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August 18, 2008

Via Electronic Mail

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

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

Re: 12 C.F.R. Pt. 222; 16 C.F.R. Pts. 640 & 698
Federal Reserve Regulation V: Docket No. R-1316
FTC FACT Act Risk-Based Pricing Rule, Project No. R411009

Ladies and Gentlemen:

MasterCard Worldwide ("MasterCard")[1] submits this comment letter in response to the Proposed Rule under 12 C.F.R. Pt. 222 (Regulation V) and 16 C.F.R. Pts. 640 and 698, published by the Board of Governors of the Federal Reserve ("Board") and the Federal Trade Commission ("FTC" and, together with the Board, "Agencies") in the *Federal Register* on May 19, 2008 ("Proposal"), 73 Fed. Reg. 28966. The Proposal would implement the risk-based pricing notice provision of the Fair and Accurate Credit Transaction Act ("FACT Act"), Pub. L. 108-159, 117 Stat. 1952, codified at Section 615(h) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681m(h). MasterCard appreciates the opportunity to provide its comments on the Proposal.

MasterCard applauds the Agencies for their careful and thoughtful work and effort in developing the Proposal. In particular, the Agencies have balanced the important benefits of providing increased information to consumers about their consumer reports with how

[1] MasterCard Worldwide (NYSE:MA) advances global commerce by providing a critical link among financial institutions and millions of businesses, cardholders and merchants worldwide. Through the company's roles as a franchisor, processor and advisor, MasterCard develops and markets secure, convenient and rewarding payment solutions, seamlessly processes more than 16 billion payments each year, and provides industry-leading analysis and consulting services that drive business growth for its banking customers and merchants. With more than one billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®, MasterCard serves consumers and businesses in more than 210 countries and territories, and is a partner to 25,000 of the world's leading financial institutions. With more than 24 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard. For more information go to www.mastercard.com.

burdensome and costly the new requirements are on users of consumer reports. MasterCard encourages the Agencies to continue to appreciate the need for this balance in deciding on a final rule. Further, the Agencies should be mindful of the important benefits that the use of credit reports can provide to consumers, including prompt and efficient credit applications and credit decisions. The burdens of the new rules should not inhibit these benefits, and the Agencies should consider modifications to the Proposal to avoid any adverse effects.

As recognized by the Agencies, 73 Fed. Reg. at 28967, operational feasibility is an important consideration. Various types of creditors offer credit and use consumer reports in different ways, and it is important for the rules to allow feasible compliance within the various frameworks. One important example of this in the context of credit cards is co-branded credit cards for which consumers can apply at a retail point-of-sale. These cards allow consumers to have instant access to new credit to enable purchases, but there are operational limits on the ability of the issuer to provide customized disclosures at the point-of-sale. Similarly, consumers benefit today from many credit card offers that permit balance transfers, and the balance transfer can often be requested at the same time the consumer is applying for credit on the telephone. Here, too, there are operational limits to providing written disclosures. The new rule should recognize those limits to allow consumers to continue to benefit from such offers.

Set forth below are MasterCard's specific comments in response to the Proposal.

I. Significant Comments Relating to Material Terms, Account Review, and Timing

Three aspects of the Proposal deserve particular attention, and thus MasterCard addresses them before presenting comments on other aspects of the rule. First, the Agencies have properly determined that the "material terms" for purposes of credit cards mean the annual percentage rate ("APR") for purchases. This focuses the rule appropriately on that key term, and enhances the ability of creditors to comply with the new requirements. Second, the inclusion of account review in the scope of the proposed rule should be reevaluated. MasterCard believes that extending the proposal to account review is neither required by the statute nor appropriate. Third, MasterCard urges the Agencies to provide greater flexibility in complying with the timing rules. The strict standard adopted in the Proposal does not serve practical consumer interests, and imposes impractical burdens on creditors.

A. Definition of Material Terms

One of the most important aspects of the Proposal is the definition of "material terms" in the context of a credit card plan to refer to the APR for purchases. *See* 73 Fed. Reg. at 28971; § _.71(i). MasterCard strongly supports this aspect of the Proposal. As is recognized already by the fact that this key term must be emphasized in the "Schumer box" solicitation disclosures for credit cards, *see* 12 C.F.R. § 226.5a(b)(1), this is likely to be the key term on which consumers compare credit offers. It is also the primary term that issuers regularly vary as part of risk-based pricing.

Thus, using the purchase APR fulfills the statutory requirement of comparing offers based on the material terms. It also enables issuers to more readily and accurately comply with the rule, because it enables straightforward comparisons. If the "materials terms" were defined

to include multiple financial terms of an account, it would become far more burdensome – and difficult – to compare offers to determine when a notice is necessary. As a result, even though some other terms of credit card accounts may vary based on a risk-based pricing – such as introductory rates – it is nevertheless appropriate for the Proposal to focus on the purchase APR.

B. Account Review Should Not Trigger a Risk-Based Pricing Notice

MasterCard believes that the Proposal's requirement to provide a risk-based pricing notice in connection with account review is not required by the statute, and is not necessary to serve the purpose of the statutory requirement. Thus, the Agencies should reconsider and delete this aspect of the proposed rule in finalizing the terms.

First, the terms of the statute do not require extending the risk-based pricing rule to account review. The statute contemplates a notice when a creditor uses a consumer report "in connection with an application for, or a grant, extension, or other provision of, credit...." 15 U.S.C. § 1681m(h)(1). None of these terms relates to account review. Clearly, there is no application at the account review stage. Moreover, at the time of an account review, the creditor has already granted, extended, and provided credit.[2] Account review may be used to vary the terms of the credit extended, but it does not involve a decision to grant, extend, or provide credit. As a result, the Proposal should not include a requirement to provide risk-based pricing notices in connection with account review.

Second, the history of the risk-based pricing provisions in Section 615(h) of the statute reflects that the requirement was intended to address a perceived gap in the definition of adverse action under Regulation B, which is incorporated into the FCRA. The definition of adverse action in connection with an application applies where the creditor refuses "to grant credit in substantially the amount or on substantially the terms ***requested in an application***...." 12 C.F.R. § 202.2(c)(1)(i) (emphasis added). Because creditors are free to design their own application processes, in many cases consumers do not request specific rates in credit applications. Therefore, granting credit at an APR other than the lowest rate often does not involve denying the terms requested in the application, and does not constitute adverse action. The risk-based pricing rule addresses this process, by requiring the new notice for applicants who receive less favorable rates.

However, the same perceived gap does not exist in the definition of adverse action for account review. For changes in terms of existing accounts, Regulation B defines "adverse action" to encompass any "termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts." 12 C.F.R. § 202.2(c)(1)(ii). There is no gap here for the risk-based pricing notice to fill, as the adverse action requirement already satisfies the need for providing notice in these circumstances.

For all these reasons MasterCard requests that the Agencies withdraw this aspect of the Proposal.

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[2] Indeed, the Agencies use all of these words to describe an initial credit decision, not an account review, elsewhere in the Proposal. *See* Proposed § _.73(c)(2).

C. The Timing Requirements Should Be Relaxed

The timing requirements in the Proposal impose an unnecessary burden on creditors, and that burden is neither required by the statutory language nor justified by any marginal benefit it would provide to consumers. Under the Proposal, credit card issuers would be required to deliver the notice before the first transaction on the card plan, but not earlier than the communication of the credit decision to the consumers. §§ _.73(c)(2); _.74(e)(3). The Agencies should reconsider this requirement.

1. Notice Prior to the First Transaction Is Unnecessary

The statute gives the Agencies substantial latitude in determining the time at which the risk-based pricing notice must be provided, referring to "the time of an application" and "the time of communication of an approval," but also to the timing requirements and exceptions set by regulation. 15 U.S.C. § 1681m(h)(2). The Agencies explain the rationale for requiring that the notice be provided before the first transaction as allowing the consumer to review his or her credit report before going forward with the transaction. 73 Fed. Reg. at 28979. This, however, is not an accurate assessment of the process by which credit card applications are taken and approved.

First, credit card applications are almost always decisioned quickly, and presented for immediate acceptance by the applicant. Whether by telephone, online, at point-of-sale, or through the mail, the creditor typically presents the offer, and the consumer either accepts or declines. This leaves little time, as a practical matter, for the consumer to obtain a copy of his or her consumer report. And it certainly provides too little time for the consumer to attempt to correct any apparent errors. As a result, the burden of providing notice prior to the first transaction simply outweighs any consumer benefit of such expeditious notice.

Second, the credit card marketplace already provides substantial alternatives for a consumer who, after opening an account, obtains his or her consumer report and is able to fix an error. The issuer, upon request, is likely to re-evaluate the terms of the account to take into account the accurate information. But even if that were not available, the consumer could – armed with the improved consumer report – apply for a new credit card account and easily transfer any existing balances.

Because of the practical timeline of credit card transactions, and the available alternatives, MasterCard urges the Agencies to reconsider the timing requirement, at least with respect to credit card applications. A more appropriate timeframe would be the one required by Regulation B for providing notice of adverse action.

2. At a Minimum, Flexibility Should Be Allowed for Instant Credit

If the Agencies determine to keep the general timing rule set forth in the Proposal, the Agencies should create an exception for transactions where delivery of the risk-based pricing notice would delay the completion of the transaction, and provide for particular examples. In these cases, delivering the notice within 30 days after the application would be appropriate.

One situation where this problem arises, and which would present nearly insurmountable difficulties, is in connection with credit card applications (such as for a co-brand card) at a retail point-of-sale. These offers give the consumer the chance to apply for a new credit card (and often receive a substantial incentive such as a discount off purchases, or a promotional rate) and receive an instant credit decision. Creditors and retailers have developed procedures to enable the delivery of disclosures that are currently required prior to the first transaction – for example, the initial (or account opening) disclosures (Reg. Z) and the privacy policy (Reg. P or related rules) may be printed in a package with the application, which the consumer can keep. As a result, the consumer can purchase goods and services using the new account immediately.

It would be extremely difficult if not impossible to deliver a risk-based pricing notice (or a credit score disclosure) within the context of this process. Unlike the initial disclosures and the privacy policy, the risk-based pricing notice cannot be preprinted because it requires certain customization (*e.g.*, the identification of the consumer reporting agency used). Nor, even if it could be preprinted, would it be possible to include the risk-based pricing notice in the disclosure packet, given the Agencies' admonition against providing the notice to all applicants and the rule against providing it prior to the credit decision. And the notice could not be printed at point-of-sale, as the only printer available is likely to be the receipt printer.

Privacy concerns also militate against a rule that would require delivery of a risk-based pricing notice (or a credit score disclosure) at point-of-sale. First, requiring delivery at that stage would put the information in the hands of the retail clerk. Moreover, there may be little privacy at the point-of-sale, and other customers may observe the documents being given to the applicant. An applicant may well be concerned and irritated about having this information available in the retail context.

Telephone applications represent another circumstances where delivering the risk-based pricing notice should be permitted after the first transaction. This would avoid causing unreasonable delay of, for example, balance transfers requested by telephone.

We do not believe that oral disclosures, although permitted under the rule, are a reasonable alternative for many creditors. It is more difficult to systemically document that appropriate disclosures are provided when they are given orally, absent expensive recording practices. And, at point-of-sale, an oral disclosure would exacerbate the privacy concerns noted above.

Thus, because providing a risk-based pricing notice will be either difficult or impossible in this context, and may inhibit making beneficial offers of credit, the Agencies should relax the timing rules.

3. The Timing for Account Review Notices Should Be Relaxed

The practical effect of the timing rules for providing a risk-based pricing notice for an account review depends significantly on other pending proposals under Regulation Z and Regulation. Those requirements may significantly limit the manner and time at which creditors can change terms in connection with an account review, and the notices that must be provided.

As a result, there may be few circumstances in which no notice will be provided prior to the effective date of the change in the APR.

However, if there are such circumstances, creditors should be able to provide the risk-based pricing notice (or credit score disclosure) with the next periodic statement, rather than within 5 days of the effective date. *See* Proposed § _.73(c)(3). The increase will be reflected on that next periodic statement, which makes it the logical place to include information about the increase and what led to it. Moreover, a consumer is more likely to appreciate the importance of, and to review, the notice if it is provided within the periodic statement than in a separate mailing. Creditors, therefore, should have the flexibility to provide notice with the next statement instead of incurring the cost of a separate mailing.

II. Additional Comments

A. Comments on the Scope of the Rule (§ _.70)

The Agencies have struck the proper balance under the Proposal in limiting the rule to credit extended for personal, family and household purposes, and specifically excluding business and commercial credit. 73 Fed. Reg. at 28970. Borrowers of business and commercial credit are, as a general matter, more sophisticated than consumer borrowers, and are far more likely to already be aware of their consumer reports and the importance of monitoring their reports. Applying the rule to business or commercial credit would raise a series of compliance burdens. First, it would encompass a new set of creditors into the scope of the rule, and require them to develop compliance procedures. Second, it is far from clear that many types of business credit are readily susceptible of the types of comparisons required by the rule to provide notice. In that regard, the terms of business credit are likely to be far more customized, and it may become quite difficult to compare various types of business credit.

B. Comments on the Definitions (§ _.71)

The definition of "materially less favorable" in the Proposal provides limited guidance in interpreting the statutory term. In that regard, the definition uses the phrase "significantly greater," which provides little clear guidance for creditors. It would be useful for the Agencies to suggest safe harbors, based on the definition of "material terms." For example, and relevant to MasterCard issuers, the Agencies could supply a safe harbor of what difference between purchase APRs on credit cards would be considered significant. The safe harbor might be a difference of one whole percentage point in comparing two APRs. In any case, however, it is likely that most creditors will rely on one of the safe harbors or exceptions set forth in the rule.

C. Comments on the General Requirements (§ _.72)

MasterCard applauds the Agencies for the various options for determining to whom to send the risk-based pricing notice. The direct method, the credit score proxy, the tiered pricing method, and the credit card rule provide good alternatives for creditors to find an operationally feasible means of complying with the rule. MasterCard offers a number of comments to make further improvements on the rule.

1. Card Issuers Should Have Flexibility Under the Rule

As drafted, Section _.72(c) provides a special rule for credit card issuers. MasterCard believes that this rule is an appropriate and helpful part of the Proposal, and presents an alternative upon which many credit card issuers will rely. MasterCard believes that the intent of the proposal was to allow card issuers to rely on subsection (c) or any of the other alternatives under Section _.72, although this is not entirely clear. MasterCard requests that the Agencies clarify that card issuers have the flexibility to rely on the other alternatives – whether the direct method, the credit score proxy, or the tiered pricing method – in addition to the specific credit card method.

2. The 60% Threshold for the Credit Score Proxy Should Be Reconsidered

Under the credit score proxy method, the creditor is required to provide a risk-based pricing notice to each consumer whose credit score is below the threshold where 40 percent of the creditor's consumers are above and 60 percent are below. 73 Fed. Reg. at 28974. MasterCard appreciates that some threshold is necessary, and agrees with the Agencies that a bright-line rule is appropriate. However, MasterCard questions whether the appropriate threshold is the one created by the rule, where consumers falling in the majority of the score range are designated to receive notices. It is far from apparent in the text of the statute, or in the legislative history, that there was an intent for receipt of the notice to be the rule, rather than the exception. Indeed, the effectiveness of the risk-based pricing notice is likely to be diminished if receipt becomes routine, rather than an exception. This is one reason that the Agencies have determined to require that the notice be given to some – but not all – applicants. Given the cost of providing a targeted notice, the rule should be designed to target the notice to preserve its efficacy. A more appropriate standard would be to provide the notice to those who fall within the lowest 30 percent of the issuer's credit scores.

3. The Credit Card Rule is Appropriate

MasterCard applauds the Agencies for the special rule applicable to credit card issuers, which appropriately recognizes the facts and practices particular to that industry, as well as the current and proposed rules for disclosure of terms in connection with applications and solicitations under Regulation Z. Targeting the risk-based pricing notice to those who receive a purchase APR less favorable than the lowest rate in the solicitation is proper and operationally feasible. For the same reason, MasterCard agrees with the Agencies that no risk-based pricing notice should be required for those who respond to an offer that included only a single APR

The reasoning set forth in the proposal, however, is not entirely correct. In the Supplementary Information, the Agencies suggest that applicants responding to a solicitation are applying for the best rate offered in that solicitation. 73 Fed. Reg. at 28976. We do not believe that this is the manner in which most card issuers have constructed their application process for purposes of Regulation B. Rather, applicants are applying for the best rate for which they qualify, of the rates in the offer. Those who qualify for a rate other than the lowest are still receiving the terms for which they applied, but they nevertheless, under the Proposal, should

receive a risk-based pricing notice. We request that the Agencies clarify this reasoning in the final rule.

D. Comments on the Content, Form and Timing of the Notices (§ _.73)

1. Length of Model Forms

MasterCard commends the Agencies for attempting to construct model forms that can be readily understood by consumers, and highlight important information for consumers. However, the currently proposed forms should be shortened – or creditors should be given discretion to shorten them – to decrease the costs of compliance with the new rule. The proposed risk-based pricing notices (forms H-1 and H-2) occupy most of a page of paper. However, the form could be readily shortened through minor formatting changes (for example, slightly shrinking the white space within the table). Creditors should also be given flexibility to, for example, divide the table between the front and the back of a single piece of paper.

The Agencies should also consider ways to shorten the model form for the credit score disclosures (forms H-3, H-4 and H-5). A shorter disclosure is more likely to be noticed and read by a consumer than one that fills two full pages. In that regard, in addition to formatting changes, the Agencies should consider whether some of the information could be eliminated or said more succinctly.

2. Free Credit Report

Under the Proposal, the Agencies have interpreted the FCRA to allow the recipient of a risk-based pricing notice (but not a credit score disclosure) to obtain a free credit report pursuant to Section 612(b). *See* 73 Fed. Reg. at 28969. MasterCard respectfully submits that this is not the correct interpretation of the history of the risk-based pricing rule or the terms of Section 612(b), which provides the obligation for consumer reporting agencies to make available free reports to consumers. Although Section 612(b) refers to a "notification pursuant to section 615," 15 U.S.C. § 1681j(b), that language was enacted at a time when the *only* notification provided for in Section 615 was the adverse action notice, 15 U.S.C. § 1681m(a). Reading the language in Section 612 to apply to *all* notifications now provided for in Section 615 makes little sense: many of the Section 615 notifications have nothing to do with requesting or receiving a free consumer report. *See* 15 U.S.C. § 1681m(b) (adverse action notice based on non-consumer report information), (d) (prescreening opt out notice), (e) (red flag/identity theft notices). Instead, it is more faithful to the construction in the FCRA to read Section 612(b) to refer only to the adverse action notice as it existed at the time that Section 612(b) was adopted.

Nor is the Agencies' proposed interpretation of Section 612(b) necessary to ensure that the purposes of Section 615(h) are being implemented. The right to a free annual report from each of the three major consumer reporting agencies provides an adequate and appropriate way for consumers to access their information – without imposing on the agencies or their customers the cost of yet an additional free report. Indeed, this is part of the basis on which the Agencies appropriately concluded that recipients of a credit score disclosure are not entitled to a fee consumer report under Section 612(b).

E. Comments on the Exceptions (§ _.74)

1. Prescreening

The Agencies correctly determined that obtaining a prescreened list should not be subject to the requirement of providing a risk-based notice, and we agree with the exception they have provided in the Proposal. It is not clear to us, however, whether a regulatory exception is required. In this regard, a risk-based pricing notice is only required if credit is actually extended. Therefore, for those consumers who receive a firm offer of credit, but do not apply or do not qualify for credit, a risk-based pricing notice would not be required anyway. For those consumers who do receive a firm offer of credit, and are granted credit as a result of the firm offer, there is almost certainly a "postscreen" involving a consumer report. In these circumstances, the creditor would apply the requirements of the Proposal accordingly as it does not appear that the Agencies' exception would extend to such circumstances. We therefore ask the Agencies to consider whether an exception in the final rule is necessary, or whether similar clarity can be provided in the Supplementary Information so as to avoid inappropriate inferences about the scope of the regulation itself.

We also ask the Agencies to provide a similar interpretation for the use of consumer reports in connection with prequalifications for credit. These circumstances are functionally similar to prescreening, with the exception that the consumer has generally provided written instructions to obtain the consumer report. We do not believe there is a distinction between a prescreen and a prequalification that should result in differential treatment under the Proposal.

2. Credit Score Notice

The exception provided by the Agencies for creditors that choose to send credit score disclosures is an important and laudable aspect of the Proposal. It is unclear to MasterCard whether credit card issuers will follow this alternative in large numbers, but the flexibility is important. However, we believe that several items should be clarified regarding this notice.

First, creditors should have the flexibility to provide credit score notices to all applicants, or only those applicants who would otherwise receive a risk-based pricing notice. As to the former option, it would facilitate compliance by creditors who cannot easily segregate their applicants into those who should and should not receive risk-based pricing notices. Given that the Agencies have indicated that it would not be appropriate to provide risk-based pricing notices to all applicants, the credit score disclosures may be the best option for these creditors. However, creditors should also be able to target the credit score notices to those applicants who would otherwise receive risk-based pricing notices. If the credit score disclosure is an exception to the risk-based pricing notice, logically it need only be delivered to those who are otherwise entitled to risk-based pricing notices. This should be made express.

Second, the Agencies should provide guidance on how frequently the information on credit score disclosures (in the distribution graph or other statement comparing the consumer's score to others) need be updated. MasterCard believes that annual updates are appropriate, as wide swings in the distribution of credit scores are unlikely.

Third, the Agencies should clarify that creditors have the right to include the credit scores they obtain from consumer reporting agencies in the disclosures made to consumers. Under the FCRA provision applicable to the home loan credit score disclosure, the statute provides that any contractual provision between a creditor and a consumer reporting agency that prohibits disclosures of a credit score is void. 15 U.S.C. § 1681g(g)(2)(A). The Agencies should clarify that this provision applies for all creditors who chose to provide credit score disclosures.

3. Form of Credit Score Notice

Under the Proposal, as provided in the statute, the risk-based pricing notice can be provided "in oral, written, or electronic form." § _.73(b)(1)(ii); *see also* 15 U.S.C. § 1681m(h)(1). However, the exception for the credit score notice requires that the disclosure be provided "in writing and in a form that the consumer may keep." § _.74(e)(2)(iii). This separate standard is unnecessary. Although it is unlikely that a creditor could provide a credit score disclosure orally, there may well be circumstances where the notice could be provided electronically. Thus, the risk-based pricing notices and the credit score disclosures that form the basis of the exceptions should be subject to the same format rule, as provided in the statute.

F. Effective Date

Implementing the final risk-based pricing rule will be a substantial undertaking for credit card issuers. Creditors will need to design disclosures, and implement and test processes and procedures for determining the consumers who should receive notices, and sending the notices. Creditors may also need to redesign the processes that they use to receive and evaluate applications in order to be able to implement the new requirements. If they intend to rely on the credit score proxy, creditors will also need an opportunity to analyze their portfolios to determine the cut-off threshold.

In addition, the Proposal comes at a time when several other significant regulatory actions are pending: comment periods only recently closed on proposals to amend the open-end credit disclosure rules under Regulation Z, and the unfair and deceptive acts and practices rules under Regulation AA. Implementing any final rules under those regulations will demand substantial issuer resources.

As a result, MasterCard believes that a two-year implementation period is appropriate for the risk-based pricing rule. Two years should allow issuers time to devote resources to this obligation and to other important regulatory obligations in order to ensure compliance.

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MasterCard appreciates the opportunity to provide its comments on the Proposal. Please do not hesitate to contact me at (914) 249-5978, or our counsels at Sidley Austin LLP in connection with this matter, Michael McEneney at (202) 736-8368, John Van De Weert at (202) 736-8094, or Karl Kaufmann at (202) 736-8133, if you have any questions or would like to discuss our comments.

Sincerely,

Jodi Golinsky
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Regulatory & Public Policy Counsel