C. 1681e, 1681g, 1681j, 1681m, 1681s, and 1681s–3; Public Law 108–159, sections 211(d), 214(b), and 311; 117 Stat. 1952.

■ 3. Amend § 698.1 by revising paragraph (b) to read as follows:

§ 698.1 Authority and purpose.

* * * * *

(b) *Purpose.* The purpose of this part is to comply with sections 607(d), 609(c), 609(d), 612(a), 615(d), 615(h) and 624 of the Fair Credit Reporting Act, as amended by the Fair and Accurate Credit Transactions Act of 2003, and sections 211(d) and 214(b) of the Fair and Accurate Credit Transactions Act of 2003.

■ 4. In Part 698, add a new Appendix B to read as follows:

Appendix B—Model Forms for Risk-Based Pricing and Credit Score Disclosure Exception Notices

1. This appendix contains two model forms for risk-based pricing notices and three model forms for use in connection with the credit score disclosure exceptions. Each of the model forms is designated for use in a particular set of circumstances as indicated by the title of that model form.

2. Model form B–1 is for use in complying with the general risk-based pricing notice requirements in § 640.3. Model form B–2 is for risk-based pricing notices given in connection with account review. Model form B–3 is for use in connection with the credit score disclosure exception for loans secured by residential real property. Model form B–4 is for use in connection with the credit score disclosure exception for loans that are not secured by residential real property. Model form B–5 is for use in connection with the credit score disclosure exception when no credit score is available for a consumer. All forms contained in this appendix are models; their use is optional.

3. A person may change the forms by rearranging the format or by making technical modifications to the language of the forms, in each case without modifying the substance of the disclosures. Any such rearrangement or modification of the language of the model forms may not be so extensive as to materially affect the substance, clarity, comprehensibility, or meaningful sequence of the forms. Persons making revisions with that effect will lose the benefit of the safe harbor for appropriate use of Appendix B model forms. A person is not required to conduct consumer testing when rearranging the format of the model forms.

a. Acceptable changes include, for example:

i. Corrections or updates to telephone numbers, mailing addresses, or web site addresses that may change over time.

ii. The addition of graphics or icons, such as the person's corporate logo.

iii. Alteration of the shading or color contained in the model forms.

iv. Use of a different form of graphical presentation to depict the distribution of credit scores.

v. Substitution of the words "credit" and "creditor" or "finance" and "finance company" for the terms "loan" and "lender."

vi. Including pre-printed lists of the sources of consumer reports or consumer reporting agencies in a "check-the-box" format.

vii. Including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains.

viii. Including the name of an agent, such as an auto dealer or other party, when providing the "Name of the Entity Providing the Notice."

b. Unacceptable changes include, for example:

i. Providing model forms on register receipts or interspersed with other disclosures.

ii. Eliminating empty lines and extra spaces between sentences within the same section.

4. If a person uses an appropriate Appendix B model form, or modifies a form in accordance with the above instructions, that person shall be deemed to be acting in compliance with the provisions of § 640.4 or § 640.5, as applicable, of this regulation. It is intended that appropriate use of Model Form B–3 also will comply with the disclosure that may be required under section 609(g) of the FCRA.

B–1 Model form for risk-based pricing notice.

B–2 Model form for account review risk-based pricing notice.

B–3 Model form for credit score disclosure exception for credit secured by one to four units of residential real property.

B–4 Model form for credit score disclosure exception for loans not secured by residential real property.

B–5 Model form for credit score disclosure exception for loans where credit score is not available.

BILLING CODE P

B-1. Model form for risk-based pricing notice

[Name of Entity Providing the Notice]
Your Credit Report[s] and the Price You Pay for Credit

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment]. The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact **[insert name of CRA(s)]**, which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact **[insert name of CRA(s)]**: *By telephone:* Call toll-free: 1-877-xxx-xxxx *By mail:* Mail your written request to: **[Insert address]** *On the web:* Visit **[insert web site address]**
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

B-2. Model form for account review risk-based pricing notice

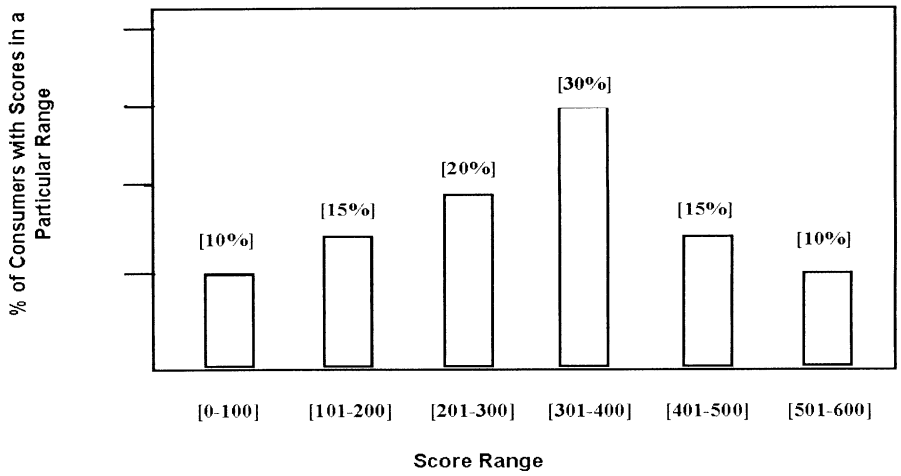
[Name of Entity Providing the Notice]
Your Credit Report[s] and the Pricing of Your Account

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We have used information from your credit report[s] to review the terms of your account with us. Based on our review of your credit report[s], we have increased the annual percentage rate on your account.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact **[insert name of CRA(s)]**, which [is/are] [a consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact **[insert name of CRA(s)]**: *By telephone:* Call toll-free: 1-877-xxx-xxxx *By mail:* Mail your written request to: **[Insert address]** *On the web:* Visit **[insert web site address]**
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

B-3. Model form for credit score disclosure exception for loans secured by one to four units of residential real property

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	**[Insert credit score]** Source: **[Insert source]** Date: **[Insert date score was created]**

Understanding Your Credit Score	
What you should know about credit scores	Your credit score is a number that reflects the information in your credit report. Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. Your credit score can change, depending on how your credit history changes.
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.
The range of scores	Scores range from a low of **[Insert bottom number in the range]** to a high of **[Insert top number in the range]**. Generally, the higher your score, the more likely you are to be offered better credit terms.
How your score compares to the scores of other consumers	 **[or]** [Your credit score ranks higher than [X] percent of U.S. consumers.]

Understanding Your Credit Score (continued)	
Key factors that adversely affected your credit score	**[Insert first factor]** **[Insert second factor]** **[Insert third factor]** **[Insert fourth factor]** **[Insert fifth factor, if applicable]**

Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/ bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

Notice to the Home Loan Applicant

In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

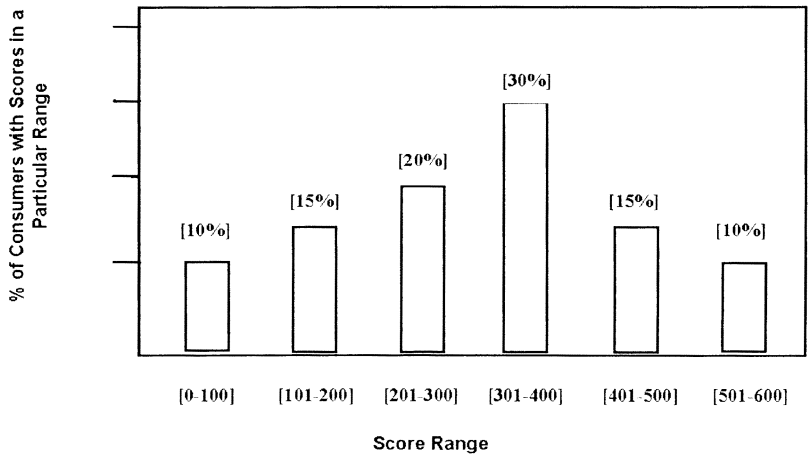
If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

If you have questions concerning the terms of the loan, contact the lender.

B-4. Model form for credit score disclosure exception for loans not secured by residential real property

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	**[Insert credit score]** Source: **[Insert source]** Date: **[Insert date score was created]**

Understanding Your Credit Score	
What you should know about credit scores	Your credit score is a number that reflects the information in your credit report. Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. Your credit score can change, depending on how your credit history changes.
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.
The range of scores	Scores range from a low of **[Insert bottom number in the range]** to a high of **[Insert top number in the range]**. Generally, the higher your score, the more likely you are to be offered better credit terms.
How your score compares to the scores of other consumers	 **[or]** [Your credit score ranks higher than [X] percent of U.S. consumers.]

Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/ bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

B-5. Model form for loans where credit score is not available

[Name of Entity Providing the Notice]
Credit Scores and the Price You Pay for Credit

Your Credit Score	
Your credit score	Your credit score is not available from **[Insert name of CRA]**, which is a consumer reporting agency, because they may not have enough information about your credit history to calculate a score.
What you should know about credit scores	A credit score is a number that reflects the information in a credit report. A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. A credit score can change, depending on how a consumer's credit history changes.
Why credit scores are important	Credit scores are important because consumers who have higher credit scores generally will get more favorable credit terms. Not having a credit score can affect whether you can get a loan and how much you will have to pay for that loan.
Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

By order of the Board of Governors of the Federal Reserve System, December 18, 2009.

Jennifer J. Johnson,

Secretary.

The Federal Trade Commission.

By direction of the Commission.

Donald S. Clark,

Secretary.

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