# COALITION TO IMPLEMENT THE FACT ACT

**TransUnion**
**USAA**
**Nationwide**
**Consumer Bankers Association**
**HSBC**
**Ford Credit**
**Allstate**
**Independent Community Bankers of America**
**State Farm Insurance**
**GE**
**MetLife**
**MasterCard Worldwide**
**Credit Union National Association**
**Farmers Insurance**
**National Retail Federation**

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 Coalition to Implement the FACT Act ("Coalition") in response to the Notice of Proposed Rulemaking ("Proposal") regarding risk-based pricing notices under the Fair Credit Reporting Act ("FCRA") published by the Board of Governors of the Federal Reserve System ("Board") and the Federal Trade Commission (collectively, "Agencies") in the *Federal Register* on May 19, 2008. The Coalition represents a full range of trade associations and companies that furnish and use consumer information, as well as those who collect and disclose such information. The Coalition thanks the Agencies for the opportunity to comment on the Proposal.

## Executive Summary

In general, the Coalition believes the Agencies have proposed implementing Section 615(h) of the Fair Credit Reporting Act ("FCRA") in a reasonable manner, especially given the difficult nature of the statutory language. In particular:

- The Coalition agrees with the Agencies' determination to apply the risk-based pricing notice ("RBP Notice") requirement only to consumer—not business—credit.
- The Coalition strongly supports the Agencies' definition of "material terms."

- We applaud the Agencies' effort to provide proxies for creditors to consider when determining which consumers should receive a RBP Notice, although we believe the Agencies should make modifications to those proxies.

- The Coalition does not believe the RBP Notice is necessary or required by the statute in the context of an account review.

- We strongly support the notion that the auto dealer is the entity that must provide the RBP Notice (or credit score disclosure) in the context of an indirect auto loan, and that no other notice is required in connection with the auto loan.

- We strongly support the option to provide a credit score disclosure instead of a RBP Notice.

- We believe the Agencies could reduce the size of the model forms of the RBP Notice and the credit score disclosure without sacrificing utility.

- We ask the Agencies to provide flexibility regarding the timeframes in which the risk-based pricing notice and the credit score disclosure must be provided, especially in connection with credit extended at the point of sale and instant credit.

- The better reading of the Fair Credit Reporting Act is that there is no additional right to a free file disclosure from a consumer reporting agency ("CRA") in connection with the receipt of a RBP Notice.

**Scope Limited to Consumer Credit**

The Agencies would apply the Proposal only to credit that is used primarily for personal, family, or household purposes. In so doing, the Agencies are adhering to the clear intent of Section 615(h) of the FCRA, which is to provide *consumers* with useful information. For the reasons articulated by the Agencies in the Supplementary Information, we do not believe that an expansion of the Proposal's scope to encompass business credit—even if such credit is underwritten using an individual's consumer report—would provide much corresponding benefit to consumers. On the other hand, as the Agencies note, the application of the Proposal to business credit could create significant but unnecessary complexities and compliance burdens. We strongly urge the Agencies to retain the Proposal's scope in any final rule.

**Definitions**

*Annual Percentage Rate*

The Proposal includes a definition for "annual percentage rate" ("APR"), which is a key term for purposes of the "material terms" definition. The Agencies propose that, for purposes of the Proposal, APR has the same meaning given the term in § 226.14(b) of Regulation Z for open-end credit and § 226.22 of Regulation Z for closed-end credit. The Coalition believes these are appropriate.

*Material Terms*

The definition of "material terms" is critical to the Proposal because a creditor may base its determination of whether to provide a consumer with a RBP Notice on the "material terms" of credit provided to that consumer. The Agencies provide a definition of "material terms" in four contexts: (i) for open-end credit (other than a credit card), the APR that would be disclosed in account-opening disclosures under Regulation Z (other than temporary promotional, or penalty, APRs); (ii) for credit cards, the purchase APR; (iii) for closed-end credit, the APR required to be disclosed prior to the consummation of the loan; and (iv) for credit for which there is no APR, any monetary terms that the person varies based on information in a consumer report.

The Coalition strongly supports the Agencies' definition of "material terms" in the Proposal. The Agencies obviously recognize that compliance with the requirements of Section 615(h) can become virtually impossible if a creditor must engage in subjective judgments regarding which of the various terms in a credit contract are "material," and how to evaluate whether the consumer received "material terms" that are "materially less favorable" than the most favorable terms available to a substantial proportion of its customers. The Agencies also recognize that the APR applicable to a loan is, generally speaking, an effective proxy for purposes of determining which consumers should receive a RBP Notice. The Coalition concurs with the Agencies' judgment, and we urge the Agencies to retain the definition of "material terms" as proposed.

*Materially Less Favorable*

Generally, a creditor must provide a RBP Notice if the material terms of credit provided to a consumer are materially less favorable than the most favorable terms it provides to a substantial proportion of other consumers. The Agencies would define "materially less favorable" to mean that the terms provided to one consumer differ from the terms granted to a second 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.

We note at the outset that, so long as the Agencies continue to provide attractive proxies and exceptions in the final rule, the definition of "materially less favorable" may not have much of an impact on how creditors comply with the final rule. It may be unlikely that a creditor will want to engage in a case-by-case determination of whether a consumer should receive a RBP Notice—and therefore it would be unlikely that the creditor would need to reference this definition—when there are relatively clear proxies and/or exceptions that can be implemented in a more automated, and compliant, fashion. Having said that, we note that the definition is so vague as to provide little certainty to creditors when determining whether the APR is "materially less favorable" than the most favorable APR the creditor offers to a substantial proportion of its consumers. The Agencies provide relevant factors for a creditor to consider, such as the type of credit product and the extent of the difference between the APRs. We think this is helpful, and we also appreciate that the Agencies provide guidance for creditors to use when selecting a baseline from which to measure the material terms. The Coalition believes the Agencies should explore providing additional guidance, however, to assist those creditors relying on the definition. For example, the Agencies could state that "it would be unlikely that an APR

differential of 4% between credit card accounts is 'materially less favorable.'" Despite our comments, we also concede that we do not necessarily have a better definition to offer, and that the Agencies have done well in attempting to provide a definition for such an inherently vague term.

*"Most Favorable Terms"*

The Agencies do not provide a definition for the term "most favorable terms." For the reasons we describe above, the definition to this term may not affect many creditors' compliance with the requirement. For those creditors that intend to compare material terms for consumers for purposes of complying with the final rule, the Agencies note in the Supplementary Information that a creditor should not use in its comparison material terms that are available to only a tiny percentage of its clientele. We agree with this interpretation, but not because it provides much guidance on how to determine what terms are most favorable. Indeed, the only material term of importance is the APR, and the creditor would then determine whether the consumer's APR is materially less favorable than the most favorable APR available to a substantial proportion of its consumers. Therefore, the Supplementary Information's reference to a "tiny percentage" of customers does not add much guidance to creditors with respect to the definition of "most favorable terms." If anything, it is guidance relating to how a creditor determines what a "substantial proportion" of its customers is (which we discuss immediately below).

*"Substantial Proportion"*

The Agencies also do not provide a regulatory definition for what a "substantial proportion" of a creditor's customers may be. The Supplementary Information states that the Agencies expect a creditor to consider a substantial proportion as constituting more than a small percentage of customers, but that the proportion may or may not represent a majority of the customers. Although this guidance gives little certainty to creditors, the Agencies' views may be best left as provided as opposed to adopting a "hardwired" definition that may or may not reflect the nature of various product lines or customer attributes. We do appreciate, however, that the Agencies appear to suggest that it would not be *per se* unreasonable for a creditor to designate a majority of its customers as a "substantial proportion" for purposes of the final rule. The Coalition believes this is an important clarification, and we ask that it be retained in the Supplementary Information to the final rule.

**General Requirement**

The Proposal would require a creditor to provide a consumer a RBP Notice (assuming no exceptions apply) if the person both: (i) uses a consumer report in connection with an application for, or a grant, extension, or other provision of, consumer credit to that consumer; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer 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 note that the Proposal does not impose a quantitative standard or specific

methodology for determining whether a consumer is receiving materially less favorable terms, but that the determination should be made in a reasonable manner. We agree.

Additionally, the Agencies state that they "expect that creditors would provide risk-based pricing notices to some, but fewer than all, of the consumers to whom they extend credit." In this regard, the Agencies appear concerned about providing too many consumers with too many RBP Notices such that the notices lose their intended effect. In particular, the widely understood purpose of the RBP Notice is to provide the consumer with a mild jostle at the so-called "teachable moment" indicating that the contents of his consumer report are affecting the terms of credit he is getting. If all consumers were to receive an RBP Notice, it arguably would not signify anything special to the consumer.

The Coalition does not believe it is necessarily inappropriate to provide a generic notice to all consumers. Indeed, we believe that this can be educational for consumers and act as a constant reminder to consumers to handle credit responsibly and to review the contents of their files as CRAs for accuracy. This is why we believe the Agencies should have permitted creditors to provide such a notice on all applications. They have not proposed to do so, and we reiterate our request for such flexibility here.

Although we believe the RBP Notice should be permissible on all applications—as is provided in the statute—we suspect that the Agencies will not permit it for the reasons we have described. It is not clear to us, however, whether the Agencies could affirmatively *prohibit* a creditor from providing valuable information, including the information included in the RBP Notice, to all consumers at any time during the credit granting process or relationship. We raise this not because we believe many creditors will find it appealing to tell *all* their customers that they did not necessarily receive the "best deal" the creditor has to offer. On the other hand, we ask the Agencies to allow creditors reasonable flexibility in providing RBP Notices and to be tolerant of possible over notifications.[1]

**Account Review**

The Agencies state that the Proposal's requirements apply not only in connection with new credit, but also in connection with account reviews. In particular, a creditor must provide a RBP Notice if the creditor uses a consumer report in connection with an account review and, based in whole or in part on the consumer report, increases the APR on the account. The Coalition does not believe that this is a circumstance in which Congress intended for RBP Notices to be provided. The statutory circumstances that could require a RBP Notice are an application for credit or a "grant, extension, or other provision of" credit. An account review is clearly not an application for credit. Therefore, the Agencies must rely on the account review being a grant, extension, or other provision of credit. It does not appear that Congress had the same understanding of these terms. For example, elsewhere in the FCRA Congress appears to distinguish an "extension" of credit from an account review.[2] There is nothing in the legislative

[1] Based on the large number of notices that will be provided under the proxies designed by the Agencies, we assume the Agencies will be *very* tolerant of circumstances where too many, not too few, consumers receive the RBP Notice.

[2] *See* Section 604(a)(3)(A).

history, to our knowledge, that suggests Congress took a different view when it drafted Section 615(h).

**Multi-Party Transactions**

We agree with the Agencies' determination that the compliance obligation under the Proposal belongs to the person to whom a credit obligation is initially payable, and that subsequent creditors need not provide additional RBP Notices. For example, the Agencies state that if an auto dealer is the person to whom the loan is initially payable, such as may be the case in indirect auto lending, the auto dealer would need to comply with the final rule, even if the dealer were to immediately assign the loan to another lender. Any purchaser of the loan would not have any obligations under the Proposal. We believe the Agencies' approach is an appropriate application of the statutory requirements, as the person to whom the obligation is initially payable is the entity that, as a contractual matter, sets the terms of credit. Furthermore, in fact, the consumer is obtaining funding from the auto dealer in an indirect loan, even if the dealer intends to sell the loan. An expectation to sell a loan should not be grounds to avoid compliance with the statute. Not only would this create significant compliance issues in the auto lending context, but also in the mortgage finance context. Therefore, that entity should be the one to provide a notice (if any) to the consumer. We therefore ask that this approach be retained in the final rule.

**RBP Notice Recipients**

Although the Agencies provide clarity regarding the entity that must provide the RBP Notice (or credit score disclosure), it is not clear who must receive the information when there are multiple applicants or co-signors for a loan. We ask that the Agencies allow a creditor to comply in a manner similar to that provided in Regulation B, where the creditor can provide the notice to the primary applicant. This would seem to be inherently reasonable in connection with the provision of a RBP Notice or a credit score disclosure. Of course, it may be that a creditor would want to provide the RBP Notice or credit score disclosure to the applicant whose consumer report was used, or whose consumer report resulted in the less favorable pricing. We also believe a creditor could prefer to provide separate credit score disclosures to each applicant. The Coalition urges the Agencies to provide this flexibility.

**Credit Score Proxy**

Instead of directly comparing the material terms a customer receives with other customers' material terms, a creditor could make use of the credit score proxy provided in the Proposal. This proxy is available to creditors that set the material terms of credit based in whole or in part on a credit score. The proxy would require a creditor to provide a RBP Notice to each customer whose credit score is below the creditor's cutoff score for that product line.

The Coalition strongly supports the notion of a credit score proxy, and we ask the Agencies to retain this concept in the final rule. We believe that this approach gives creditors an *option* that can be implemented relatively easily in a manner that provides some level of

compliance certainty. We also believe that the Agencies have correctly focused on a consumer's credit score as an appropriate proxy for whether the consumer should receive a RBP Notice.

The Agencies provide that the cutoff score is the *approximate* point at which 40% of the creditor's customers for a given class of products have a higher credit score, and 60% have a lower score. In calculating the cutoff score, a creditor would need to consider all, or a representative sample, of the consumers to whom it has granted credit for a given class of products (*e.g.*, mortgages, credit cards).[3] The Coalition believes that this cutoff point will result in a large number of consumers receiving the RBP Notice. We question whether 60% of a creditor's customers should be given a notice that is clearly intended to imply that they have creditworthiness issues. We also believe that if a majority of creditors' customers receive the RBP Notices, the Agencies should simply allow for generic notices on all applications. As we describe above, we do not necessarily believe this is a negative outcome. The Agencies, however, appear to want to avoid RBP Notices being provided to "too many" consumers. If this is the case, we do not believe that the Agencies should set a standard that will result in a clear majority of consumers receiving the RBP Notice. We suggest that the Agencies reset the cutoff such that it applies to only those consumers who are not among the top two-thirds in terms of credit scores.

**Tiered Pricing Proxy**

A person that sets the material terms of credit through use of discrete pricing tiers may rely on the tiered pricing proxy in the Proposal. In this regard, if a creditor has four or fewer pricing tiers, the creditor would provide a RBP Notice to each consumer who receives credit at a price higher than that of the top tier. If the creditor has five or more pricing tiers, the creditor would determine a tier cutoff representing no less than 30% but no more than 40% of the top *tiers* (not number of consumers receiving credit). So, if a creditor has nine pricing tiers, it would provide a RBP Notice to each consumer placed in the bottom six tiers.

Although this proxy method may be less appealing to creditors simply because pricing tiers are less ubiquitous than the use of credit scores, the Coalition commends the Agencies for providing this *option* to creditors for their consideration. For creditors that use tiered pricing, this may be an appealing alternative that, like the credit score proxy, can be implemented in a more efficient manner than the standard method.

Just as the credit score proxy may result in large numbers of consumers receiving the RBP Notice, we believe the same result is likely with respect to the tiered pricing proxy. We therefore ask the Agencies to recalibrate the tiered pricing cutoff such that the RBP Notice is required for a tier that is below the top 60-70% of tiers.

[3] The Agencies provide appropriate cutoff score calculation methodologies for new entrants and portfolio acquisitions.

**Credit Card Proxy**

According to the Proposal, a credit card issuer must provide a RBP Notice if a consumer applies for a credit card in connection with an application program or in response to a solicitation for which more than one purchase APR may apply, and, based in whole or in part on a consumer report, the issuer provides a credit card to the consumer with a purchase APR that is greater than the lowest purchase APR available under that application or solicitation.

Regardless of the substance of the requirement, the Coalition asks the Agencies to state clearly in the final rule whether the credit card proxy is an *option* for credit card issuers or whether it is a *requirement* for credit card issuers. The text of this provision in the Proposal, and several portions of the Supplementary Information, strongly suggest that this is a *requirement* for card issuers. However, the credit score proxy includes an example of a card issuer opening a new account and providing a RBP Notice based on the application of the credit score proxy, which clearly suggests that the credit score proxy is available to credit card issuers. We strongly urge the Agencies to make this an *option*, not a *requirement*, for credit card issuers.

Assuming that the credit card proxy is not mandatory for credit card issuers, the Coalition supports its inclusion in the final rule. For the reasons we describe above regarding the numbers of consumers who will receive the RBP Notices, we question whether a credit card issuer should provide a notice to all cardholders who do not happen to qualify for the best APR available under a given offer indicating that they may have credit issues. The Coalition also disagrees with the Agencies' justification for providing the RBP Notice to customers who do not qualify for the best rate. Specifically, the Agencies state that they are "basing the [Proposal] on the assumption that when a credit card issuer offers a range of rates within a single solicitation or offer, *the consumer applies for the best rate available under that offer.*" (Emphasis added.) This latter assertion is simply not a true statement, nor is it how the Agencies (and others) interpret similar consumer protection regulations, such as Regulation B or the FCRA itself for purposes of determining whether a creditor has taken adverse action. If, in connection with the final rule, the Agencies take an inconsistent (and, we believe, incorrect) position relative to other regulations, they will create unnecessary confusion with respect to the rate for which the consumer is deemed to be applying in the context of other regulations. We also note that the Board has proposed amendments to Regulation AA that will make it more clear to prescreened consumers that the rate offered may depend on the consumer's creditworthiness. Such a disclosure will make it clear to the consumer that the consumer is not necessarily going to qualify for the best rate advertised, and inform the consumer ahead of time that this may be due to the consumer's creditworthiness, further undermining the Agencies' stated justification in the Supplementary Information.

The Agencies do state that a card issuer is not required to provide a RBP Notice if the consumer applies for a credit card for which a single purchase APR applies. We agree with this interpretation, as no consumer in this circumstance would receive material terms that are materially less favorable than any other consumer in connection with this offer. The Agencies are also careful to explain that no RBP Notice is required if the card issuer offers the consumer the lowest purchase APR available under the offer for which the consumer applied, even if the

issuer offers lower purchase APRs under different offers. We agree, and we ask the Agencies to retain this interpretation in the final rule.

**Issues Common to Proxies**

The Agencies state that if a creditor uses one of the proxies to evaluate whether consumers of a type of loan are to receive a RBP Notice, the creditor must use the same proxy for all loans of the same type. We ask the Agencies to provide creditors with slightly more flexibility. For example, it may be that an auto lender relies on credit scores for the majority of its auto loans, but not all. In this example, the auto lender could not use the credit score proxy even though such a proxy may be the most appropriate one for the majority of its loans. Even if the auto lender, for example, did use credit scores for all of its lending decisions, it could be that it uses very different pricing models across various auto lending lines. We believe it would be more appropriate to allow the creditor to apply the different compliance methodologies across these different lines, or even to use different proxy calculations (*e.g.*, credit score cutoffs) for the same type of proxy across product lines.

We also ask the Agencies to clarify what the different loan types may be. In the Supplementary Information, for example, the Agencies suggest that if a creditor uses a proxy for new auto loans, it must use the same proxy for all vehicle loans. The Coalition does not believe that auto loans are necessarily the same loan type as boat or motorcycle loans. In fact, we do not believe that a new auto loan is the same loan type as a used auto loan. Regardless, we ask the Agencies to provide clarity to creditors so they know how to segment their loan types for purposes of compliance with the final rule.

**Exceptions: General**

The Agencies provide for specific exceptions to the requirement to provide a RBP Notice. For example, if a consumer applies for specific terms and is granted those terms, no RBP Notice is required. This exception is provided in the statute, and we ask that it be retained in the final rule. Similarly, the statute provides an exception to the RBP Notice requirement if the creditor has provided or will provide an adverse action notice pursuant to Section 615(a) of the FCRA. This exception is included in the Proposal and should be retained.

There is another exception in the Proposal pertaining to prescreening. Specifically, the Agencies state that a creditor is not required to provide a RBP Notice to the consumer if the creditor obtains a consumer report in connection with making a firm offer of credit. We agree with the substance of this exception, although we do not believe that the better reading of the statute or its intent would suggest that a RBP Notice is necessary in the context of prescreening.[4] Therefore, we ask the Agencies to weigh whether a regulatory exception is necessary, or whether the same objectives could be achieved through use of the Supplementary Information.

[4] A RBP Notice is required only after credit is extended, at which point the creditor could apply the requirements accordingly.

**Exceptions: Credit Score Disclosures**

The Agencies have provided exceptions to the RBP Notice requirement in several circumstances where the creditor provides the consumer with a specific credit score disclosure. The credit score disclosure would include, among other things, a credit score for the consumer and educational information about the importance of credit scores. We strongly support the Agencies' determination that consumers would benefit from this credit score disclosure as much as, if not more than, they would from the receipt of the RBP Notice. We also believe that this exception could ease compliance obligations for at least some creditors, making it beneficial to both consumers and creditors alike.

The Coalition believes that the credit score disclosure is beneficial to consumers because it gives them a tangible, real-life assessment of how others may assess their creditworthiness. The credit score, combined with the educational material in the proposed disclosure, provides a consumer with a better understanding of his specific circumstances, as opposed to some vague notion that his credit report may have had a negative impact on how one creditor evaluated his application. Furthermore, we believe that the disclosure of the credit score, along with information placing the score in context relative to other scores, provides a consumer with the same or more jostle the RBP Notice would provide.

We also believe that the credit score disclosure exception may be a simpler compliance option for some creditors, especially if the Agencies incorporate at least some of our comments below regarding the delivery of the disclosure and its format. In this regard, a creditor may not need to attempt to calculate and compare material terms, cutoff scores, etc., so long as it provides a credit score disclosure to any consumer who could have qualified for a RBP Notice. This sort of "erring on the side of extreme caution" may not be viewed favorably by the Agencies if a creditor did so in connection with providing the RBP Notice, but it appears to be expected (if not required—see below) in connection with the credit score disclosure.

The Coalition believes that the credit score disclosure option would allow creditors to provide the credit score disclosure to all consumers, but not necessarily require it. In this regard, if the credit score disclosure is an *exception* to the requirement based on the notion that consumers who would otherwise receive the RBP Notice would not necessarily benefit from such a notice if they receive the credit score disclosure instead, we do not see how the Agencies could require the credit score disclosure to be provided to all consumers regardless of whether they would have received a RBP Notice. Stated differently, the exception would come into play only if the creditor otherwise needed to provide a consumer with a RBP Notice—no exception is necessary if the requirement is nonexistent with respect to a given consumer. In fact, this is how we read the text of the Proposal. However, the Supplementary Information suggests that a creditor must provide a credit score disclosure to *all* consumers in order to qualify for the exception. We do not believe this is the correct interpretation of the statutory exception authority, nor is it a correct interpretation of the Proposal as drafted. We urge the Agencies to reject such an interpretation.

With respect to the content of the credit score disclosure, some information that must be provided may be outside the control of the creditor. Specifically, the creditor may not be in a

position to ensure the accuracy of the score, the date it was calculated, or the distribution of scores as this information could be provided by a third party. The Agencies appear to provide creditors with a safe harbor for purposes of compliance if they disclose to the consumer the information the creditors received from a third party. Such a safe harbor is only appropriate, and we ask the Agencies to make this view explicit in the final rule.

We also ask the Agencies to provide creditors with an understanding of how often the credit score distributions must be updated. Given the fact that credit score distributions generally do not change in a material sense over short periods of time, we do not believe it is necessary to update the distributions often. We believe it would be appropriate for a creditor (and, in reality, the credit score providers) to update the distributions annually. This is especially important for those creditors that may provide a bar graph illustrating the distribution. This bar graph may need to be preprinted on stock forms, and if it must be updated frequently, creditors would have a difficult time managing these forms.

The Agencies also ask whether a creditor should provide the key factors affecting a consumer's credit score as part of the credit score disclosure, similar to the disclosure of key factors in certain adverse action notices. We do not believe that such a disclosure should be required (although we do not believe it should be prohibited, either). The credit score disclosure already runs the risk of becoming "information overload," and we believe that a consumer who has questionable credit will likely know the primary reasons for it based on a review of a consumer report.

**Format and Model Forms of Notices/Disclosures**

The RBP Notices may be provided in writing, electronically, or orally. This is the format that is prescribed in the statute, and we urge the Agencies to retain it in the final rule. The credit score disclosures, however, must be provided in writing an in a form the consumer may keep. Although this would appear to preclude oral delivery of the credit score disclosures, the Coalition assumes that the provisions of the E-SIGN Act would apply, allowing a creditor to provide the credit score disclosure electronically in compliance with the E-SIGN Act. We ask the Agencies to specifically acknowledge this option in the Supplementary Information or the final rule itself.

The Proposal includes several model forms for use by creditors. These model forms range in length from one to three pages. The Coalition asks the Agencies to revise these model forms, not so much for purposes of content but for purposes of length. It is not clear that consumers must receive a multipage disclosure of standardized language for them to comprehend the information—especially since the notices/disclosures will be given in most credit transactions and receipt of the information will become routine. If anything, we believe the length of the model forms proposed by the Agencies and others in various rulemakings will be counterproductive. For example, in addition to a two page credit score disclosure, a credit card issuer could also be required to provide a full page account opening disclosure, and a multipage privacy policy (based on the recent proposal for model privacy policies). That is at least five pages of disclosures that could accompany the card itself, and that does not even count the credit card agreement or other consumer information included in "welcome kits." We question

whether consumers will simply ignore the voluminous disclosures as opposed to wading through a stack of documents that, based on current disclosure formatting trends emanating from the Agencies (and other agencies), could soon rival that associated with a home mortgage.

Not only are the lengthy disclosures proposed by the Agencies not necessary (and possibly counterproductive), the model forms will result in significant and unnecessarily wasted resources, such as paper and postage. Also, as we discuss below, it is not possible for some creditors to provide these semi-customized model forms to consumers in the timeframe proposed. We ask the Agencies to consider our comments below when developing the model form options for consumers.

**Delivery Timing for Notices/Disclosures**

*Closed-End and Open-End Credit*

The timing for delivery of the RBP Notice or the credit score disclosure depends slightly on the type of loan involved. For closed-end credit, a creditor must deliver the RBP Notice before the consummation of the transaction, but not earlier than the time the decision to approve an application for, or an extension of, credit is communicated to the consumer by the person required to give the notice. For open-end credit, a creditor must deliver the RBP Notice before the first transaction is made under the plan, but not earlier than the time the decision to approve an application for, or extension of, credit is communicated to the consumer by the person required to provide the notice. For purposes of our comments, the timing requirements are similar with respect to the credit score disclosures.

The Coalition generally believes that the timing requirements are appropriate for many types of loans. We have significant concerns, however, regarding the timing requirements for purposes of credit extended at the point of sale, such as at a retail outlet or an auto dealership. We ask the Agencies to consider the circumstances in which the notice would be provided, both from the consumer's perspective and the creditor's. For example, a consumer may not appreciate receiving RBP Notice information at the retail counter, as it could signal to other people in line (or to a friend or colleague accompanying the consumer) that the consumer may have credit issues. We believe a consumer would also likely not want a retail store clerk to provide the consumer with a credit score disclosure if that meant the clerk was able to see the consumer's credit score.[5]

Aside from the fact that the Proposal could result in some awkward circumstances for the consumer, there are few, if any, compliance options available to creditors extending credit at the point of sale or in another "real time" context. It is simply not an option for a retailer to have a printer at every location where applications are accepted to print out a full-page RBP Notice with the name and contact information of the CRA that provided the consumer report used in connection with account opening. It is also not an option for a card issuer to rely on a retail sales clerk to provide different forms and disclosures to consumers as opposed to simply providing all

[5] These issues are admittedly less noteworthy in the context of an auto loan, where the consumer has more control over who witnesses the transaction and is presumably working with a finance officer who may be handling other sensitive information, not just a credit score, about the consumer.

consumers with preprinted documents and possibly a sales receipt with the account APR, which is how issuers manage compliance with various other regulations such as Regulation Z. Although the concerns are most pronounced in connection with retail credit opened at the point of sale, we have similar concerns if an auto (or other vehicle) lender is expected to rely on a dealership employee to satisfy its compliance obligations.

The Coalition urges the Agencies to create a different timing requirement for those lenders that are not interacting directly with the consumer at the time the account is opened. Specifically, we believe a creditor should have the option of providing the RBP Notice or the credit score disclosure within a reasonable period of time after the loan is consummated or after the first transaction under the plan. We believe this approach would still provide the consumer with the information required by the statute in a meaningful timeframe. The Coalition is not convinced that any of the information described in the Proposal *must* be provided prior to the account opening, as we believe it highly unlikely that any consumer, upon receipt of the information, will pause the account-opening process, take action with the hope of obtaining better credit terms, and restart the application process at a later time. This is especially unlikely in the context of credit opened at the point of sale. We do not believe it is plausible that a consumer would sacrifice the in-store discount, or delay a major purchase, based on an unquantifiable *possibility* that the consumer could reduce the purchase APR on the credit card by a few percentage points. We also do not believe it is plausible that a consumer will halt the process of buying a car based on the same information.

If the Agencies do not intend to provide additional flexibility regarding the timing of the RBP Notices and the credit score disclosures, we ask that they explore other options that would allow creditors to comply with the requirement. We are unaware of viable options that would not result in all consumers receiving the bulk of the RBP Notice as part of the application. We ask the Agencies for the opportunity to discuss this matter further as part of a separate dialogue if necessary.

*Account Review*

The Proposal includes a timing requirement for the RBP Notice in connection with an account review. It does not appear to include, however, an applicable timing requirement for the credit score disclosure in the context of account reviews. We believe the Agencies intend to allow creditors to provide the credit score disclosure instead of a RBP Notice in connection with an account review. If this is not correct, we ask the Agencies to clarify their position in the final rule. If it is correct, we ask the Agencies to provide a timing requirement for the credit score disclosures similar to that of the RBP Notices.

With respect to the timing requirement itself, a creditor must provide the RBP Notice at the time the decision to increase the APR based on a consumer report is communicated to the consumer or, if no such notice is given prior to the effective date of the change in APR, no later than five days after the effective date of the change in APR. Based on the Board's proposed revisions to Regulation Z, we think it unlikely that an account's APR will increase based on a consumer report without prior notice, but it is conceivable. In such circumstances, we ask that the creditor have the opportunity to provide the RBP Notice in the first periodic statement

provided to the consumer reflecting the change. We believe that this will result in a more effective notice to the consumer with less compliance burden.

**Interplay with Section 612(b) and Free File Disclosures**

The Agencies have proposed that a consumer has a new right to a free file disclosure if he receives a RBP Notice from a creditor. The Agencies base their determination on the language in Section 612(b) of the FCRA, indicating that a consumer has a right to a free file disclosure if the consumer receives a notification under Section 615. We note that the Agencies' interpretation is one not of Section 615(h), but of Section 612(b). The Coalition respectfully suggests that the rulemaking authority granted to the Agencies under Section 615(h) does not grant the authority to issue rules or interpretations under other portions of the FCRA. Rather, any rulemaking relating to Section 612(b) would occur pursuant to the process established under Section 621.

Regardless, we believe the Agencies are applying an interpretation of Section 612(b) that, if taken to its logical conclusion, would create clearly absurd results. Consumers could receive many notifications pursuant to Section 615. These include adverse action notices based on information in a consumer report, adverse action notices based on other information, prescreening disclosures, notifications pertaining to address changes, and RBP Notices. Certainly the Agencies do not believe that Section 612(b) provides a free file disclosure in response to each and every one of these notifications provided under Section 615. Therefore, Section 612(b) must be read in the proper context. Specifically, only the notice described in Section 615(a) specifically refers to the free file disclosure described in Section 612(b) subject to the 60-day timeframe (*i.e.*, not the free annual disclosure).[6] We ask the Agencies to compare this language to the language on which they rely in Section 615(h)(5)(C), which does not refer to any 60-day timeframe and therefore appears to refer to the free annual file disclosure that does not have a time limit. We also note the distinct lack of legislative history supporting the Agencies' position which would be unusual given the extensive discussion of free file disclosures generally and of the RBP Notice specifically.[7]

The Coalition does support the Agencies' determination that a credit score disclosure does not trigger a right to a free file disclosure. We agree with the Agencies that the credit score disclosure is not a notice provided under Section 615, and therefore Section 612(b) does not apply. If the Agencies decide that it is appropriate to opine on Section 612(b) as part of a rulemaking under Section 615(h), we strongly urge the Agencies to retain this position in their final rule.

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[6] *See* Section 615(a)(3)(A).

[7] The Coalition concedes that a lack of legislative history, *per se*, does not indicate a lack of congressional intent. Indeed, there were several provisions of the FACT Act that were drafted late in the process that do not have much, if any, legislative history despite their import. However, the concepts of free file disclosures and of RBP Notices were discussed at length even prior to formal legislative activity on the FACT Act.

**Effective Date**

The Coalition asks the Agencies to provide creditors with sufficient time to comply with the final rule. In so doing, it is critical that the Agencies consider the other compliance obligations that will be imposed on creditors in the near future. For example, many creditors will need to comply with significant revisions to Regulation Z and Regulation AA. We understand that the Board's revisions to these two regulations will create *significant* strains on the legal, compliance, and information technology resources at many creditors, especially credit card issuers. The adoption of this final rule will only add to that strain. Under "normal" circumstances, we would ask the Agencies for at least a year to comply with the final rule. In light of the current regulatory environment, however, the Coalition believes it is appropriate for the Agencies to give creditors at least two years to come into compliance with the final rule.

Sincerely,

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