NADC
NATIONAL ASSOCIATION
OF DEALER COUNSEL

August 18, 2008

Office of the Secretary of the Federal Trade Commission
Room H-135 (Annex M)
600 Pennsylvania Avenue NW
Washington, DC 20850

Re: FACT Act Risk-Based Pricing Rule
Project Number R411009

Dear Secretary:

The National Association of Dealer Counsel is a trade association of nearly 500 attorneys who represent motor vehicle dealers throughout the United States. The membership of NADC is vitally interested in the proposed Risk-Based Pricing Rule because of its potentially negative impact on the clients of NADC's members.

At the outset, NADC would like to compliment the Federal Trade Commission for its work in attempting to craft a rule that gives due consideration to the needs of the various industries involved. NADC notes that section 311 of the Fair and Accurate Credit Transaction Act of 2003 ("FACT Act") is highly complex with a potentially substantial burden for creditors.

We appreciate the opportunity to provide these comments. We ask that our comments be taken in the spirit of this association trying to provide insight, rather than being critical of the FTC's efforts.

The FTC should reconsider the application of this Rule to motor vehicle dealers.

The language of section 311 of the FACT Act and the legislative history make clear that Congress was interested in having creditors that use risk-based factors in credit decisions provide information usable by consumers. In the vast majority of cases involving three-party financing, motor vehicle dealers do not utilize risk-based factors in determining the credit worthiness of the consumers with whom they deal.

In making this comment, NADC does not contend that dealers who are involved in two-party financing and who are the ultimate determinors of the creditworthiness of their customers should be exempt. In two-party credit situations, where the dealer sells a vehicle and actually extends credit pursuant to a financial instrument it does not assign,

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the application of the Risk-Based Pricing Rule may be appropriate. Those situations, which generally take place in "buy here pay here" transactions in the motor vehicle business, look more like the traditional financing arrangements considered by Congress when it passed section 311 of the FACT Act.

Three-party financing, which makes up the bulk of the transactions in the motor vehicle dealer business, do not look like the traditional financing transactions that Congress apparently contemplated when it enacted section 311. In these transactions, a dealer sells a vehicle, the customer signs a retail installment sale contract ("RISC") with the dealer as the nominal creditor in most states, and then the dealer assigns the RISC to a third party creditor that has notified the dealer that it accepts the credit of the customer. The third party creditor then services the debt directly with the customer.

NADC does not contend that dealers are not creditors in three party financing. Under the law in most states they are, nominally, creditors at the initiation of the transaction. However, they are not creditors who consider risk-based pricing factors in determining the sale of a vehicle. Simply stated, motor vehicle dealers only finalize sales of vehicles on credit if they can assign the RISC to a third-party financing source. Risk-based factors do not generally enter the picture in the decision to extend the credit or in the decision about the type of credit to be extended. The desire to make the sale is the overriding factor to be considered. Dealers will sell a vehicle if an assignee that does consider risk-based factors will accept assignment of the RISC.

NADC agrees that dealers receive credit applications from their customers and access credit reports. The purpose of these activities is to make a decision as to the likelihood that a creditor will accept assignment of the contract. In the motor vehicle dealer business, this is known as "approval" by a finance source. If a dealer believes that a finance source will approve a deal, the dealer will enter the deal with the customer and will complete it with the customer upon assignee approval. If a finance source does not approve a deal, then the dealer most likely will not to complete the deal, or if the vehicle was delivered, it will rescind the RISC pursuant to contract rights and terminate the deal.

NADC appreciates the decision by the Federal Trade Commission to require only one risk-based pricing notice in a three-party finance transaction. However, NADC notes that placing this requirement for compliance on the dealer is placing it on the wrong party. The potential assignees make the decision as to the creditworthiness of customers. The potential assignees ultimately make the credit decisions based upon risk-based factors, not the dealer.

For this reason, NADC requests that the FTC reconsider its decision to impose the compliance requirements of the Risk-Based Pricing Rule on motor vehicle dealers.

If dealers are required to comply, they should only be required to deliver Notice B-1.

NADC appreciates the decision of the FTC to provide a mechanism by which motor vehicle dealers can comply through delivery of an alternative notice to customers. However, dealer personnel who deal directly with customers are seldom experts in the complexities of credit scoring. Because of this, NADC suggests that motor vehicle dealers should be required only to deliver the model form for risk-based pricing notice B-1 as contained in the proposed Rule.

NADC is concerned that requiring motor vehicle dealers to issue a notice that contains detailed information concerning credit scores and the credit score itself will simply be another source of litigation against car dealers. The sales personnel who deal with customers in car dealerships are generally knowledgeable in selling vehicles. F&I personnel in dealerships who deal with customers are knowledgeable in the selling of financing and other products and services. Each type of employee may know the function of the credit score and its implication as to the creditworthiness of a customer from experience. However, these personnel generally do not know the procedures used by those issuing credit scores and the detailed factors that are involved.

Consistent with the intent of Congress, the "teachable moment" involved in the extension of credit should really involve those who are able to teach. When a motor vehicle dealer provides a notice of the credit score and detailed credit score information, that will likely lead to questions that are apt to lead to answers that may be considered misleading in a subsequent lawsuit by a disgruntled customer.

For this reason, we suggest that the B-1 notice is the notice that should be required of motor vehicle dealers involved in three-party financing if the Federal Trade Commission believes it should continue to apply the risk-based pricing notice requirements to motor vehicle dealers in three-party finance transactions.

Thank you for the opportunity to comment.

Sincerely,

Michael G. Charapp
President

MGC/jdr