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September 14 2006

VIA OVERNIGHT DELIVERY

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, N. W.
Washington, D.C. 20580

Re: The Red Flags Rule, Project No. R611019

Dear Sirs:

I write to you on behalf of Nissan Motor Acceptance Corporation ("NMAC") in response to your Notice Of Proposed Rule Making ("NPRM") regarding Identity Theft Red Flags And Address Discrepancies Under The Fair And Accurate Credit Transactions Act Of 2003 (hereafter "Proposed Rule"). The NPRM indicates that comments may be made to the Proposed Rule on or before September 18, 2006.

By way of background and in order to further clarify the nature of the comments in this correspondence, I first describe to you the nature of NMAC's business. NMAC is a captive automotive finance company held 100% by its parent corporation, Nissan North America, Inc. ("NNA"). As is typical of captive finance lenders for other major automotive companies, NMAC's primary mission is the financing of consumer acquisitions of motor vehicles distributed by NMAC's parent, NNA, and sold by NNA's independent franchised dealers. NMAC's consumer financing generally takes the form of retail installment sales contracts and motor vehicle leasing. NMAC acts as an indirect lender, essentially purchasing by assignment consumer installment contracts and leases originated and contracted by Nissan motor vehicle dealers. As such, NMAC is not engaged in the negotiation or consummation of the consumer transaction. After the purchase of the contract from the motor vehicle dealer, NMAC then typically services the contract for the remainder of the contract term.

NMAC has two major areas of concern regarding the Proposed Rule, the first of which arises out of NMAC's role as an indirect lender. The second concerns some of the specific burdens imposed by the Proposed Rule, including the laundry list of red flags listed in Appendix A to the Proposed Rule. First, I will address the concerns of NMAC as an indirect lender.

NMAC is concerned that the Proposed Rule, as written, does not expressly address the situation of indirect lending and how the burdens of the Proposed Rule might be met when more than one lender is involved in a transaction. I did note that in the Regulatory Analysis of the preamble to the Proposed Rule, the FTC took the position that the burden on motor vehicle dealers would be relatively light because of their assumed ability to rely on programs developed by financial institutions purchasing dealer-originated paper. I am concerned that this assumption in the Regulatory Analysis, however well-intended, is not

actually reflected in any portion of the written Proposed Rule. The Proposed Rule is written in a way to define the various duties of a "creditor," without ever really leaving room for the interpretation that a "creditor" might be comprised of more than one creditor (for purposes of identity theft prevention) or that compliance might be met by the actions of more than one creditor.

Some of the duties identified in the Proposed Rule and Appendix A thereto clearly do not contemplate the mechanics of an indirect lending transaction. Proposed Rule §681.2(d)(2)(i) specifically contemplates that a creditor must have policies and procedures to "obtain identifying information about, and verify the identity of, a person opening an account." The Proposed Rule does not make allowances for the position of an indirect lender and the difficulties that lender will face in attempting to actually validate the identity of a person presenting themselves for credit at a motor vehicle dealership geographically remote from the indirect lender. In the Appendix A listing of red flags, which a creditor must consider in implementing its program, items 4 through 7 assume the creditor's ability to personally verify forms of physical identification, such a photo IDs, against the appearance or other characteristics of an applicant, or to check that the photo ID has not been altered or modified in some way. While these are duties that a motor vehicle dealer might perform in person, they are not easy tasks for an indirect lender.

Other Appendix A red flags assume duties that may be beyond the reach of a small local motor vehicle dealer. For example, the Appendix A red flags assume that a dealer will be able to check applicant information against Social Security Administration death master files, birth date ranges, prison addresses, phone data or other nationwide data which might only be found through other services or databases that may not be within the reach or economic circumstances of a motor vehicle dealer.

Because Proposed Rule §681.2(d)(1)(i) mandates that a creditor "at a minimum...must incorporate any relevant Red Flags from...Appendix A," and since the term "relevant" is not defined in terms of burden or industry practice, but rather appears to be defined in terms of risk of identity theft, it would appear that NMAC might be found deficient for not being able to validate personal identity by physical documents or physical appearance at the point of transaction. Similarly, a dealer might be found deficient if not able to incorporate and reference a broad array of materials which presumably must be identified and searched on a national basis. It is conceivable that the indirect lender would contractually rely upon a dealer to perform a personal identity validation at the point of the dealer's origination of the motor vehicle transaction, and that a dealer might rely on the indirect lender, in conducting its own credit review, to check against other relevant sources of potentially conflicting information, such as Social Security data, prison addresses, etc., assuming that this information is reasonably within the reach of the indirect lender. However, the Proposed Rule does not appear to contemplate successful compliance resulting from the collective actions of multiple prospective creditors in a transaction.

While it seems possible for the Proposed Rule to be revised in order to contemplate this type of relationship and allow counter reliance among the parties to an indirect lending transaction, the Commission should be careful of the relationships of the parties and expressly avoid the creation of agency relationships. As independent motor vehicle franchisees, motor vehicle dealers do not typically like to be deemed an agent of the captive finance lender, and typically the captive finance lender prefers that the independent motor

vehicle dealer not be identified as an agent of the lender. As such, it may be necessary to recognize any counter-reliance by multiple creditors as a matter of contract between the originating and the indirect lender.

NMAC's second area of concern relates to the substantive burdens contemplated by the Proposed Rule. A useful point of reference might be the FTC Safeguards Rule, which, in this writer's opinion, did an admirable job of setting standards that assess the regulated creditor by its size, complexity and area of business. The Safeguards Rule did not attempt to get into specific compliance requirements, as do the Proposed Rule and Appendix A to the Proposed Rule. While under the Safeguards Rule, a business might reasonably expect to look to its peers in its industry for the prevailing standards for the protection of information, the Proposed Rule does not leave a creditor with this flexibility to meet an industry standard. I have several bases for this concern. Although the Proposed Rule, at §681.2(c) begins with such a size and industry standard, this standard is in turn undermined by the requirement at sub-section (b)(1) for a creditor "at a minimum" to "incorporate any relevant red flags from...Appendix A." As mentioned above, the term "relevant" is not defined in terms of burden, complexity, or industry standards, but may arguably be defined only by the risk of identity theft. While I understand sub-section (d)(2) may deal procedurally with the actual handling of identified red flags in a particular circumstance, its prohibition that a creditor may not disregard a red flag without a "reasonable basis" again suggests that red flags which should be considered for relevance under a creditor's program relates to the risk of identity theft, and not to burden or industry practice. Because of these relevancy considerations, and because of a lack of real support for relevancy being defined by issues other than the risk of identity theft, the listing at Appendix A may arguably become a mandatory list of red flags so long as they are technically feasible, and without regards to whether they are practically feasible.

As The Commission surely knows, the credit industry is a highly automated and efficient process. The requirements to check against fictitious mail drops, prison addresses, answering service phone numbers, social security number ranges, and the like, present significant additional incremental changes to the credit process. While I do not disagree that these may be useful tools only when measured against their ability to prevent identity theft, they will require creditors to obtain or build additional processes, which may either defy automation or increase the cost of automation. While some of the foregoing items may be capable of future automation, some of the red flags identified at Appendix A clearly are designed to frustrate automation, and The Commission should only adopt them if it is really their intent to raise such barriers within the credit system. For example, Appendix A, Item 3 suggests that a creditor would be required to review a consumer report for any "pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer." If this is truly to be the standard, then automated credit review may no longer be possible. The consequences to the industry in terms of efficiency and staffing could be severe.

I could refer to other examples of some of the burdens imposed by specific items in Appendix A to the Proposed Rule. However, I think the real source of the potential problem is not so much the specific items listed in Appendix A (many of which are thoughtful and potentially useful) as is the varying approach taken by the Proposed Rule, as compared to prior regulatory standards, such as the FTC Safeguards Rule. The Proposed Rule seems to work fairly well when it talks about the requirement of a program and the measurement of

such a program against the size, complexity and business of the regulated creditor and in setting forth the basic components of a program. The flexible nature of the Proposed Rule disappears when it turns to specifying a mandated review of a list of standards and relevancy considerations which do not appear to address size, complexity and nature of the business, arguably addressing only the relevancy of the red flags. This ends up, in the view of the undersigned, in created specific rules, without regard to burden or applicability to the nature of the creditor's business. Approaching Appendix A as a guideline, rather than a minimum standard, might make the Proposed Rule a more successful analogy to the Safeguards Rule, and more easily implemented by creditors without undue controversy or difficulty.

In conclusion, I suggest that The Commission consider addressing specifically within the Proposed Rule the situation of indirect lenders and the degree to which the indirect structure of the transaction may affect which red flags are relevant and the degree to which the actions of dealers and indirect lenders may effect a complementary or mutual compliance. Also, I would recommend that the Proposed Rule not take what would be good guidelines, such as the Appendix A red flags, and make them a mandatory baseline. In this way, perhaps regulatory burden and litigation may be minimized without detracting from the general effectiveness of the Proposed Rule.

I want to thank The Commission for this opportunity to comment on the Proposed Rule. If you have any questions regarding this correspondence, I would be happy to entertain them, and can be reached at (214) 596-5154.

Yours truly,

Alan R. Hunn
Director & Asst. General Counsel, Nissan North America, Inc.,
in my capacity as General Counsel for Nissan Motor Acceptance Corporation

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