

making of loans” to eligible borrowers. For the purpose of applying borrower rights, a loan that is facilitated by a third-party dealer or other agent is no different from any other loan made by a qualified lender. As a direct loan, trade credit loans require that the borrower buy stock pursuant to section 4.3A of the Act. Further, trade credit loans meet the definition contained in part C of title IV of the Act and are subject to borrower rights.

## VI. Specific Issues

### A. Definitions [§ 617.7000]

We propose moving the existing definition sections in §§ 614.4440 and 614.4512 to proposed § 617.7000. The definitions of applicant (§ 614.4440(b)), foreclosure proceeding (§ 614.4512(e)), independent evaluator (§ 614.4440(f)), and qualified lender (§§ 614.4440(h) and 614.4512(g)) remain unchanged. We propose the following definitional changes.

#### 1. Adverse Credit Decision [§ 614.4440(a) to Proposed § 617.7000]

The FCC and a System institution requested that we revise the definition of “adverse credit decision” in existing § 614.4440(a) to clarify its intent. According to the commenters, the definition has been incorrectly construed to mean a denial of a loan and all the loan terms requested by the applicant.

We agree with this comment and propose clarifying this definition by deleting the phrase “deny the credit applied for, or approve an extension of credit in an amount less than the amount applied for” and replacing it with the following: (a) The lender decides not to make a loan to an applicant; (b) makes the loan in an amount less than the applicant requested; or (c) denies an application for restructuring. Making a loan in the amount requested, but with different terms, is not considered an adverse credit decision.

#### 2. Application for Restructuring [§§ 614.4440(c) and 614.4512(a) to Proposed § 617.7000]

In response to a comment from the FCC, we propose to amend this definition to allow a borrower’s plan of reorganization submitted in a bankruptcy proceeding to serve as the application for restructuring. We propose this change because the application for restructuring and the bankruptcy plan of reorganization contain similar information.

#### 3. Distressed Loan [§§ 614.4440(e) and 614.4512(d) to proposed § 617.7000]

The FCC asked us to change our definition of a distressed loan to include all the loans from the qualified lender that the borrower is obligated to repay. We decline to change our definition because each loan separately must meet the definition of distressed.

#### 4. Loan Application [§ 614.4440(d) to Proposed § 617.7000]

The FCC commented that we should clarify when a loan application is sufficiently complete to begin deliberations. FCC commented that qualified lenders need to distinguish between an inquiry and an application because an adverse decision on an application triggers borrower rights, but an inquiry does not. The FCC also suggested that we adopt the Regulation B definition of an application.<sup>8</sup>

We agree with the comment and propose changing the definition of a loan application to one similar to Regulation B. We propose adding language specifically describing a loan application as a package that provides the qualified lender with enough information to make a credit decision. Lenders should be mindful of the distinction between an application and an inquiry for purposes of borrower rights and Regulation B. Informal inquiries may rise to the level of applications if the lender evaluates information about the inquirer, decides to decline the request, and communicates this to the inquirer. Whether or not an inquiry is an application depends on the particular circumstances and a qualified lender needs to focus on how it responds to an applicant, rather than on what the applicant asks, in order to make the determination.

We propose to change the title of “Application for a Loan or Loan Application” in § 614.4440(d) to “Loan Application” in proposed § 617.7000.

#### 5. Restructure [§§ 614.4440(i) and 614.4512(h) to Proposed § 617.7000]

We propose modifying the definition of restructure to recognize that not all restructurings will result in viability. For more discussion, see Part E.2. of this preamble.

#### 6. Delete Reference to the Certified Lender and Special Asset Group [§ 614.4512(b)]

We propose deleting the definition of a certified lender in existing § 614.4512(b) and the reference to special asset group in § 614.4519(c)

because the requirements for them are obsolete.

#### 7. Redesignate Existing § 614.4512(c)—Cost of Foreclosure—to Proposed § 617.7415(b) [§ 617.7415(b)]

We propose redesignating the content of existing § 614.4512(c) to proposed § 617.7415(b) to locate the criteria for the cost of foreclosure near the rules on evaluating applications for restructuring.

### B. May Qualified Lenders Use Electronic Communications to Comply with Borrower Rights? [§ 617.7005]

The FCC asked that we amend our existing rules to authorize electronic communications for borrower rights disclosures. As part of our initiative to implement the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106–229, codified at 15 U.S.C. 7001 *et seq.* (E–SIGN) and our electronic commerce (E–commerce) rule,<sup>9</sup> we propose adding § 617.7005 to permit electronic communications as allowed for by law.

The preamble to the final E–commerce rule states that E–SIGN preempts (with some exceptions) provisions in most state or federal statutes or regulations, including the Act and its implementing regulations, which require contracts or other records to be written, signed, or to be in non-electronic form. With the parties’ agreement, qualified lenders may now use E–commerce and electronic communications in many situations.

Qualified lenders should interpret this part broadly to allow electronic transmission, communications, records, and submissions, as provided by E–SIGN. Qualified lenders may interpret the terms used in this part to permit electronic transmission, communications, records, and submissions in business, consumer, or commercial transactions, unless otherwise prohibited. E–SIGN does not, however, allow electronic communications for a notice of default, acceleration, repossession, foreclosure, eviction, or the right to cure when an individual’s primary residence secures the loan.<sup>10</sup> In these instances, a qualified lender must use the paper communications required by the Act and borrower rights regulations. E–SIGN also requires paper notification to cancel or terminate life insurance.

In addition to the primary residence provision, E–SIGN established different standards for business and consumers

<sup>9</sup> 67 FR 16627 (April 7, 2002).

<sup>10</sup> This exception is found in section 103(b)(2)(B) of E–SIGN and 12 CFR 609.950(c).

<sup>8</sup> 12 CFR 202.2(f).