The Huntington National Bank
Legal Department
Huntington Center
41 South High Street
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By Electronic Delivery

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551
regs.comments@federalreserve.gov

Donald S. Clark, Secretary
Federal Trade Commission, Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FRB Docket No. R-1316
FTC RIN 3084-AA94, Project No. R411009
Risk-Based Pricing Proposed Rule
73 FR 28966 (May 19, 2008)

Dear Ms. Johnson and Mr. Clark:

This letter is submitted on behalf of The Huntington National Bank ("Huntington Bank")[1] in response to the above-referenced rule proposed by the Board of Governors of the Federal

[1] The Huntington National Bank ("Huntington Bank") is a national bank and the principal subsidiary of Huntington Bancshares Incorporated, which is a $55 billion regional bank holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington Bank has more than 142 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 600 regional banking offices in Indiana, Kentucky, Michigan, Ohio, Pennsylvania and West Virginia. Huntington Bank also offers retail and commercial financial services online at huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of approximately 1400 ATMs. Selected financial service activities are also conducted in other states including: dealer sales activities in Arizona, Florida, Nevada, New Jersey, New York and Tennessee; private financial and capital markets group services in Florida; and mortgage banking offices in Maryland and New Jersey. Huntington Bank's affiliate, Huntington Insurance, Inc., offers retail and commercial insurance agency services in Ohio, Pennsylvania, Michigan, Indiana and West Virginia. International banking services are made available through the headquarters office in Columbus, a limited purpose office located in the Cayman Islands and another office located in Hong Kong.

Reserve System (the "Board") and the Federal Trade Commission (the "Commission", and jointly with the Board, the "Agencies") with respect to the risk-based pricing notice required by section 311 of the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"). We appreciate the opportunity to provide the comments set forth below with respect to the proposed rule.

The Agencies are to be commended for crafting a reasonable rule with multiple compliance alternatives notwithstanding the very difficult underlying statutory language in section 311 of the FACT Act. We generally support the proposed rule, with specific comments addressing portions of the rule needing clarification or improvement as set forth below. Our primary issue has to do with implementation of the rule in the context of lending through third party sellers, particularly auto lending through motor vehicle dealerships.

Business Credit

We agree with the Agencies that the proposed rule should not apply to business credit even if an individual's consumer report is obtained in connection with underwriting a business loan, such as in connection with an individual who is a joint obligor on the business loan or who is guaranteeing the loan. We believe, as the Agencies suggest, that business loans are less standardized and less comparable—even for small businesses—than consumer loans which are the clear target of section 311. Attempting to compare material terms of one business loan against material terms of another business loan would be more confusing and less meaningful than for consumer loans.

Material Terms

We believe the Agencies are correct to focus on the Truth in Lending annual percentage rate ("APR") as the best proxy for "material terms". The complexity of having to establish a matrix incorporating several "terms" of a credit transaction—particularly where different combinations of loan terms might be better or worse depending on the specific transaction—would result in a rule impossible to meaningfully comply with. For better or worse, the APR is recognized as generally representing the overall cost of credit, and thus is a reasonable choice as a proxy for implementation of this rule.

Materially Less Favorable

While we are not happy with the definition of "materially less favorable", we believe that is primarily a result of the underlying statute, and that the Agencies are correct by incorporating the concept of cost "significantly" greater as the heart of the test.

Disclosure Obligation on Original Creditor

We believe that one notice per credit transaction is the right approach, and that generally the party obligated to provide the notice should be the original creditor and not the assignee or purchaser of a credit obligation. We note that this approach needs certain modification in the context of lending through motor vehicle dealerships, and this issue is addressed below.

Compliance Alternatives

We note that the Agencies provide the following compliance options: (i) provide the risk-based pricing notice pursuant to one of the following options: (A) case-by-case determination, (B) credit score proxy, (C) tiered pricing proxy, or (D) credit card proxy; or (ii) in lieu of the risk-based pricing notice, provide a credit score disclosure pursuant to an exception.

While we think it is unlikely that many creditors will use the case-by-case determination method because of the difficulty of applying the test, it is nonetheless important to retain that option which may turn out to be the most feasible option to use for a particular line of business that may have a very small incidence of transactions that would trigger the risk-based pricing notice requirement.

With respect to the credit score proxy and the tiered pricing proxy, we generally agree with what the Agencies have proposed, except that we are concerned that the Agencies' general target of 60% of consumers within a particular product line as the right percentage of those who receive "materially less favorable" terms is an oversimplification and in many cases will result in overnotification that may be misleading to consumers who receive the notice. The purpose of the risk-based pricing notice is to alert consumers that there may be something wrong with their consumer report that is causing the consumer to be offered "materially less favorable" terms so that the consumer may then want to check his/her consumer report and be able to make any appropriate corrections. Overnotification will result in many consumers receiving this alert when in fact the terms they are being provided are not "materially less favorable", with the result that even if there is some issue with the consumer's credit report, fixing that issue will not result in any change in the offered terms. We realize that the approach taken by the Agencies to utilize proxies will necessarily result in a certain degree of imperfection as to capturing the proper class size of recipients for the notice, but a general target of 60% appears to be erring too far on the side of providing the notice.

Classification of Loans

For the risk-based pricing notice options, the creditor will be required to determine which borrowers get the notice and which do not based on all loans within a "given class of products". We encourage the Agencies to allow reasonable flexibility in how creditors establish such classifications. For example, it would not be appropriate to require a creditor to base the notice on a class of all motor vehicle loans, since such loans may be originated through different channels (at a dealership versus at the banking office) which each have their own separate pricing matrices.

Notice Content

Both the risk-based pricing notice alternative (with its various options) and the credit score disclosure exception contemplate a notice that is mostly standardized content that will not change from consumer to consumer, but also in each case requires disclosure of information particular to that consumer or that transaction which must be filled in on each individual notice/disclosure. The risk-based pricing notice will require the name and contact information of the consumer reporting agency that provided the consumer report. Use of the credit score disclosure must include the consumer's credit score and various items of information related to the credit score that will be particular to the consumer involved.

Because either disclosure alternative will require specific fill-in content, use of a simple pre-printed form with no content to fill in will not be possible, and will make it more difficult to have this notice provided in contexts where the original creditor is not dealing directly with the consumer, but is rather extending credit through an agent or broker, such as credit extended at the location of a motor vehicle dealer, and where the timing requirements do not leave sufficient time for the original creditor to mail the disclosure to the consumer before "consummation" of the transaction.

We note that mortgage loan transactions, even through brokers, typically allow time for disclosures to be sent directly by the lender to the borrower, and in fact, the Truth in Lending Act and the Real Estate Settlement Procedures Act require disclosures to be provided to the applicant generally within three days after application, so mortgage lenders are already geared to provide disclosures prior to consummation. Furthermore, mortgage lenders already have a requirement to provide a credit score disclosure "as soon as reasonably practicable" under section 609(g) of the Fair Credit Reporting Act. The same time availability is not typically the case for non-real estate secured transactions, which often have a much shorter time period between application and closing. In the case of credit extended at a motor vehicle dealership, the application, approval and closing of the transaction can take place within an hour or so while the consumer is at the dealership, and in "spot delivery" deals the loan is conditionally closed by the dealer before the lender even sees the application or has approved the credit.

Timing Issues

The timing requirement for either the risk-based pricing notice or the credit score disclosure is prior to "consummation" of the transaction for a closed-end extension of credit and prior to the first transaction under an open-end credit plan. This timing rule, in combination with the notice content as referenced above and the original creditor rule, will make it very difficult for the original creditor to comply with this rule where the original creditor is extending credit through an agent, particularly in the case of dealer-arranged loans originated through motor vehicle dealers.

Loans at Motor Vehicle Dealerships

We generally agree with the Agencies' determination in the proposal that the party to whom the credit obligation is initially payable is the party required to provide the risk-based pricing notice or the credit score disclosure. There is a problem with the Agencies' proposal, however, where the extension of credit at a motor vehicle dealership is in the form of a dealer-arranged loan rather than a retail installment contract.

The Agencies specifically provide that, where credit is obtained at a motor vehicle dealership and the dealer is the original creditor under a retail installment contract, the dealer has the obligation for providing the risk-based pricing notice or the credit score disclosure, and not the bank or other lender who will be the purchaser or assignee of the retail installment contract, even though the assignee is approving the credit and establishing the pricing (or at least part of it) upon which it will acquire the transaction. This result makes sense for several reasons. First, motor vehicle dealers normally obtain a credit report and a FICO score as part of the auto purchase transaction and thus have access to all of the information necessary to provide a risk-based pricing notice utilizing the credit score proxy option or to provide the credit score disclosure alternative under the proposed rule.[2] Moreover, dealers typically source credit applications to a number of banks or finance companies with whom they regularly do business and the dealer may not know which bank or finance company to whom it will assign the retail installment contract at the time the dealer would provide the risk-based pricing notice or credit score disclosure to the consumer. Additionally, many financing transactions are closed conditionally on a "spot delivery" basis before any potential assignee of the contract has even seen the application or approved the deal. Thus, it makes sense for the dealer to be in control of the notice or disclosure required by this rule and the process of completing and producing the document. The proposed rule's requirement to provide the risk-based pricing notice or credit score disclosure before or at consummation means that in these kinds of transactions, if the obligation to provide the notice or disclosure is on the assignee, the assignee will not have time to mail the notice or disclosure directly to the consumer and will not be present at the dealership to deliver the notice or disclosure personally, and would only be able to provide it on site at the dealership through the agency of the dealer. Since the dealer will need to control and produce the document and will be handling the closing of the extension of credit, it would not be appropriate to make the bank or finance company obligated for compliance when the entire process is in the hands of the dealer. Furthermore, if the obligation for providing the risk-based

[2] We think it is most likely that dealers will choose the credit score disclosure alternative because that would be a disclosure that would be provided for every transaction and would enable dealers to establish a consistent procedure that applies every time. If dealers were to elect the risk-based pricing notice credit score proxy option, that would mean that some transactions would require the notice and some would not (and the rule apparently does not permit the notice to be given when it is not required to be given), which is likely to be a difficult process for the F&I office of a dealership to handle if the notice is given for some deals and not for others.

pricing notice or credit score disclosure were to be placed on the assignee (because, for example, the assignee is approving the credit and/or establishing the risk-based pricing for the extension of credit), the assignee would then need to be providing the data to the dealer that would be needed to fill in the notice or disclosure form, which would result in complex data transmission, programming, training and document issues that would need to be resolved. Also, if the assignee had the disclosure obligation and thus had to provide fill-in information to the dealer in order for the dealer to complete a form of notice or disclosure, such as the credit score, sharing a credit score with the dealer would raise issues of whether or not the assignee would thereby become a consumer reporting agency as a result of sharing the credit score, or would possibly violate the assignee's contract with the consumer reporting agency from which it obtained the credit score by sharing that credit score with a third party. Since the transaction is occurring at the dealership location, the dealer in any case is the party who would actually be providing the disclosure whether the obligation to do so is on the dealer or on the assignee, and thus it makes sense for this disclosure to be the obligation of the dealer and not that of the assignee through the agency of the dealer.

The same should be the case when the legal form of the extension of credit is a dealer-arranged loan instead of a retail installment contract because nothing is essentially different about the process the dealer would then use to comply with the proposed rule. While use of retail installment contracts to finance the purchase of motor vehicles at dealerships is the dominant legal form of these transactions throughout the country, it is common historic practice in Ohio for state law reasons for banks and other depository institutions to extend credit through motor vehicle dealerships in the form of dealer-arranged loans where the bank is the original creditor (the promissory note is initially payable to the bank). Moreover, some national banks also extend credit in Ohio and other states through motor vehicle dealerships in the form of dealer-arranged loans in order to utilize the consistency available through the preemption and "exportation" authority applicable to national banks under sections 24(Seventh) and 85 of the National Bank Act. For dealer-arranged loans, the proposed rule would literally require the risk-based pricing notice or credit score disclosure to be provided by the bank as the original creditor, even though the bank is not present at the dealership and the entire transaction is being handled by the dealer on behalf of the bank. This creates a difficult compliance situation as described above, because the bank would be obligated to provide the notice/disclosure, but could only do so through the agency of the dealer with no control over the form of the notice/disclosure and the process for completing the document, since it is unlikely that the dealer would consent to use a different process to provide the notice/disclosure on behalf of the bank in the context of a dealer-arranged loan from what the dealer will already be using when the obligation is that of the dealer in the context of a retail installment contract.

In fact, for all intents and purposes with respect to the requirements of the proposed rule, there is no difference in terms of what the dealer does in the transaction between an extension of credit that is documented as a retail installment contract and one that is documented as a dealer-arranged loan. What will happen in the case of dealer-arranged loans where the proposed rule currently places the compliance obligation on the creditor is that the dealer will simply use the same form and process it would already be using for retail installment contract transactions, and the creditor would for all practical purposes have no control over the form or process, but would nonetheless be liable for noncompliance. As a practical matter, dealers will need to have only one set of procedures around providing the notice or disclosure required by this rule, and cannot have one procedure if the form of the transaction is a retail installment contract and another procedure if the form of the transaction is a dealer-arranged loan.

Thus, we believe that the proposal needs to be modified so that the obligation to provide the risk-based pricing notice or credit score disclosure is always the obligation of the dealer when the extension of credit occurs at the location of the dealer, regardless of whether the legal form of the transaction is a retail installment contract or a dealer-arranged loan.[3] To reach that result, the rule will need to be modified to extend the notice/disclosure obligation to the dealer or other retail seller who is originating the loan on behalf of the bank at the location of the dealer or seller. One possible way to do that is as follows:

(i) Add the following sentence at the end of section 222.75(b)(i):[4]

> However, where credit is extended at the location of an auto dealer or other retail seller, and the dealer or seller arranges a loan under which another party will be the initial creditor rather than using a retail installment contract, the dealer or other seller must provide the applicable notice.

(ii) Revise section 222.75(b)(3)[5] as follows (new language underlined; language to be deleted in brackets):

> (3) *Examples.* (i) A consumer obtains credit <u>at an auto dealership</u> to finance the purchase of an automobile. If the auto dealer is the person to whom the [loan]<u>credit</u> 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]<u>contract</u> to a bank or finance company. The bank or

3 Another possible solution would be to permit the bank in a dealer-arranged loan to provide the notice/disclosure after consummation at the time the bank books the loan and sends out to the borrower the welcome letter and payment coupon book. That way the bank could provide the notice/disclosure directly to the consumer using its own forms and process and would not have to rely on the agency of the dealer to provide the notice/disclosure on the bank's behalf. We believe this is an inferior alternative, however, since dealers will presumably be providing the notice/disclosure for all retail installment transactions, which are the majority of financing transactions at dealerships, and thus will be in a position to easily provide the notice/disclosure for dealer-arranged loans as well, and in fact will probably do so whether or not the bank sends a notice/disclosure later simply so that the dealer can have a single process that applies to all the financing transactions handled by the dealer.

4 This is the citation to the Board's rule. In the Commission's rule it is section 640.6(b)(i).

5 Section 640.6(b)(3) of the Commission's rule, which will need appropriate internal references to the Commission's rule.

> finance company, which is an assignee, has no duty to provide a risk-based pricing notice to the consumer. <u>Similarly, if the extension of credit at the auto dealership is a loan arranged by the auto dealer where the bank or finance company is the original creditor (rather than a retail installment contract under which the auto dealer is the original creditor), the auto dealer (and not the bank or finance company) must also in that case provide the required notices.</u>
>
> (ii) A consumer obtains credit to finance the purchase of an automobile<u> at the location of a bank or finance company and not at the location of the auto dealer</u>. [If a]<u>The</u> bank or finance company is the person to whom the loan obligation is initially payable[,]<u>.</u> [t]<u>T</u>he 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 <u>from whom the consumer purchases the auto with the proceeds of the loan </u>has no duty to provide a risk-based pricing notice to the consumer.

Multiple Consumers

The proposal does not appear to provide guidance with respect to which party is required to be given the risk-based pricing notice or credit score disclosure where there are two or more borrowers obligated under the extension of credit. Guidance is needed because of potential privacy issues, particularly with disclosure of credit scores that might result in disclosure of the credit score of borrower A to borrower B.

In the case of the risk-based pricing notice, there is no disclosure in the notice of specific information about the borrower (such as the borrower's credit score). Thus we recommend that the notice be required to be provided only to the primary borrower (as determined by the creditor), which would then be consistent with the requirement for adverse action notices under the Equal Credit Opportunity Act and Regulation B.

In the case of the credit score disclosure, however, it would contain information about the particular borrower, *i.e.*, the borrower's credit score, and thus there is a potential privacy issue if Borrower A's credit score is disclosed to Borrower B, or *vice versa*. Moreover, it may not be the primary borrower's credit score that affected the determination of the APR, and thus it would not always be relevant to provide the credit score disclosure (of the primary borrower's credit score) to the primary borrower. Thus, to be consistent with the purposes of the underlying statute and the proposed rule, it appears that the credit score disclosure should be required to be provided to each consumer whose credit score was used in connection with establishing the APR—in other words, if the credit scores of both borrowers affected the APR, then Borrower A would get a credit score disclosure containing Borrower A's credit score and Borrower B would get a credit score disclosure containing Borrower B's credit score. For example, if a creditor establishes the APR based on the borrower with the highest FICO score, then the credit score disclosure would only be required to be provided to that borrower.[6] However, if the creditor establishes the APR based on a merge or combination of the FICO scores of both borrowers (in a transaction where there are two borrowers), then a separate credit score disclosure would appear to be required to be sent to each borrower disclosing only that borrower's credit score and related information.

Thank you for the opportunity to provide these comments.

Very truly yours,

Daniel W. Morton
Senior Vice President & Senior Counsel

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[6] With this approach, we also recommend permitting the creditor voluntarily to adopt the option always to give a credit score disclosure to each borrower even if only one borrower's score affected the determination of the APR if the creditor elects to do so, for example, to simplify its procedures.