CONSUMER BANKERS ASSOCIATION

August 18, 2008

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

Re: FACT Act Risk-Based Pricing Rule
Docket No. R-1316

Federal Trade Commission
Office of the Secretary
Room H-134 (Annex M)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FACT Act Risk-Based Pricing Rule
Project No. R411009

To whom it may concern:

This comment letter is submitted by the Consumer Bankers Association ("CBA") in response to the Proposed Rule ("Proposal") regarding risk-based pricing notices under the Fair Credit Reporting Act ("FCRA") published by the Board of Governors of the Federal Reserve System and the Federal Trade Commission (collectively, "Agencies") in the *Federal Register* on May 19, 2008. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

Every CBA member will be affected by this rule. Two businesses have unique issues. The first is student lending. A number of CBA members provide federal and private student loans to their customers. Private student loans will be subject to this rule. In this regard, Congress recently passed the Higher Education Opportunity Act which will require a series of complicated new disclosures that must be made at specific times. We ask that these new requirements be considered in the final risk-based pricing rule.

In addition, CBA represents the auto finance business of our member banks. The comments reflect issues raised by members of the CBA Auto Finance Committee and are incorporated within this letter.

CBA appreciates the opportunity to share its views on the Proposal with the Agencies.

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In General

CBA commends the Agencies for crafting the Proposal in a manner designed to give flexibility to banks while still providing meaningful information to consumers. We believe that the Agencies have generally developed the appropriate framework to implement an inherently vague and difficult provision in the FCRA. We are especially appreciative of the deliberate and diligent nature employed by the Agencies to draft the Proposal, including taking the opportunity to solicit and receive significant input from all interested parties. Although we propose several relatively modest, but *critically important*, revisions to the Proposal below, we believe the Agencies' efforts reflect a generally sound approach to implementing Section 615(h) of the FCRA.

Scope of Proposal

The Agencies propose that the risk-based pricing notice requirements apply only in connection with credit that is extended primarily for personal, family, or household purposes. CBA agrees with the Agencies' determination that the risk-based pricing notice is not necessarily appropriate in connection with commercial loans, even if an individual's consumer report is used in connection with the underwriting of the commercial loan. An individual who intends to guarantee a commercial loan is likely to be relatively sophisticated, and therefore would not benefit as greatly from a notice. Furthermore, as the Agencies note, it is not necessarily reasonable for a commercial lender to measure the material terms of one business loan against another as these loans tend to be less standardized than consumer loans. We therefore concur with the Agencies' position in the Proposal, and we do not believe it would be appropriate to expand the scope of the Proposal beyond consumer lending.

Definitions

"Material Terms"

CBA applauds the Agencies for focusing on the annual percentage rate ("APR") as the best proxy for a loan's "material terms" for purposes of the Proposal. As the Agencies are aware, if a bank had to establish a matrix of several "material terms," each with presumably different weightings, it would be virtually impossible for a bank to determine whether many consumers received "material terms" on a loan that are materially less favorable than other consumers' terms. In the Supplementary Information, the Agencies correctly note that it would not be operationally feasible for creditors to compare credit terms on the basis of multiple variables. The Agencies, however, have wisely determined that the use of the APR as the key "material term" 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. Not only do we believe the APR is the correct proxy, but we also believe the Agencies correctly identified the appropriate APR for closed-end, open-end, and credit card products. CBA therefore strongly urges the Agencies to retain this definition in the final rule.

"Materially Less Favorable"

The Agencies propose to define "materially less favorable" as, when applied to material terms, when the terms granted to a consumer differ from the terms granted to another consumer such that the cost of credit to the first consumer would be "significantly greater" than the cost of credit granted to the second consumer. The Agencies specifically avoid a bright line test, but note that the factors relevant to determining the significance of a difference in cost include the type of credit product, the term of the credit extension, and the extent of the difference between the APR between the two consumers. The application of this guidance could come to different conclusions based on the product type, even if the difference in APRs is the same. For example, the Agencies suggest that a 0.25% difference in an APR on a credit card product may not be "materially less favorable" but that a 0.25% difference in an APR on a mortgage loan could be. In the Supplementary Information, the Agencies note that for purposes of making the comparison, a creditor should select the most favorable terms available to a group of consumers that represents a substantial proportion of consumers to whom the creditor extends credit and compare those terms to the individual consumer's terms.

CBA appreciates that Congress has tasked the Agencies with implementing a rule that has terms that are difficult to define. We also appreciate that the Agencies recognize the need to provide flexibility to banks as they attempt to determine which consumers may receive risk-based pricing notice. We do not have any suggested revisions to this definition, although we ask the Agencies to recognize that there will be some variances among banks in terms of their determinations as to what may be "materially less favorable." As a practical matter, given the proxies the Agencies have provided and the credit score disclosure alternative, we believe that many banks will not necessarily need to rely on the definition of "materially less favorable" for purposes of complying with the final rule. For those banks that do not rely on these proxies or exceptions, and instead rely on the definition for purposes of determining which consumers will receive a risk-based pricing notice, we ask the Agencies to note that creditors have flexibility to make reasonable determinations as to what may be "materially less favorable" for its consumers. We ask the Agencies to state, in particular, that there is no bright line test and that different creditors may come to different conclusions so long as such conclusions are reasonable.

"Substantial Proportion"

The term "substantial proportion" is an important one for purposes of the Proposal, as a creditor who extends credit 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 Agencies do not provide a definition of "substantial proportion" in the Proposal. They do note in the Supplementary Information, however, that they expect creditors would consider a "substantial proportion" as constituting more than a *de minimis* percentage, but that it may or may not represent a majority of consumers.

Again, the Agencies are charged with implementing a rule based on inherently vague terms. We believe the Agencies have provided flexibility to creditors, and indicated that a "substantial proportion" could even be a majority of a creditor's consumers. We ask that the Agencies provide this guidance in the form of a regulatory definition, if for no other reason as to provide some level of clarity to those creditors that may need to rely on it for purposes of compliance. Furthermore, we ask that the Agencies state that the definition is intended to provide a creditor the flexibility to determine that a substantial proportion could exceed a majority of its consumers and, in particular, that the proposed 40/60 split in the credit score proxy and the 30%-40% rule for the price tier proxy are not indicative of a presumption that a "substantial proportion" should account for no more than roughly 40% of a creditor's consumers.

<u>Obligation on Initial Creditor</u>

The Proposal states that the Proposal's compliance obligation falls on the person to whom a credit obligation is initially payable, even if that person immediately assigns the credit agreement to a third party and is not the source of funding for the credit. Furthermore, neither the purchaser nor the assignee of a credit contract with a consumer is subject to the requirements of the Proposal. In fact, the Agencies have stated explicitly that only one risk-based pricing notice (or credit score disclosure) is necessary in connection with an account opening, even if several parties are involved. The Agencies provide an example of the application of this interpretation in the context of an auto loan. For indirect auto lending, the compliance obligations would fall on the auto dealer. For direct lending, the compliance obligations would fall on the auto lender. The Agencies also state that the Proposal does not cover brokers or other intermediaries who do not themselves grant, extend, or provide credit.[1]

CBA supports the Agencies' determination that an account opening requires only one risk-based pricing notice (or credit score disclosure). We have concerns, however, about how the Proposal would operate when the lender is not interacting directly with the consumer and has no opportunity to do so after the terms are set but prior to the consummation of the transaction. Specifically, in the case of an auto loan consummated at a dealership (or other location remote from the lender), we ask that the compliance obligation under the Proposal be the dealer's (or the obligation of the person arranging the loan remote from the lender).

In the context of direct lending, the Proposal would place auto lenders' compliance in the hands of an auto dealer. Although the dealer may be in a position to provide a lender's Regulation Z and other relatively "form" disclosures to all customers, we are less confident that the dealer will be able to adhere to a variety of lenders' risk-based pricing notice compliance programs—all of which may vary. For example, one creditor may want to use a credit score disclosure, while another may rely on a credit score proxy, a third may rely on the tiered pricing method, and the fourth may simply provide them on a case-by-case basis. It is not clear that dealers will be able to accommodate each of these circumstances, providing customized notices or disclosures to some (but not all) customers depending on the lender involved. We believe it would be more appropriate for the dealer to rely on a standardized compliance method within the dealership—such as a credit score disclosure—and require the dealer to provide a notice or disclosure based on that method. The lender, however, should not be responsible if the dealer does not provide the appropriate information as the dealer would control the process entirely.[2]

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[1] For a more fulsome discussion of the risk-based pricing notice and auto finance lending, we refer you to one of our member bank's comment letters, The Huntington National Bank.

[2] Below we suggest that for purposes of other point-of-sale credit (*e.g.*, private label or co-brand credit cards) that the creditor have 30 days to provide the notice after the account is opened as opposed to placing the notice

Alternative Compliance Options

Under the Proposal, a creditor has the option of engaging in a case-by-case determination of whether a consumer receives material terms that are materially less favorable than the most favorable terms available to a substantial proportion of the creditor's customers. This is unlikely to be an appealing option for many (if not most) of CBA's member banks. Although we appreciate the flexibility the Agencies propose to provide in connection with this option, it is more likely that larger creditors would prefer simpler alternatives that do not require a comparison of the borrower's terms to the terms of other customers.

CBA applauds the Agencies for proposing three alternative compliance options for creditors providing the risk-based pricing notice. We believe it is important that the Agencies provide a variety of "safe harbors" for banks to consider as they design their compliance programs. We offer our comments on each of them below.

Credit Score Proxy

A bank that sets the material terms of credit based in whole or in part on a credit score may comply with the Proposal by providing a risk-based pricing notice to each consumer whose credit score is below the "cutoff score." The Agencies propose that such a creditor determine the cutoff score by determining the approximate breakpoint where 40% of consumers for a given class of product (*e.g.*, credit card, auto, mortgage) have a higher credit score and 60% have a lower credit score.[3] The creditor would then provide a risk-based pricing notice to each consumer to whom it grants credit who has a credit score below the cutoff score.

CBA believes the credit score proxy may prove useful to some creditors.[4] We ask the Agencies to consider some modifications, however. First, as proposed by the Agencies, the same cutoff score must be used for a given class of products. For example, an auto lender would need to calculate its cutoff score based on at least a representative sample of *all* of its auto loan customers. We do not think this is necessarily appropriate if the auto lender has distinctive lines of auto lending businesses with different pricing models (*e.g.*, based on channel or method of acquisition), however, as it could provide for some distorted results. We ask the Agencies to provide creditors the flexibility to determine the cutoff score based on distinct product lines, even if the lines relate to the same type of loan. This flexibility could allow a creditor to distinguish first mortgages from HELOCs, for example, or to distinguish auto loans based on distinct pricing models.

We also ask the Agencies to adjust the cutoff score breakpoint. We do not believe it is appropriate that a creditor would have to provide approximately 60% of its customers with a

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obligation on the retailer (for example). A retailer is not as likely as an auto dealer to be in a position to develop a program and provide a notice, for example, because the retailer may not otherwise have access to the consumer's credit score.

[3] CBA believes that the methods proposed to calculate (and recalculate) the cutoff score are appropriate.

[4] Aside from the general operational issues associated with computing a cutoff score and providing notices to 60% of customers, not all creditors have systems, for example, that would currently allow them to compare a customer's credit score to a cutoff score.

risk-based pricing notice. We believe that there is a significant chance that this will result in the overnotification of consumers, making the notice itself less meaningful to those consumers who are most likely to need to react to the notice. CBA believes it would be more appropriate to calculate the cutoff score based on a 60/40 split instead of the 40/60 split, which would result in roughly 40% of a creditor's consumers receiving a risk-based pricing notice if the creditor relies on the credit score proxy.

Tiered Pricing Proxy

A bank that sets the material terms of credit by placing the consumer within one of a discrete number of pricing tiers, based in whole or in part on a consumer report, may comply with the requirement to provide a risk-based pricing notice by providing such a notice to each consumer who is not placed within the top pricing tier or tiers. If the bank has four or fewer pricing tiers, each consumer who does not qualify for the top tier would get the notice. If the bank has five or more tiers, each consumer who does not qualify for the top two tiers and any other tier that, together with the top tiers, comprises no less than the top 30% but no more than the top 40% of the total number of tiers would get the notice. The Agencies state that this proxy method focuses on the number and percentage of tiers, not on the number or percentage of consumers who are assigned to each tier.[5]

It is not clear to CBA whether this proxy will be useful to many creditors. We believe it should be retained by the Agencies, as it may be a viable alternative to at least some creditors. We ask the Agencies to relax the cutoff criteria, however, as we do not believe a creditor should be required to provide a notice to consumers who do not get "top tier" pricing. We believe it would be more appropriate to set the tiered pricing proxy such that consumers who do not fall within the top 60% to 70% of tiers receive a notice. Again, we believe this will reduce the likelihood of overnotification to consumers.

Credit Card Proxy

The Agencies have provided a third proxy available only to credit card issuers. Specifically, the proxy applies if a consumer applies for a credit card in connection with an application program or in response to a solicitation and more than a single possible APR may apply and, based in whole or in part on a consumer report, the card issuer provides the credit card to the consumer with a purchase APR that is greater than the lowest purchase APR available under that application or solicitation. No risk-based pricing notice is required if the consumers applies for a specific APR. Furthermore, no risk-based pricing notice is required if the card issuers the consumer the lowest purchase APR available under the offer for which the consumer applied, even if the issuer offers a lower purchase APR under different offers.

At the outset, it is critical for the Agencies to clarify their intent with respect to whether this proxy is *required* for card issuers or whether it is simply an option that can be chosen for purposes of compliance. On one hand, the Proposal includes an example in the credit score proxy provision relating to opening a new credit card account. This suggests that a credit card

[5] CBA agrees with the Agencies' clarification that a creditor should not consider a top tier that is available only to consumers with perfect or near-perfect credit and which the creditor rarely, if ever, uses.

issuer can use the credit score proxy for purposes of providing risk-based pricing notices to new cardholders. On the other hand, the Proposal and the Supplementary Information appear to suggest that the credit card proxy is not optional, and that credit card issuers must use it for purposes of compliance (unless an exception applies). For example, the Proposal states that a credit card issuer subject to the general requirement "*must* provide a risk-based pricing notice to a consumer" if the conditions of the credit card proxy are met.[6] Furthermore, the Supplementary Information states that a card issuer is "required" to provide the risk-based pricing notice if the conditions are met,[7] and that the credit card proxy "generally requires a credit card issuer to provide a risk-based pricing notice to a consumer" if the conditions are met.[8] It is our hope that the Agencies intend the credit card proxy to be an additional option so as to provide card issuers with additional flexibility. Regardless, CBA asks the Agencies to clarify their intent. For the reasons we describe below relating to overnotification, we also believe a card issuer should not be required to provide a risk-based pricing notice unless the consumer qualifies for the highest APR offered in connection with the application or solicitation.

Issues Common to the Proxies

As we suggest above, CBA is concerned that use of the proxies could result in the overnotification of consumers. This would frustrate the Agencies' intent that consumers receive a notice in those circumstances where their credit report is having a significant impact on the ability to obtain credit. As the Agencies are well aware, the risk-based pricing notice was designed to "replace" the adverse action notices that are no longer given as a result of risk-based pricing.[9] Although risk-based pricing has had a significant impact on the number of consumers who can qualify for credit, we do not believe it is necessarily the case that, absent risk-based pricing, the bottom 60% of approved consumers would have otherwise been denied and provided an adverse action notice. Therefore, we do not believe the risk-based pricing notice should be designed to go to 60% of approved customers.

Not only is the overnotification of customers not consistent with the congressional intent of the notice, but it also thwarts the intent of the notice. The risk-based pricing notice was supposed to be the notice given to consumers to signify that they should do something affirmatively, such as amend their behavior or check their credit report for errors. As proposed, however, it appears that large numbers of consumers will receive these notices and eventually assume that such notices are standard for most products. This is especially true for the credit card products, where consumers generally have multiple cards and unlikely have the lowest APR on *all* of them (meaning they may have gotten one or more risk-based pricing notices just from the credit cards).

CBA does not deny that this risk of sending too many notices will be present so long as creditors can rely on proxies to determine who receives a notice. This is not to suggest that the

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[6] § ___.72(c)(1). (Emphasis added.)
[7] 73 *Fed. Reg.* 28966, 28968.
[8] *Id.* at 28976.
[9] Instead of having an application for a loan on specific terms rejected and receiving an adverse action notice, consumers are now more likely to receive credit but at a customized price. This has resulted in fewer adverse action notices than would otherwise be provided, all else equal.

Agencies should eliminate the proxies, as they provide the only meaningful ways for many creditors, especially larger ones, to contemplate providing a risk-based pricing notice as opposed to the credit score notice. CBA believes the Agencies can mitigate this risk, however, by revising the notification threshold cutoffs as we describe above. In so doing, the Agencies would ensure that a meaningful number of consumers receive the notices without necessarily "overnotifying" consumers.

The Agencies also state that if a creditor uses one of the proxies for a loan type, it must use it for all loans of that type. The Agencies illustrate this interpretation by stating that if a creditor uses a proxy for new automobile loans, the creditor must use the same proxy for all new "vehicle loans." We agree that a creditor should use a proxy consistently for a specific type of loan, and we appreciate that the Agencies apparently would distinguish new auto loans from used auto loans, thereby allowing the creditor the option of using two different proxies for the two types of auto loan products. However, for the reasons we describe above relating to flexibility in segmenting loans more granularly for purposes of choosing loan types in connection with a credit score proxy, we ask that similar flexibility be granted in connection with applying the proxies. For example, a lender may offer several varieties of the same "type" of loan. The tiered pricing proxy may be appropriate for one variety with nine distinct pricing tiers, while the credit score proxy may be more appropriate for a different line that is not priced using distinct tiers. However, at the very least, we ask the Agencies to provide a more precise example of what they consider to be loans of similar type. Specifically, we assume the Agencies would permit a creditor to use one proxy for new auto loans, but another compliance method for new boat or motorcycle loans. If so, we ask the Agencies to provide more clarity in this regard as opposed to suggesting that the creditor must use the same proxy for all new "vehicle" loans.

Account Review

The Proposal states that a person must provide a risk-based pricing notice if the person uses a consumer report in connection with a review of credit that has been extended to the consumer and, based in whole or in part on the consumer report, increases the APR. We ask the Agencies to delete this portion of the Proposal. The FCRA risk-based pricing notice requirement is in connection with the "grant, extension, or other provision of credit" to a consumer. We do not believe Congress intended this to include account reviews. The terms "grant," "extension," and "other provision" of credit appear to be synonymous for purposes of Section 615(h) since both "grant" and "extension" are viewed as a type of "provision" of credit. Therefore, we believe it would be instructive to determine whether Congress had used any of those terms in the FCRA in a manner that suggests an account review is or is not synonymous with an extension of credit. In fact, Congress does not believe they are synonymous. For example, under Section 604(a)(3)(A) of the FCRA, Congress provided for a permissible purpose to obtain a consumer report "in connection with a credit transaction…involving the *extension* of credit to, or *review* or collection of an account of, the consumer." In this portion of the FCRA, it appears that Congress did not view an account review to be the equivalent of an extension of credit and therefore provided a separate permissible purpose for "review" of the account.

CBA also questions whether the provision of a risk-based pricing notice as part of an account review will be meaningful to a consumer. We do not believe that an account review is a "teachable moment" for purposes of conveying the information in a risk-based pricing notice. Furthermore, the requirement will impose a significant compliance burden on creditors—particularly credit card issuers—that is difficult to justify in light of the limited consumer benefits associated with this notice.

<u>Content, Format, and Timing of Risk-Based Pricing Notice</u>

The bulk of the risk-based pricing notice is standardized language, although it must include the name and contact information for the consumer reporting agency that provided the consumer report in connection with the underwriting decision that triggered the notice. The Agencies have provided a model form for the notice that is an entire page. For closed-end credit, the notice must be provided before the consummation of the transaction, but no earlier than the time the decision to approve an application is communicated to the consumer. For open-end credit, the notice must be provided before the first transaction is made under the plan, but not earlier than the time the decision to approve the application is communicated to the consumer. The notice may be given in writing, orally, or electronically.

Length of Model Form

CBA generally has no suggestions regarding the content of the notice, *per se*, although we do not believe it is necessary that the risk-based pricing notice should be an entire page in length as the model form suggests it should. We believe that the information can be communicated in a more concise manner without sacrificing the consumer's understanding of its contents. Furthermore, as consumers become more and more accustomed to the notice and its contents, it does not appear to us that the overly spacious format will be necessary to convey the largely unchanging contents of the notice itself. The only information that could change in the notice is the name and contact information of the consumer reporting agency. Finally, we believe that the length and volume of disclosure documents that will be provided prior to consummation (for closed-end) or prior to the first transaction (for open-end) is becoming such that a consumer will read none of them.[10]

Timing: Instant Credit

We also ask the Agencies to consider additional flexibility with respect to the timing requirements for the risk-based pricing notice. Although the proposed timing requirement appears appropriate in connection with some credit card and mortgage lending, it presents significant compliance difficulties if the lender must provide the notice at the point of sale (*e.g.*, direct auto lending, co-brand credit card accounts) or in connection with other "instant" credit. We are concerned that a bank's compliance efforts will need to depend significantly on a third party providing a semi-customized notice to a consumer. This is not optimal.

Today, for example, a credit card issuer can provide disclosures under § 226.6 of Regulation Z at the point of sale by preprinting the bulk of the disclosure, providing it with the

[10] Not only is the risk-based pricing notice at least a page, but the proposed Gramm-Leach-Bliley privacy policy is several pages, and the proposed account-opening disclosures under Regulation Z is a page. This would be 4-5 pages of disclosures based on these requirements alone.

application, and then providing the APR on the account in a separately printed disclosure (*e.g.*, a receipt), as part of an integrated document. Using this approach, the compliance risk can be managed as the retail employees are trained to provide the same preprinted disclosures to *all* applicants and to provide the automatically generated APR information to the consumers who are approved. A similar option does not appear available under the Proposal, nor would it be feasible. Not only would a similar option result in the bulk of the risk-based pricing form being given to *all* consumers, but it is not clear that store cash registers could print the name of the consumer reporting agency and its contact information. Nor is it clear that all retail employees would be able to handle the complexities of both the Regulation Z disclosures and the risk-based pricing notice. We have similar concerns regarding auto lenders that must provide a risk-based notice in the direct lending context.

We ask the Agencies to consider several options to improve the likelihood that consumers receive the risk-based pricing notice in a manner consistent with the Agencies' intent. For example, a lender could preprint the standardized information from the risk-based pricing notice with the application and: (i) provide the consumer a toll-free number to call (and possibly a web site to visit) to learn whether the consumer was, in fact, entitled to a risk-based pricing notice and the name and contact information of the consumer reporting agency that provided the consumer report; or (ii) automatically provide the consumer with such information in writing within a reasonable period of time (*e.g.*, 30 days). Alternatively, in those circumstances when the creditor does not have direct contact with the consumer, the creditor could be given the flexibility of providing the risk-based pricing notice within a reasonable period of time (*e.g.*, 30 days) after the consummation of the loan or after the first transaction under the plan.

Timing: Account Review

The Proposal requires a creditor to provide the risk-based pricing notice to a consumer in connection with an account review "at the time the decision to increase the [APR] based on a consumer report is communicated to the consumer…or if no notice of the increase in the [APR] is provided to the consumer prior to the effective date of the change in the [APR], no later than five days after the effective date of the change in the [APR]." We ask the Agencies to provide additional flexibility with respect to providing this notice. For example, there could be a circumstance when the APR adjustment is triggered and becomes effective with little lead time, such as could occur with default pricing. Therefore, the increased APR could become effective before the creditor is able to notify the consumer of the change. We do not believe it is necessary to force the creditor, in this circumstance, to provide a risk-based pricing notice within five days, which would almost certainly require a mailing separate from a periodic statement. Not only does this create processing issues, but it could result in substantial additional costs to the creditor without corresponding consumer benefits. Indeed, such costs could cause the creditor to decrease reliance on consumer reports in connection with default pricing decisions which is harmful to consumers since such reliance generally winnows out certain consumers from having an account repriced. We believe it would be more appropriate to allow a creditor to provide the risk-based pricing notice no later than the later of: (i) 15 days after the effective date; or (ii) the periodic statement that first reflects the changed APR.[11]

General Exceptions

The Agencies note that a risk-based pricing notice is not required in certain circumstances. For example, if the person applies for specific material terms and is granted those terms, no risk-based pricing notice is required. The same is true if the creditor has provided or will provide an adverse action notice pursuant to Section 615(a) of the FCRA. These exceptions are appropriate (and included in the statute). The Agencies also provide a specific exception in connection with the prescreening process (but not necessarily for any postscreeen). Although we strongly agree that the Proposal would not apply in the prescreening process, we do not believe that an explicit exception is necessary. The process of prescreening is not covered by the Proposal under the Proposal's plain language. This is so because no credit is actually extended as part of a prescreen, and no risk-based pricing notice is required unless credit is actually extended. Therefore, an exception could cause confusion regarding the scope of the Proposal. We ask the Agencies to consider including the substance of the exception as text in the Supplementary Information, or providing greater clarity as to why a regulatory exception is necessary. Again, we agree with the Agencies but ask that they consider the best method to convey their intention with respect to prescreening.

Credit Score Disclosure Exception

In General

Section 615(h)(6)(A)(iii) of the FCRA provides that the Agencies may create "exceptions to the notice requirement…for classes of persons or transactions regarding which the [A]gencies determine that notice would not significantly benefit consumers." The Agencies have provided an exception to the requirement to provide a risk-based pricing notice if the creditor provides a detailed credit score disclosure to the consumer instead.[12] Generally speaking, we commend the Agencies for proposing an alternative to the risk-based pricing notice that will provide creditors with a viable alternative for purposes of compliance. Furthermore, we believe that the credit score disclosure will also be of more use to consumers than the risk-based pricing notice as it provides more concrete information to consumers and the ability to understand their individual credit circumstances. Although the risk-based pricing notice *may* be an indicator to the consumer that his or her credit score affected the price of credit from a particular lender, the

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[11] We also believe these timing requirements should apply with respect to creditors who provide a credit score disclosure instead of a risk-based pricing notice in connection with an account review. The Proposal does not appear to provide timing requirements for such circumstances, however.

[12] The text of the Proposal itself suggests that the credit score disclosure would be necessary only in cases where the consumer would otherwise be entitled to a risk-based pricing notice. The Supplementary Information, however, suggests otherwise by stating that "[u]nder this exception, a creditor will provide this disclosure to all consumers…". (*See* 73 *Fed. Reg.* 28966, 289880). We believe the Proposal does not require it, nor should the final rule. Indeed, it is not clear that the Agencies would have the authority to require such a notice be provided to all consumers in connection with an exception to provide a risk-based pricing notice that would be provided only to some consumers.

credit score disclosure is more broadly applicable and still gives the consumer the intended "wake up call" if the consumer sees that the credit score is subpar.

We believe that the credit score disclosure will be most appealing to mortgage lenders, as it is very similar to the existing disclosure requirements under Section 609(g) of the FCRA. It is not yet clear, however, whether the credit score disclosure will be common in connection with other types of loans. Like the risk-based pricing notice, much of the credit score disclosure is standardized disclosure language. However, the consumer's credit score, the date of its calculation, the provider of the score, and possibly the distribution disclosure (either as a bar graph or statement comparing the score to others') would be customized. Because the credit score disclosure has the same delivery timing requirements as the risk-based pricing notice, the same problems we describe above in connection with point-of-sale and instant credit are present. Furthermore, some consumers may be concerned about retail employees having access to their credit scores. The model form for the notice is also generally *two* pages, making it bulkier and more expensive to print and mail than the risk-based pricing notice.[13] If the Agencies provide flexibility on the timing requirements as we request above, and shorten the length of the form, the credit score disclosure could be a more popular option.

Calculations and Reliance on Third Parties

We also ask the Agencies to provide additional clarification regarding some of the issues arising in connection with the credit score disclosure. For example, it is not clear how often the bar graph/statement of comparison must be updated. We do not believe it is necessary that a creditor or credit score provider should update the calculations used for this portion of the disclosure instantaneously, as that would be a significant burden with little corresponding benefit as credit score distributions change only gradually over time. Rather, it would be more appropriate to allow for a recalibration of the calculations once a year. This would make it simpler for creditors to effectuate the necessary programming on a cost-efficient basis while still giving consumers a very reasonable approximation of how their credit scores compare to the broader populations'. We also ask that the Agencies provide for an explicit safe harbor in the final rule that if a creditor provides the credit score and the distribution information it receives from a third party, that the creditor's disclosure is deemed to be compliant.

Recipient of Risk-Based Pricing Notice/Credit Score Disclosure

It does not appear that the Proposal or the Supplementary Information provide guidance as to who would receive the risk-based pricing notice or the credit score disclosure in circumstances where there are two or more applicants for a loan. We ask the Agencies to thoroughly consider this issue and provide guidance to creditors regarding their compliance obligations. For example, we believe that a creditor that provides the risk-based pricing notice (or credit score disclosure) to the primary applicant should be deemed to be in compliance with the notification requirement. This is the approach adopted under Regulation B for purposes of adverse action notices under the Equal Credit Opportunity Act. We believe it is equally suitable here. If the Agencies determine that the information must be provided to a particular applicant,

[13] We believe that the option provided in the Proposal to describe the distribution, as opposed to providing a bar graph, will provide for a minimally shorter form than one with a bar graph. Both are still too long, however.

we ask that the risk-based pricing notice or credit score disclosure be provided to the consumer, or respective consumers, whose consumer report(s) formed the basis for the decision to price at a rate that would trigger the risk-based pricing notice requirement.

Free Credit Report

The Agencies interpret the FCRA in a manner that grants a consumer an independent right to a free consumer report if the consumer receives a risk-based pricing notice.[14] We do not believe this is the best reading of the statute, and we urge the Agencies to reconsider this interpretation. Specifically, the Agencies interpret Section 612(b) as providing this right. This provision states, under the heading "Free disclosure after adverse notice to consumer," that a consumer reporting agency must provide a free file disclosure if the consumer makes a request for such a disclosure "not later than 60 days after receipt by such consumer of a notification pursuant to section 615." We do not believe that this provision can be read fairly to suggest that any notification under Section 615 triggers a free report, as there are several notifications provided pursuant to Section 615, including prescreening disclosures, notifications of address changes, and adverse action notices unrelated to consumer reports. Therefore, it would be appropriate to review the context in which the provision was enacted and the legislative history surrounding Section 615(h) to determine whether Section 612(b) should grant a free consumer report in connection with a risk-based pricing notice. In this regard, Section 612(b) was clearly enacted to reference the adverse action notice in what is now Section 615(a), and not any other notice in Section 615 even prior to the enactment of the FACT Act. Furthermore, despite the extensive discussions pertaining to free consumer reports in connection with the FACT Act, there is no evidence to suggest that Section 615(h) creates a new right to a free consumer report.[15]

Regardless of the Agencies' interpretation of Section 612(b) in relation to the risk-based pricing notice, we strongly agree with the Agencies' determination that a credit score disclosure does not trigger an additional free consumer report. The credit score disclosure is not a notification pursuant to Section 615—in fact, it is a disclosure provided as an exception to the requirements of Section 615(h). Therefore, it would be incorrect to interpret the FCRA to require a free consumer report in connection with such a disclosure. We urge the Agencies to retain this position in the final rule.

Effective Date

CBA requests the Agencies to provide an effective date that reflects not only the operational issues that arise under the Proposal, but also those operational issues that will arise in connection with other rulemakings. Aside from the Proposal, CBA members will need to review

[14] Strictly speaking, the Agencies are providing an interpretation of Section 612(b) of the FCRA, which is not the subject of the Proposal. Any rulemaking relating to implementation or interpretation of Section 612(b) would be conducted pursuant to authority granted solely to the federal banking agencies in Section 621(e), not to the Agencies under Section 615(h).

[15] We respectfully disagree with the Agencies' reliance on Section 615(h)(5)(C) of the FCRA as evidence to support a congressional intent to provide a new right to a free report. The provision is better read to reference the free report provided under Section 612(a), especially in light of no other legislative history to support an alternate interpretation.

regulations, and develop compliance programs, relating to Regulation Z, Regulation DD, and Regulation AA, among other regulatory changes. There are only so many legal, compliance, and information technology resources available to a bank, and we expect these resources to be stretched very thinly over the next several years. We believe it would be appropriate, therefore, to provide a two-year compliance period for banks once the final rule is issued. This will allow banks the ability to review *all* their new compliance obligations and prioritize them accordingly.

Conclusion

Again, CBA commends the Agencies for their diligence and their efforts in developing a reasonable approach to a difficult statutory provision. We believe the Agencies have taken the correct approach in terms of implementing the risk-based pricing notice requirements under the FCRA, and we urge the Agencies to retain the framework in the final rule. We hope our specific comments provide constructive analysis for use in crafting a final rule. Please do not hesitate to contact me at (703) 276-3873 if we can be of further assistance.

Sincerely,

Marcia Z. Sullivan

Marcia Z. Sullivan
Director, Government Relations