NAF
ASSOCIATION

August 11, 2008

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

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

Re: FACT Act Risk-Based Pricing Rule, Regulation V; Docket No. R-1316 / RIN 3084-AA94; Project No. R411009

Ladies and Gentlemen:

The National Automotive Finance Association ("NAF Association") appreciates the opportunity to comment on the proposed Risk-Based Pricing Regulations of the Federal Trade Commission and Federal Reserve Board (collectively, "the Agencies").

The NAF Association is the only trade association exclusively serving the non-prime auto financing industry. Organized in 1996, the NAF Association supports its members and the industry with programs and education. The Association represents auto finance companies and dealers throughout the country that provide credit for millions of Americans in an otherwise underserved segment of the automobile market. As purchasers of automobile dealer retail installment contracts, the NAF Association members want to be sure that the dealers we work with comply with all applicable laws, including the proposed Risk-Based Pricing Regulations. NAF Association members also include auto dealers, who will be directly affected by the proposed rule. We are concerned, however, that given the complex nature of the retail installment credit

process, dealers – especially small and independent dealers – will not be able to comply with the rule as currently proposed in a way that is meaningful for consumers.

The NAF Association recognizes the challenges facing the Agencies in crafting a regulation to implement Section 311 of the FACT Act and appreciates the Agencies' efforts to create a reasonable set of standards for conveying the required notice. In particular, the NAF Association supports the Agencies' conclusions that the initial creditor should provide the notice to consumers and that a consumer should receive one risk-based pricing notice in connection with a single credit extension. Requiring only one notice per transaction eliminates the cost and confusion that would accompany duplicative notices, which benefits consumers and creditors alike.

Finally, the NAF Association supports the Agencies' effort to provide practical, cost-effective ways to provide a risk-based pricing notice that is meaningful to consumers. However, automobile dealers will still find it difficult to comply with the proposal. Neither the risk-based pricing notice analyses nor the credit score disclosure exception permitted under the proposed Credit Score Exception for Non-Mortgage Credit (Proposed 16 C.F.R. § 640.5(e)) provides a feasible method for auto dealers to comply with the regulation that also meets the statute's goal of alerting consumers to the existence of negative information on their consumer reports.

Instead, the NAF Association respectfully recommends that initial creditors like auto dealers be permitted to provide the Model form for risk-based pricing notice (found at B-1 of the proposed FTC Rule) (hereinafter the "B-1 Form") to all of their credit customers after the terms of credit have been set, but before the contract is consummated. In the alternative, we suggest that the Rule expressly state that providing risk-based pricing notices to consumers who did not receive materially less favorable material terms is not a violation of the Rule.

As explained below, the methods proposed for creditors to determine which consumers should receive the risk-based pricing notice are at best impractical and at worst impossible for auto dealers to implement. Moreover, the credit score notice imposes a significant burden on auto dealers, requiring that they provide specific credit score information that is of minimal benefit to consumers beyond what would already be provided under the B-1 Form.

As the Agencies are aware, motor vehicle retail installment contracts are complex multi-party credit transactions. Unlike most "initial creditors," automobile dealers rarely conduct their own underwriting of consumers' credit applications and are not likely to have a tiered or risk-based pricing regime based on credit report information. Rather, dealers generally submit a consumer's application to multiple sales finance companies. Each sales finance company uses different credit report information, credit scores, and other criteria in its underwriting and a different system of risk-based pricing. Each may come to different conclusions about the terms on which it will purchase a particular contract. The sales finance company then tells the dealer whether it will purchase the contract and on what terms.

Because auto dealers generally do not themselves engage in risk-base pricing, they do not have the information necessary to compare terms among consumers whose contracts were priced and underwritten based on the different methods and standards of the various sales finance companies with which the dealer does business.[1] Even if the dealers had this information, it would be difficult, if not impossible, to reconcile the various methods and standards in a clear and meaningful way for consumers, and the proposal offers no guidance on how to proceed with this task. Thus, auto dealers will simply be unable to provide the risk-based pricing notice using any of the available methods.

[1] Indeed, because dealers typically price credit based on the terms quoted by their prospective assignees, and not based on the credit report, whether they are required to give a risk-based pricing notice is open to question.

For auto dealers, the only feasible compliance option for the rule as proposed would be the credit score disclosure exception at proposed § 640.5(e) of the rule for "other extensions of credit."[2] In fact, the supplemental information explaining the proposed rule specifically suggests that "auto lenders" may use this alternative notice. The credit score notice, however, is both burdensome for auto dealers and potentially misleading to consumers.

Because dealers typically rely on the assignee for the credit evaluation, they often do not feel a need to obtain credit reports for underwriting purposes. Although some dealers regularly obtain credit reports in connection with credit transactions, it is not a universal practice. In addition, some may purchase a conventional credit report but not a credit score. For dealers that do not regularly obtain credit scores, the proposed rule would require them to purchase one for the sole purpose of providing the credit score notice.

In addition, requiring provision of a credit score opens auto dealers up to myriad questions from consumers they cannot answer, because they did not use the score to determine the terms of credit, nor are they aware of the actual underwriting criteria used to determine the terms in most instances.

Not only would such a process be unduly burdensome for auto dealers, but it also is potentially misleading to consumers. As proposed, auto dealers would have to provide a notice under the credit score disclosure exception to all of its credit customers (not just those who received materially less favorable material terms). The notice must include a credit score, but there is no requirement that the score form part of the basis for the terms of the credit contract. On the contrary, a score must be supplied even if it was never used

[2] Fair Credit Reporting Risk-Based Pricing Regulations; Proposed Rule § 640.5(e), 73 Fed. Reg. 28966, 29011 (May 19, 2008) [hereinafter "Risk-Based Pricing Proposed Rule Notice"].

in the transaction. The rule would require the dealer to disclose a score that was not the basis for the assignee's pricing decision. Despite this disconnect between the score and the credit terms offered the customer, auto dealers would have to provide the notice at essentially the same "teachable moment" as the risk-based pricing notice – after the application is submitted but on or before the time the credit sale is consummated.[3]

Section 311 of the FACT Act's stated goal is to "notify consumers that information in their consumer reports caused them to receive materially less favorable material terms, and to encourage those consumers to check their consumer reports for possible errors."[4] The credit score notice does not provide consumers significantly better information with which to correct their credit reports than the B-1 Form. Consumers would still have to obtain a credit report to determine whether any errors appeared on the report that may have affected their creditworthiness.

At the same time, if 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,"[5] then it is the kind of information all consumers will find meaningful and useful. Certainly, there is no harm in providing such information to all consumers. On the contrary, making all consumers of credit products aware of the factors affecting the credit terms they receive can only benefit consumers and industry alike, by ensuring more a more accurate credit scoring system and creating more sophisticated consumers. The proposed rule's provision allowing the credit score disclosure to be provided to all consumers and the Agencies' acknowledgement that, as drafted, even its risk-based pricing notice requirements may be

[3] Risk-Based Pricing Proposed Rule Notice, 73 Fed. Reg. at 29010.
[4] *Id.*, 73 Fed. Reg. at 28973.
[5] *Id.*, 73 Fed. Reg. at 29867.

over-inclusive,[6] suggest the Agencies' recognition of the benefits of this information being more broadly transmitted.

Rather than providing the burdensome and potentially misleading credit score notice, however, the proposed Rule should permit automobile dealers, as initial creditors, to provide the B-1 Form to *all* of its customers after the terms of the credit have been set but before the contract has been consummated. We would also encourage the Agencies to develop a proxy method that is appropriate for auto dealers and other original creditors who rely on the underwriting decisions of their assignees. It is imperative that any such method be easy for dealers to implement.[7]

As a final matter, we ask the Agencies to clarify that the rule does not apply to leasing transactions. It seems clear from both the language of the proposed rule and the supplemental information that the Agencies do not contemplate its application to consumer leases.[8] Due to the fact that one Circuit Court of Appeals has deemed consumer lease transactions to be "credit" transactions under the Equal Credit Opportunity Act, this clarification would be very helpful to the industry.[9]

The NAF Association believes that the B-1 Form provides an accurate, non-misleading, and relevant notice to consumers sufficient to alert them to their rights and interests, without imposing an undue burden on initial creditors like auto dealers. In addition, a simpler disclosure requirement protects auto dealers from, on the one hand,

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[6] *See, e.g., Id.*, 73 Fed. Reg. at 28975 ("The point at which consumers typically begin to receive materially less favorable material terms ... will vary from credit to creditor.... The Agencies believe, however, that setting a numerical standard ... represents a reasonable balancing of the goal of providing notices to consumers most likely to benefit from them with the need for a clear bright-line standard....")

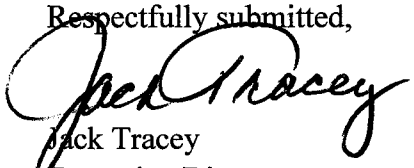
[7] One approach might be to set a cutoff Annual Percentage Rate, representing the point at which approximately 60 percent the dealer's customers have higher APRs. The dealer could then provide a risk-based pricing notice to each consumer who has an APR higher than the cutoff rate. This method could be used by dealers who do not obtain credit scores for underwriting purposes and who do not themselves have tiered pricing.

[8] For example, the term "annual percentage rate" has no application to a consumer lease transaction.

[9] Brothers v. First Leasing, 724 F.2d 789 (9th Cir. 1984).

the risk of unintentional or technical violations of the rule, which are likely under the current proposal, where auto dealers cannot of their own accord determine who should or should not get the risk-based pricing notice; and, on the other hand, from expensive notices to consumers that would expose them to extensive inquires about the underwriting process, which they do not conduct and which is unrelated to the information the proposal requires for consumers.

Respectfully submitted,



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