



December 23, 2010

VIA ELECTRONIC & REGULAR MAIL

The Honorable Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
E-Mail: regs.comments@federalreserve.gov

Re: Regulation Z; Docket R-1393 Truth in Lending/Credit Card Act

Dear Secretary Johnson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the Board of Governors of the Federal Reserve System’s (hereinafter, “the Board”) proposed rulemaking on *Regulation Z; Docket No R-1393 Truth in Lending*.¹ Advocacy is concerned that the Federal Reserve has not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA).² Advocacy recommends that the Board prepare an initial regulatory flexibility analysis (IRFA).

Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Because Advocacy is an independent office within the Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the Act, as amended by the Small Business Regulatory Enforcement Fairness Act.³

In addition, Executive Order 13272 enhances Advocacy’s RFA mandate by directing Federal agencies to implement policies protecting small entities when writing new rules and regulations. Executive Order 13272 also requires Agencies to give every appropriate consideration to any

¹ 75 Federal Register 67458.

² 5 U.S.C. §§ 601-612.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so. In September 2010, Congress passed the Small Business Jobs Act.⁴ Section 1601 of the Small Business Jobs Act codified the requirement that agencies respond to any comments filed by the Chief Counsel of Advocacy in response to a proposed rule and provide a detailed statement of any changes made in response to the comments in the Federal Register.

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the federal agency is required to prepare an IRFA to assess the economic impact of a proposed action on small entities. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.⁵ In preparing the IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.⁶ The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of a general notice of proposed rulemaking for the rule.⁷

Pursuant to section 605(a), in lieu of an IRFA, the head of the agency may certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. A certification must be supported by a factual basis.

The Proposed Rule

On November 2, 2010, the Board published a proposed rule on Regulation Z: Truth in Lending. The proposal implements the Truth in Lending Act (TILA). It will amend the provisions that apply to open end credit plans, in order to implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009. The purpose of the proposed rule is to clarify specific portions of the rule and staff commentary that the Board finalized on February 22, 2010 and June 15, 2010⁸ which dealt with issues such as TILA disclosures for credit cards,

⁴ Public Law 111-240.

⁵ 5 USC § 603.

⁶ 5 USC § 607.

⁷ 5 USC § 603.

⁸ Although the preamble for the proposed rule states that the Board issued the final rule on June 15, 2010, the rule did not appear in the Federal Register until June 29, 2010. See 75 FR 37526.

the reasonableness of penalties and fees, rate increases, over-the-limit increases, and student credit cards.⁹

Compliance with the RFA

In the RFA section of the preamble, the Board states:

“This proposed rule would clarify aspects of the Board’s February and June 2010 Final Rules implementing the Credit Card Act. Section VI of the **SUPPLEMENTARY INFORMATION** to the February 2010 Final Rule and section VII of the **SUPPLEMENTARY INFORMATION** to the June 2010 Final Rule set forth the Board’s analyses and determinations under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) with respect to those rules. *See* 75 FR 7789–7791, 75 FR 37565–37567. In addition, section VII of the **SUPPLEMENTARY INFORMATION** to the February 2010 Final Rule and section VIII of the **SUPPLEMENTARY INFORMATION** to the June 2010 Final Rule set forth the Board’s analyses and determinations under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR Part 1320 Appendix A.1) with respect to those rules. *See* 75 FR 7791, 75 FR 37567–37568. Because the proposed amendments are clarifications and would not, if adopted, alter the substance of these analyses and determinations, the Board continues to rely on those analyses and determinations for purposes of this rulemaking.”¹⁰(Emphasis in the original)

In the RFA section of the February 22, 2010 final rule, the Board states that for the October 2009 IRFA, it relied on the regulatory flexibility analysis conducted for the Board’s January 2009 Regulation Z rule and the July 2009 interim final rule.¹¹ The Board basically incorporated those elements by reference and provided an additional analysis for issues that were not covered in the previous rulemakings. In terms of alternatives, the Board stated that it “sought to avoid imposing additional burden, while effectuating the statute in a manner that is beneficial to consumers.”¹² However, the Board did not provide any information about specific alternatives that were considered in February 2010.

The Board’s Analysis Does Not Comply with the RFA

The Board’s treatment of the regulatory flexibility analysis is problematic. In North Carolina Fisheries Association v. Daley, 16 F. Supp. 2d 647 (E.D. VA, 1997), the National Marine Fisheries Service (NMFS) prepared a certification for its 1997 flounder quota stating that it was no different from the 1996 quota. The court stated that the government must make some showing that it had at least considered “this quota, this year.”¹³ The court also found that there was no record that the federal government did any comparison between the conditions in 1996 and

⁹ 75 Federal Register 67458

¹⁰ 75 Federal Register 67486

¹¹ 75 Federal Register 7789

¹² *Id.* at 7791.

¹³ 16 F. Supp. 2d 647, 652

1997.¹⁴ The court found that NMFS had violated the RFA and remanded the quota with an order to undertake an analysis of the economic impact on small entities.¹⁵

By relying on information found in the RFA sections of the January 2009, July 2009, October 2009 and February 2010 rulemakings for this proposed rule, the Board is in essence relying on information that is almost two years old and is concluding that nothing has changed for the industry in two years. Over the last couple of years, the banking industry has gone through several statutory and regulatory changes. One of the requirements of an IRFA is a description of and an estimate of the number of small entities to which the proposed rule will apply.¹⁶ Given these changes, the Board needs to determine how many small entities remain in the marketplace. Moreover, the “clarifications” in the proposal expand some of the provisions of the previous rulemakings. For example, the definition of the term “credit card” is “clarified” to include open-end lines of credit and charge cards¹⁷ which could change the types and numbers of entities that need to comply.

Another requirement of the RFA is to identify all Federal rules which may duplicate, overlap or conflict with the proposed rule.¹⁸ The Board’s proposed rule will implement additional changes that may require additional legal counsel and changes to existing forms. Advocacy encourages the Board to incorporate such developments from the past two years into its RFA analysis.

In addition, an IRFA requires the consideration of alternatives that will minimize the economic impact of the proposed rulemaking on small entities.¹⁹ There is no discussion of alternatives at all in the proposal. The Board cannot merely incorporate the previous analysis by reference and not address the issue of less burdensome alternatives for small entities to this particular action. The Board has an obligation to consider alternatives to this proposal such as a longer implementation time for small entities.

The Board must also make a reasonable, good-faith effort to carry out [RFA's] mandate²⁰ and show that it at least did some comparison between the conditions of the previous rulemakings and the conditions of the proposal in order to show that good faith effort.²¹ Advocacy encourages the Board to perform the necessary analysis, including a discussion of alternatives to this action which will minimize the impact on small entities, in order to comply with the requirements of the RFA.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule, to provide the information on those impacts to the public for comment, and to consider less burdensome alternatives. Advocacy encourages the Board to prepare and publish for public

¹⁴ Id at 653.

¹⁵ Id.

¹⁶ 5 USC 603 (b)(3)

¹⁷ 75 Federal Register 67459

¹⁸ 5 USC 603 (b)(5)

¹⁹ 5 USC 603 (c)

²⁰ U.S. Cellular Corp., 254 F.3d at 88 (quoting Alenco Commc'n, Inc. v. FCC, 201 F.3d 608, 625 (5th Cir.2000)).

²¹ North Carolina Fisheries v. Daley at 652-653.

comment an IRFA to determine the full economic impact on small entities; identify duplicative, overlapping or conflicting regulations; and consider significant alternatives to meet its objective while minimizing the impact on small entities prior to going forward with the final rule.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. Advocacy is available to assist the agencies in their RFA compliance. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Jennifer A. Smith
Assistant Chief Counsel
For Economic Regulation & Banking

Cc: The Honorable Cass Sunstein, OIRA/OMB