# American Financial Services Association
# Consumer Mortgage Coalition
# Mortgage Bankers Association

April 14, 2011

Jennifer J. Johnson
Secretary, Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Donald S. Clark
Federal Trade Commission
Office of the Secretary, Room H-113 (Annex M)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Risk-Based Pricing Rule Amendments
Regulations B and V, and FCRA Risk-Based Pricing Rule Amendments
FRB Docket No. R-1407, RIN No. 7100-AD66
FTC Project No. R411009

Dear Ms. Johnson and Mr. Clark:

The American Financial Services Association, the Consumer Mortgage Coalition, and the Mortgage Bankers Association appreciate the opportunity to submit comments on this proposed rule. The Board of Governors of the Federal Reserve System (Board) and the Federal Trade Commission (Commission) propose to implement section 1100F of the Dodd-Frank Act.[1] This provision amends the Fair Credit Reporting Act (FCRA) to require certain disclosures to consumers concerning their credit scores.

## I. Background

FCRA currently requires any person who takes certain adverse action with respect to a consumer, based in whole or in part on information in a consumer report, to provide an adverse action notice.[2] FCRA also currently requires delivery of a risk-based pricing notice when a person, based in whole or in part on a consumer report, provides credit to a consumer on terms that are materially less favorable than the most favorable terms that

[1] Dodd-Frank Act, Pub. L. No. 111-203 (the Dodd-Frank Act), § 1100F, 124 Stat. 1376, 2112 (2010).
[2] FCRA § 615(a).

lender makes available to a substantial proportion of consumers.[3] In both cases, the notice must, among other things, identify the consumer reporting agency that provided the report, and advise the consumer how to obtain a free consumer report, and about the right to verify the accuracy of the report.[4]

Section 1100F of the Dodd-Frank Act will amend FCRA to require additional information in adverse action notices and risk-based pricing notices relating to credit scores, when lenders use credit scores. These changes will become effective on the designated transfer date, scheduled to be July 21, 2011. The Board and Commission propose to amend regulations that implement FCRA to reflect the § 1100F amendments. The Board and Commission also propose model forms that reflect the required credit score disclosures.

The Board's Regulation B generally implements the Equal Credit Opportunity Act (ECOA) rather than the FCRA. However, FCRA and ECOA both require adverse action notices in some circumstances. Some of the Regulation B model notices include content required under both statutes. The Board proposes to amend the Regulation B model notices to include the credit score disclosures in adverse action notices required by the Dodd-Frank Act amendments to FCRA.

We appreciate the efforts of both agencies to have a final interagency rule in place by the designated transfer date. Overall, the proposed amendments are helpful. In this letter, we comment on some of the specific aspects of the proposal.

## II. Specific Comments

### *Streamlined Compliance is Welcome*

The proposed changes would continue to have certain model notices in Regulation B include content required by both FCRA and ECOA. This would permit the same model notices to meet the requirements of two different statutes. We support this because it streamlines and facilitates uniform compliance. It implements the Dodd-Frank amendments without undue regulatory burden.

### *The Definition of "Credit Score" Familiar to Consumers is the Best Definition*

The proposal would continue to use the definition of "credit score" in the Board's and Commission's existing regulations.[5] We support this because it is the credit score definition most familiar to consumers, and is therefore the definition that would make the disclosures most meaningful to consumers. It is also drawn from the statute. The definition is therefore the one Congress intended. This definition is also the one that lenders have already implemented, so it will not impose unnecessary regulatory burden.

[3] FCRA § 615(h).
[4] FCRA § 615(a); 12 C.F.R. § 222.73(a) (Board); 16 C.F.R. § 640.4 (Commission).
[5] 12 C.F.R. § 222.71(l); 16 C.F.R. § 640.2(l).

The Dodd-Frank amendments to FCRA § 615(a) and (h) both incorporate the definition of credit score in FCRA § 609(f)(2)(A). The § 609(f)(2)(A) definition excludes mortgage scores or ratings of an automated underwriting system that consider information in addition to credit information, such as the loan-to-value ratio, the amount of down payment, or the consumer's assets. It also excludes other elements of the underwriting process or decision. The two references to this definition in Dodd-Frank call it a "numerical" credit score, not just a credit score. This word "numerical" appears intended to reiterate the existing statutory exclusions for items extraneous to a credit score calculated by a consumer reporting agency.

The FCRA regulations follow the statutory exemptions from the definition by referring to credit scores as scores obtained from a consumer reporting agency rather than from a lender's underwriting process.[6] We support this definition that a credit score comes from a consumer reporting agency because that definition best implements Congressional intent to exclude extraneous items such as underwriting information. We believe the regulations could be clarified by stating in the definition that a credit score means a numerical score obtained from a consumer reporting agency.

***Proprietary Credit Scores in Combination with Other Information***

Some creditors use proprietary credit scores that incorporate, and use as a factor in a credit decision, a credit score obtained from a consumer reporting agency. We request confirmation that the credit score disclosed under FCRA § 615(a) or (h) in this circumstance refers to the credit score from a consumer reporting agency and not the proprietary score.

Credit scores from a consumer reporting agency would be the most meaningful disclosure because they are more familiar to consumers. They are also more uniform than proprietary scoring methods, which vary from lender to lender. Moreover, proprietary credit scores vary by loan type, even within one lender. Underwriting, for example, an automobile loan is far different from underwriting a mortgage loan. It would be misleading to tell an applicant for one type of loan that creditor's proprietary score because it may cause the consumer to incorrectly believe that the same score also indicates creditworthiness for other loan types. Credit scores from a consumer reporting agency would not create this problem because they are designed to reflect a more uniform credit profile. This would be the more streamlined and meaningful consumer disclosure

Some proprietary credit scores do not use credit scores from consumer reporting agencies as a factor, but do consider factors in addition to credit information from consumer reporting agencies. We request confirmation that the proprietary credit score in this

[6] *See*, *e.g.*, 12 C.F.R. §§ 222.72(b)(1)(v)(C); 222.74(d)(4)(i); 222.74(d)(4)(ii)(A); 222.74(d)(4)(ii)(B); 222.74(e)(1)(ii)(D); 222.74(e)(4)(i); 222.74(f)(1)(i); 222.74(f)(1)(ii); 222.74(f)(1)(iii)(E); and 222.74(f)(2). *See*, *e.g.*, 16 C.F.R. §§ 640.3(b)(1)(v)(C); 640.5(d)(4)(i); 640.5(d)(4)(ii)(A); 640.5(d)(4)(ii)(B); 640.5(e)(1)(ii)(D); 640.5(e)(4)(i); 640.5(f)(1)(i); 640.5(f)(1)(ii); 640.5(f)(1)(iii)(E); and 640.5(f)(2).

circumstance is not within the FCRA § 609(f)(2)(A) definition of credit score because it is a "mortgage score or rating of an automated underwriting system that considers one or more factors in addition to credit information" within the meaning of § 609(f)(2)(A)(ii)(I).

Some proprietary scores are based only on information from a consumer reporting agency and do not incorporate a credit score from a consumer reporting agency as a factor. We recommend that creditors in this circumstance be permitted to obtain a credit score from a consumer reporting agency and disclose it instead of the proprietary score. This is consistent with the practice permitted under the risk-based pricing exception disclosure.[7]

***Separate Notices to Co-Applicants or Co-Borrowers Does Not Ensure Privacy***

When a lender uses a credit score and is required to deliver a risk-based pricing notice to a consumer, the proposed rule would always require separate notices to each co-applicant or co-borrower, even if they have the same address.

When there are multiple applicants on one loan, each is able to see the application information of the other or others. Loan application information, especially on mortgage loans, includes sensitive information, including detailed information displaying consumers' income, debt, and assets. Co-borrowers elect to share their information with each other.

It is important to acknowledge that creditors cannot prevent co-applicants or co-borrowers from accessing each other's notices, even if mailed separately and even if mailed to separate addresses.

***Requiring Separate Notices to Co-Borrowers Should Prompt Option for Regulation B Adverse Action Notice***

Risk-based pricing notices are generally required when a lender, using a credit report, grants, extends, or provides consumer credit on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from that lender.[8] This disclosure does not include a credit score.

There is an exception from the general disclosure requirement for mortgage lenders that provide an alternative disclosure about credit scores and their use. This mortgage disclosure must include the consumer's credit score.[9] Most mortgage lenders make the disclosure under this mortgage exception.

Currently, under the general rule, lenders may deliver one risk-based pricing notice even if there are co-borrowers who share an address.[10] Under the mortgage exception, the

[7] 12 C.F.R. § 222.74(d)(1); 16 C.F.R. § 640.5(d)(4).
[8] 12 C.F.R. § 222.72(a); 16 C.F.R. § 640.3(a).
[9] 12 C.F.R. § 222.74(d); 16 C.F.R. § 640.5(d).
[10] 12 C.F.R. § 222.75(c)(1); 16 C.F.R. § 640.6(c)(1).

lender must send a separate disclosure to each applicant or borrower, even if they share an address, and one consumer's credit score may not be included in a notice to a different consumer.[11]

This rulemaking implements Dodd-Frank amendments that require FCRA adverse action and risk-based pricing notices to include credit scores, even for nonmortgage loans. The statute does not address situations where there are co-applicants or co-borrowers. The proposed rule would require separate risk-based pricing notices when there are multiple applicants or borrowers on the same loan, even if they have the same address, regardless of whether the loan is a mortgage loan.[12]

Adverse action notices are required by both ECOA[13] and FCRA.[14] The Dodd-Frank Act did not amend the ECOA adverse action notice requirements. When a Regulation B adverse action notice is required and there are co-applicants or co-borrowers, only one notice is required; it must go to the primary applicant if one is readily apparent.[15] That notice must be specific, and must state the principal reason or reasons for the adverse action.[16] When there are two applicants, it is insufficient for a notice to the primary applicant to state that the co-applicant did not have a qualifying score on the creditor's credit scoring system.[17] That is, the primary applicant must receive notice about the credit profile of the co-applicant.

In this circumstance, we recommend permitting creditors two options under Regulation B. One would be to continue current Regulation B practices. The Board does not propose to change the substantive Regulation B requirements, and this option is consistent with not changing Regulation B. The current practice is especially helpful when creditors send ECOA notices but not FCRA notices. Continuing current practice would not impose any regulatory burden.

The other option would be, in a combined ECOA/FCRA notice, when a secondary applicant's credit score was a reason for an adverse action, not to disclose the secondary applicant's credit score or specific principal reasons for an adverse action to other co-applicants. The creditor could send a notice to the secondary applicant specifying the principal reasons for the action relating to the secondary applicant, and the secondary applicant's credit score. The creditor would notify other co-applicants, including the primary applicant, that a co-applicant did not have a qualifying score on the creditor's credit scoring system. For example, the disclosure could read, "A co-applicant failed to achieve a qualifying score." The primary applicant would understand that the secondary applicant's credit profile was at least part of the reason for the action, without the

[11] 12 C.F.R. § 222.75(c)(2); 16 C.F.R. § 640.6(c)(2).
[12] Proposed 12 C.F.R. § 222.75(c)(1); proposed 16 C.F.R. § 640.6(c)(1).
[13] ECOA § 701(d)(2).
[14] FCRA § 615(h).
[15] 12 C.F.R. § 202.9(f).
[16] 12 C.F.R. § 202.9(b)(2).
[17] 12 C.F.R. § 202(b)(2).

necessity of divulging one consumer's specific reasons or credit score to another consumer.

This would remain consistent with the ECOA requirement that adverse action notices be provided to "[e]ach applicant" and that notices include "the reasons for such action[.]"[18]

FCRA, as Dodd-Frank amended it, does not address notices when there are two consumers on one loan. It requires adverse action notices to provide "a numerical credit score" without specifying the score of which consumer. Disclosing a separate credit score to each co-borrower whose score was used appears consistent with the statutory language.

We request confirmation that when FCRA § 615(a), as amended, requires a credit score disclosure, it requires a disclosure to each co-applicant or co-borrower whose credit score was "used" in taking adverse action, even if Regulation B requires a disclosure to only one consumer.

***Clarity Concerning Guarantors***

In the present rulemaking, the Board proposes amending Regulation B model forms to accommodate the changes to FCRA while facilitating uniform compliance. We appreciate the Board's efforts to facilitate uniform compliance. We suggest an additional area where uniformity would be appropriate.

Both statutes use the same definition of adverse action, as FCRA incorporates by reference the ECOA definition.[19] Congress did not amend this common definition when it last revisited these two statutes in the Dodd-Frank Act.

Regulation B provides that adverse action notices need only be given to one applicant, but must be given to the primary applicant where one is readily apparent.[20] The FTC has opined that ECOA and Regulation B "specify that a co-applicant is an 'applicant' but that a guarantor is not."[21] Similarly, the Board and Commission have stated that risk-based pricing notices to guarantors are not required.[22] When a lender takes an adverse action in connection with a loan or application with a guarantor, because Regulation B only requires one notice, we believe the same should be true under FCRA rules.

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[18] ECOA § 701(d)(2).
[19] FCRA § 603(k)(1)(A).
[20] 12 C.F.R. § 202.9(f).
[21] http://www.ftc.gov/os/statutes/fcra/stinneford.shtm
[22] "Under the final rules, a person is required to provide notice only to consumers to whom it 'grants, extends, or otherwise provides credit.' Except as discussed below, this generally refers to any consumer who applies and is approved for credit. A person does not grant, extend, or otherwise provide credit to a consumer who merely acts as a guarantor, co-signer, surety, or endorser for another consumer who applies and is approved for credit." 75 Fed. Reg. 2734, 2731 (January 15, 2010).

We request clarification in a regulation that when a loan has a guarantor, ECOA does not require an adverse action notice to the guarantor because the guarantor is not a primary applicant within the meaning of § 202.9(f). To maintain uniform compliance, we request clarification in a regulation that adverse action or risk-based pricing notices to the guarantor are not required under either FCRA § 615(a) or § 615(h), as amended by § 1100F of the Dodd-Frank Act.

***Multiple Credit Scores***

Creditors may obtain multiple credit scores in connection with one credit decision. The Board and Commission, in their existing rules, have provided a sensible approach that weighs the compliance burdens and the usefulness of the information to consumers, as well as the risk of overdisclosures, a common problem today.

> The Agencies believe it is appropriate to require disclosure of only a single credit score because requiring disclosure of multiple scores would unnecessarily increase the complexity of the notices and increase the compliance burden for creditors. Requiring disclosure of multiple scores in these circumstances also would require disclosure of accompanying information for each score, which would increase the length of the notices, especially if the creditor disclosed how the consumer's score compared to other consumers' scores in the form of bar graphs. Moreover, the Agencies believe consumers may not benefit from this additional information, could be confused by the disclosure of multiple scores, and could be less likely to read a longer form.[23]

The Board and Commission currently permit creditors to include one credit score when a creditor obtains more than one.[24] The same reasoning applies to the newly-required credit score disclosures. We therefore support the incorporation of this practice into proposed § ___.73(d).

***Multiple Consumers But Only One Credit Score Used***

There may be co-applicants or co-borrowers with different credit scores. The creditor may obtain a credit score for each consumer but use only one, such as the lower one. We request confirmation that this would require a FCRA adverse action or risk-based pricing notice only to the consumer whose credit score was "used" within the meaning of FCRA § 615(a)(2) and (h)(5)(E), meaning contributed to the credit decision. The creditor should also have the option of providing notice to all co-applicants or co-borrowers. This appears to be the requirement under proposed § ___.73(d), when a creditor obtains multiple credit scores but uses only one.

***Nonuse of Credit Score Should Not Require FCRA Notice***

[23] 75 Fed. Reg. 2724, 2743 (January 15, 2010).
[24] 12 C.F.R. § 222.74(d)(4) and (e)(4); 16 C.F.R. § 640.5(d)(4) and (e)(4).

Creditors, when making credit decisions, may obtain a credit report that includes a credit score, but not use the credit score in making a credit decision. For example, in considering whether to modify an existing loan, a creditor may obtain a credit report to review the borrower's outstanding debts, but not use the credit score in making its loan modification decision. Or, a creditor may obtain a credit score and it may be high enough to meet the creditor's score requirement, but the creditor may still take adverse action for an unrelated reason. We request clarification that a credit score disclosure is not necessary in this instance because the lender has not "used" the credit score within the meaning of FCRA § 615(a)(2)(A) or § 615(h)(9)(E)(i), or within the meaning or proposed § 73(a)(1)(ix), and (a)(1)(ix)(B) and (C).

***Repetitive Information Should Not be Required***

ECOA requires adverse action notices to contain a statement "the specific reasons" for the action.[25] FCRA, as amended, requires adverse action notices to contain the "key factors" that adversely affected the credit score.[26] Sometimes, the specific reasons are the same as the key factors, while other times they differ. The proposed combined ECOA/FCRA adverse action notices include the specific reasons in a different location than the key factors. This makes sense when the two differ. We request that when the specific reasons are the same as the key factors that including either or both is permissible.

***Credit Decisions are "Based On" or "Set" By Many Factors***

We suggest clarification in the regulation and model forms about the degree of reliance on credit reports. The regulation states "the terms offered, such as the annual percentage rate, have been set based on information from a consumer report."[27] Model Form H-1 and proposed Model Form H-6 state, "We used information from your credit report(s) to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/ down payment]."

The extent to which terms of credit are "based on" or "set" by credit reports is unclear. Many factors, including market interest rates, and the creditor's cost of funds and overhead, affect the annual percentage rate and other terms of credit.

The language in FCRA is "based in whole or in part on a consumer report,"[28] or "based in whole or in part on any information in a consumer report[.]"[29] This language is clearer. We recommend using it in the regulation and model forms.

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[25] ECOA § 701(d)(3).
[26] FCRA § 615(a)2)(A), as amended.
[27] 12 C.F.R. § 222.73(a)(1)(ii); 16 C.F.R. § 640.4(a)(1)(ii).
[28] FCRA § 615(h)(1).
[29] FCRA §§ 615(a)(2)(A) and 615(h)(5)(E)(i). FCRA § 615(a) uses similar language, "based in whole or in part on any information contained in a consumer report[.]"

### *ECOA Notice and Statement of Specific Reasons*

The Regulation B Commentary provides that, in stating the specific reasons for an adverse action, a creditor that uses a judgmental system must disclose reasons that relate to the factors actually reviewed.[30] We urge the Board to publish a model notice that displays both judgmental and score reasons.

The commentary also suggests including no more than four reasons.[31] It also provides that all principal reasons must be included.[32] We request guidance on which reasons constitute principal reasons.

### *Identifying Consumer Reporting Agencies*

The FTC has opined that creditors must identify in FCRA adverse action notices each consumer reporting agency whose consumer report included information on which the creditor based its decision, in whole or in part, to take and adverse action.[33] The model adverse action notices do not contain space to identify more than one consumer reporting agency. We recommend that they be modified to add sufficient space to list as many as are required to be identified.

Similarly, we recommend that the sample notification forms under Regulation B need to provide for the possibility that a creditor will base a decision on information from multiple consumer reporting agencies but will disclose a credit score from only one. As drafted, they state, for example, "[o]ur credit decision was based in whole or in part on information obtained in a report from the consumer reporting agency identified below. . . . We also obtained your credit score from this consumer reporting agency[.]"

### *Request for Compliance Flexibility*

We request flexibility in how creditors will produce and disclose the information required in Regulation B adverse action notices. Creditors deliver disclosures in Model Form H-3, and will deliver disclosures using the similar proposed Model Form H-6. Credit reporting agencies rather than creditors often prepare Forms H-3, and will prepare Forms H-6. Creditors therefore do not store, and do not have the capacity to store, the information those forms contain, in a form that makes it readily available to use in preparing other disclosures.

As proposed, the rule would require creditors to adapt their systems to store and retrieve the information to produce Regulation B adverse action notices. This would be very costly to implement. Compliance would be enormously simplified if the Regulation B adverse action notices were permitted to incorporate the Forms H-3 or H-6 rather than to

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[30] Regulation B Comment 202.9(b)(2)-6.
[31] Regulation B Comment 202.9(b)(2)-1.
[32] Regulation B Comment 202.9(b)(2)-4.
[33] http://www.ftc.gov/os/statutes/fcra/cast.shtm

put the information into a separate piece of paper. The information is substantially the same.

***Request for Reasonable Implementation Period***

We request that the Board and Commission provide a reasonable period of time to come into compliance with the new requirements of this rulemaking. Especially if systems changes will be required to store new information in creditors' systems so that it can be accessed to prepare disclosures, 12 months would be a reasonable amount of time. Many requirements in the mortgage industry are changing quickly now, and will continue to change for the foreseeable future, so systems changes are unusually time-consuming to implement.

The technology systems that lenders use to produce consumer disclosures are complex, highly specialized, and vary by lender even within one industry. Systems changes require many steps to complete. Making one change affects other aspects of the technology system. Many lenders use multiple systems, so multiple systems change projects are required for each rule change. Every system change must be carefully planned, designed, managed, documented, scheduled, installed, and tested. System change projects interrelate, so that a new project cannot necessarily be undertaken out of order. The consumer financial services industry is undergoing significant regulatory changes now, so a reasonable amount of time to come into compliance with new rules is especially important now.

## III. Conclusion

We support the efforts of both the Board and the Commission to finalize a helpful rule by the designated transfer date, and to keep implementation burdens to a minimum.

Sincerely,

American Financial Services Association
Consumer Mortgage Coalition
Mortgage Bankers Association