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## **FCRA Risk-Based Pricing Proposal**

### ***Background***

**A. *Basic Risk-Based Pricing Notice Requirement.*** Section 311 of the Fair and Accurate Credit Transactions Act of 2003 added Section 615(h) to the Fair Credit Report Act (FCRA). Section 615(h) provides in part that “if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit 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, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with [Section 615(h)].” FCRA Section 615(h)(1).

**B. *FCRA Section 615(h) Details.*** FCRA Section 615(h) also provides that:

1. Except as provided in prescribed regulations, the risk-based pricing notice may be given (a) at the time of an application for, or a grant, extension or other provision of, credit, or (b) at the time of communication of an approval of an application for, or grant, extension, or other provision of, credit.

2. A person is not required to provide a risk-based pricing notice if:

a. The consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after (i) the transaction was initiated by the consumer and (ii) the person obtained a consumer report; or

b. The person has provided or will provide a notice to the consumer under FCRA Section 615(a) in connection with the transaction (i.e., an adverse action notice).

3. A person required to provide a notice under FCRA Section 615(a) (i.e., an adverse action notice), cannot meet that requirement by providing a risk-based pricing notice under FCRA Section 615(h).

4. A risk-based pricing notice under FCRA Section 615(h) shall, at a minimum:
  - a. Include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report.
  - b. Identify the consumer reporting agency furnishing the report.
  - c. Include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge.
  - d. Include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in FCRA Section 603(p) (i.e., a consumer report agency that maintains files on consumers on a nationwide basis)).

5. The Federal Reserve Board (Board) and the Federal Trade Commission (FTC) must jointly prescribe rules under FCRA Section 615(h). The rules must address, but are not limited to:

- a. The form, content, time and manner of delivery of any risk-based pricing notice.
- b. Clarification of the meaning of terms used in FCRA Section 615(h), including what credit terms are “material”, and when credit terms are “materially less favorable.”
- c. Exceptions to the risk-based pricing notice requirement for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers.
- d. A model risk-based pricing notice that may be used to comply with FCRA Section 615(h).
- e. The timing of the risk-based pricing notice, including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

6. FCRA Section 616 (civil liability for willful noncompliance) and FCRA Section 617 (civil liability for negligent noncompliance) do not apply to any failure by any person to comply with FCRA Section 615(h). FCRA Section 615(h) is enforced exclusively under FCRA Section 621 (administrative enforcement) by the Federal agencies and officials identified in that Section.

**C. Proposal.** On May 19, 2008, the Board and FTC published joint proposed rules in the *Federal Register* (73 *Federal Register* 28966). Comments were due by August 18, 2008.

## *Executive Summary of Proposal*

**A. Coverage.** The joint proposed rules of the Board and FTC contain requirements for users of a consumer report to provide a risk-based pricing notice in (a) general situations involving the extension of credit, (b) situations involving the issuance of a credit card, and (c) situations involving the review of an existing credit account.

**B. Compliance.** The proposed rules are “substantively identical” and compliance with either the Board’s rules or FTC’s rules would satisfy the statutory requirements.

**C. Business Credit Exception.** The proposed rules would not apply to any person that uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer or to any other applicant primarily for a business purpose.

### **D. Basic Approach.**

1. **Definitions.** The proposed rules define the concepts of “material terms” and “materially less favorable.”

2. **Requirements to Provide a Risk-Based Pricing Notice.** The proposed rules would require that a risk-based pricing notice be provided to a consumer in three situations.

#### 3. **General Credit Extension Situation.**

a. **Notice Requirement.** Pursuant to the requirement for general credit extension situations, unless an exception applies a person would be required to provide a risk-based pricing notice to a consumer if the person both:

i. Uses a consumer report in connection with an application for, or a grant, extension or other provision of, credit to a consumer that is primarily for personal, family or household purposes; and

ii. Based in whole or in part on the consumer report, grants, extends or otherwise provides credit to the consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that person.

b. **Methods to Determine Consumers Entitled to Notice in General Credit Situations.** The proposed rules set forth three methods that a person could use to determine which consumers must receive a risk-based pricing notice, if an exception does not apply.

i. **Direct Comparison Method.** Using the direct comparison method, a person would directly compare the material terms offered to each consumer and the material terms offered to other consumers in similar transactions to determine who must receive a risk-based pricing notice. This method provides for the least amount of certainty in determining who is required to receive a notice.

ii. **Credit Score Proxy Method.** Using the credit score proxy method, a person would determine a cutoff score at which approximately 40% of its consumers have higher credit scores and approximately 60% of its consumers have lower credit scores. The person would provide a risk-based pricing notice to each consumer with a credit score that is below the cutoff score.

iii. **Tiered Pricing Method.** Using the tiered pricing method, a person that sets the material terms of credit by placing the consumer within one of a discrete number of pricing tiers would provide a risk-based pricing notice to each consumer who, based in whole or in part on a consumer report, is not placed within the top pricing tier or tiers.

4. **Credit Card Situation.** For a credit card issuer, unless an exception applies, a risk-based pricing notice would be required if (a) a consumer applies for a credit card in connection with an application program or in response to a solicitation under Regulation Z Section 226.5a, (b) more than a single possible annual percentage rate for purchases may apply under the program or solicitation, and (c) based in whole or in part on a consumer report, the issuer provides a credit card to the consumer with a purchase annual percentage rate that is greater than the lowest purchase rate available under the application or solicitation.

Technically, credit card users are subject to the general credit situation requirements, but the method of determining whether a risk-based pricing notice must be provided in credit card situations differs from the method under the general requirements.

5. **Account Review Situation.** For a person that uses a consumer report in connection with a review of an account that has been extended to a consumer, a risk-based pricing notice would be required if, based in whole or in part on a consumer report, the person increases the annual percentage rate (or, with a credit card, increases the annual percentage rate for purchases).

Technically, persons reviewing accounts are subject to the general credit situation requirements, but the method of determining whether a risk-based pricing notice must be provided in account review situations differs from the method under the general requirements.

6. **Exceptions.** The joint proposed rules contain six exceptions to the requirements to provide a risk-based pricing notice:

a. **Specific Terms Exception.** A person would not have to provide a notice under the general credit situation requirements or credit card situation requirements if the consumer applies for specific material terms and is granted those terms, unless those terms were specified by the person using the consumer report after (i) the consumer applied for or requested credit, and (ii) the person obtained the consumer report.

b. **Adverse Action Notice Exception.** A person would not have to provide a notice under the general credit situation requirements, credit card situation requirements or

account review situation requirements if the person provides an adverse action notice to the consumer pursuant FCRA Section 615(a).

c. ***Prescreened Solicitation Exception.*** A person would not have to provide a notice under the general credit situation requirements or credit card situation requirements if the person obtains a consumer report that is a prescreened list, and uses the report for the purpose of making a firm offer of credit to the consumer, without regard to the material terms that the person includes in *other* firm offers of credit.

d. ***Residential Real Property Loans—Consumer Report & Credit Score Notice Exception.*** A person would not have to provide a risk-based pricing notice under the general credit situation requirements or the credit card situation requirements if the credit requested by the consumer involves an extension of credit that is or will be secured by one to four units of residential real property, and the person provides the consumer with a notice that contains specified information regarding consumer reports and credit scores, including the information required by FCRA Section 609(g). The notice would be provided at the time the disclosure required by FCRA Section 609(g) must be provided (and in any event at or before consummation for a closed-end transaction or before the first transaction for an open-end transaction.).

e. ***Non-Residential Mortgage Credit Extensions—Consumer Report & Credit Score Notice Exception.*** A person would not have to provide a risk-based pricing notice under the general credit situation requirements or the credit card situation requirements if the credit requested by the consumer involves credit *other than* an extension of credit that is or will be secured by one to four units of residential real property, and the person provides the consumer with a notice that contains specified information regarding consumer reports and credit scores. The notice would be provided as soon as reasonably practicable after the credit score has been obtained (and in any event before consummation for a closed-end transaction or before the first transaction for an open-end transaction.).

f. ***Credit Score Not Available—General Consumer Report & Credit Score Notice Exception.*** A person would not have to provide a risk-based pricing notice under the general credit situation requirements or the credit card situation requirements if (a) the person regularly obtains credit scores from a consumer reporting agency and provides disclosures in accordance with the exception for a consumer report/credit score disclosure with loans secured by residential real property or the exception for a credit report/credit score disclosure with non-residential mortgage credit extensions, (b) a credit score is not available from the consumer reporting agency regularly used by the person for a consumer to whom the person grants, extends or otherwise provides credit based in whole or in part on information in a consumer report, (c) the person does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or otherwise providing credit to the consumer, and (d) the person provides the consumer with a notice that contains specified information regarding consumer reports and credit scores.

4. ***Single Notice.*** Pursuant to a rule of construction, for each grant, extension or other provision of credit a consumer would be entitled to only (a) one risk-based pricing notice

under the general credit situation requirements or the credit card situation requirements, or (b) one notice under the exceptions for (i) a consumer report/credit score disclosure with loans secured by residential real property, (ii) a consumer report/credit score disclosure with non-residential mortgage credit extensions, or (iii) a general consumer report/credit score disclosure when a credit score is not available.

5. ***Person to Whom Obligation Initially Payable.*** The person to whom a credit obligation is initially payable would be required to provide the risk-based pricing notice under (a) the general credit situation requirements or the credit card situation requirements, or (b) the exceptions for (i) a consumer report/credit score disclosure with loans secured by residential real property, (ii) a consumer report/credit score disclosure with non-residential mortgage credit extensions, or (iii) a general consumer report/credit score disclosure when a credit score is not available. This is the case even if the person immediately assigns the credit agreement to a third party and is not the source of funding for the credit.

6. ***Purchasers or Assignees.*** A purchaser or assignee of a credit contract with a consumer would not be subject to the requirements of the proposed rule.

7. ***Model Forms.*** An appendix to the proposed rules contain the following five model forms: (a) a single model form for the risk-based pricing notice under the general credit situation requirements and the credit card situation requirements, (b) a model form for the risk-based pricing notice in connection with an account review situation, (c) a model form for the exception for a consumer report/credit score disclosure with loans secured by residential real property, (d) a model form for the exception for a consumer report/credit score disclosure with non-residential mortgage credit extensions, and (e) a model form for the exception for a general consumer report/credit score disclosure when a credit score is not available. Appropriate use of a model form would be deemed to comply with the applicable requirements. Use of the model forms would be optional.

### ***Detailed Summary of Proposal***

#### ***A. Purpose and Scope.***

1. The joint proposed rules of the Board and FTC would implement the requirement under FCRA Section 615(h) that “if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit 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, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with [Section 615(h)].”

2. ***Coverage.*** The joint proposed rules of the Board and FTC contain requirements for users of a consumer report to provide a risk-based pricing notice in (a) general situations involving the extension of credit, (b) situations involving the issuance of a credit card, and (c) situations involving the review of an existing credit account.

3. **Compliance.** The proposed rules are “substantively identical” and compliance with either the Board’s rules or FTC’s rules would satisfy the statutory requirements.

4. **Business Credit Exception.** The proposed rules would not apply to any person that uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer or to any other applicant primarily for a business purpose.

**B. Definitions**

1. **Material Terms.** “Material terms” would be defined as follows:

a. In the case of credit extended under an open-end plan:

i. The annual percentage rate required to be disclosed under Regulation Z Section 226.16(a)(2), excluding both any temporary initial rate that is lower than the rate that will apply after the temporary rate expires and any penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit.

ii. In the case of a credit card (other than a credit card that is used to access a home equity line of credit), the annual percentage rate that applies to purchases and no other annual percentage rate. For purposes of the proposed rules, the annual percentage rate that applies to purchases is referred to as the “purchase annual percentage rate.”

b. In the case of closed-end credit, the annual percentage rate required to be disclosed prior to consummation under Regulation Z Section 227.17(c) and Section 226.18(e).

c. In the case of credit for which there is no annual percentage rate, such as credit extended to consumers by a telephone company or a utility, any monetary terms that the person varies based on information in a consumer report, such as the down payment or deposit.

2. **Materially Less Favorable.** “Materially less favorable,” when applied to “material terms,” would be defined to mean that the terms granted or extended to a consumer differ from the terms granted or extended to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted or extended to the other consumer. For purposes of the definition, factors relevant to determining the significance of a difference in cost include the type of credit product, the term of the credit extension, if any, and the extent of the difference between the material terms granted or extended to the two consumers.

**C. Requirement to Provide Risk-Based Pricing Notice**

1. **Requirements for Three Situations.** Under the proposed rules there are requirements to provide a risk-based pricing notice that would apply to (a) general credit situations, (b) situations involving the issuance of a credit card, and (c) situations involving the review of an existing account.

2. ***Requirement for General Credit Situations.***

a. ***Requirement.*** Pursuant to the requirement for general credit situations, a person would be required to provide a risk-based pricing notice to a consumer if the person both:

i. Uses a consumer report in connection with an application for, or a grant, extension or other provision of, credit to a consumer that is primarily for personal, family or household purposes; and

ii. Based in whole or in part on the consumer report, grants, extends or otherwise provides credit to the consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that person.

b. ***Methods to Determine Who Receives a Notice.*** For general credit situations, the proposed rules set forth three methods that a person could use to determine when a risk-based pricing notice must be provided to a consumer.

i. ***Direct Comparison Method.*** Using the direct comparison method, a person would directly compare the material terms offered to each consumer and the material terms offered to other consumers in similar transactions. This case-by-case method provides for the least amount of certainty in determining who is required to receive a notice.

A. The agencies note in the preamble that although the proposed rules do not impose a quantitative standard or specific methodology for determining whether a consumer is receiving materially less favorable terms, the determination should be made in a reasonable manner.

B. Significantly, the agencies also note in the preamble that even with the flexibility provided in the proposed rules, it may not be feasible or practical for many creditors to make the direct comparisons required by the general rule. This is why the agencies include in the proposed rules the credit score proxy method and tiered pricing method addressed below as methods that creditors can use to identify consumers who must receive a risk-based pricing notice.

ii. ***Credit Score Proxy Method.*** Using the credit score proxy method, a person would determine a cutoff score at which approximately 40% of its consumers have higher credit scores and approximately 60% of its consumers have lower credit scores, and provide a notice to each consumer with a credit score that is below the cutoff score.

iii. ***Tiered Pricing Method.*** Using the tiered pricing method, a person that sets the material terms of credit by placing the consumer within one of a discrete number of pricing tiers would provide a notice to each consumer who, based in whole or in part on a consumer report, is not placed within the top pricing tier or tiers.

c. ***Credit Score Proxy Method Details.***

i. ***Determining Cutoff Score.***

A. ***Sampling Approach (for Persons that Currently Use Risk-Based Pricing).*** A person currently using risk-based pricing with respect to credit products it offers would calculate the appropriate cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted, extended or otherwise provided credit for a given class of products, such as mortgages, credit cards, or automobile loans. (The agencies note in the preamble that when a creditor's customer base or underwriting standards vary significantly among different classes of products, it may be necessary to calculate separate cutoff scores for each class of products based on representative samples of consumers offered that type of credit. The agencies note as an example that a creditor with a wide variety of credit products may need to calculate separate cutoff scores for mortgages, credit cards, automobile loans and student loans.)

B. ***Secondary Source Approach for Limited Circumstances.*** A person that is a new entrant into the credit business, introduces new credit products, or starts to use risk-based pricing with respect to the credit products it currently offers could initially determine the appropriate cutoff score based on information derived from appropriate market research or relevant third-party sources for similar products, such as research or data from companies that develop credit scores.

1. ***Merger or Acquisition.*** A person that acquires a credit portfolio as a result of a merger or acquisition could determine the appropriate cutoff score based on information from the merged or acquired party.

ii. ***Recalculation of Cutoff Scores.***

A. ***Sampling Approach.*** A person using the sampling approach would be required to recalculate its cutoff scores no less than every two years.

B. ***Secondary Source Approach.*** A person using market research, third-party data, or information from a merged or acquired party under the secondary source approach generally would be required to calculate its own cutoff scores based on the credit scores of its own consumers using the sampling approach within one year after it begins using a cutoff score derived from data supplied by third-party sources.

1. ***Exception.*** If such a person does not grant, extend, or otherwise provide credit to new consumers during that one-year period, and therefore lacks any data with which to recalculate a cutoff score based on the credit scores of its own consumers, the person could continue to use a cutoff score derived from third-party source data using the secondary source approach until it grants, extends or otherwise provides credit to new consumers and is able to collect data on which to base the recalculation. (Note the language of the proposed rule states that if a person "does not grant, extend, or otherwise provide credit to new consumers during that one-year period, and therefore lacks any data with which to recalculate a cutoff score

based on the credit score of its own consumers,” the person can continue to use third-party data. In contrast, in the preamble the agencies state that if the person “does not grant, extend, or otherwise provide credit to a sufficient number of new consumers during that one-year period, and therefore lacks sufficient data with which to recalculate its cutoff score after one year,” the person can continue to use third-party data.)

iii. **Use of Two or More Credit Scores.** A person that generally uses two or more credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer would be required to determine the appropriate cutoff score using the same method the person uses to evaluate multiple scores when making credit decisions. These evaluation methods may include, but are not limited to, selecting the low, median, high, most recent, or average credit score of each consumer.

If a person that uses two or more credit scores does not consistently use the same method for evaluating multiple credit scores, the person would be required to determine the appropriate cutoff score using a reasonable means. In such cases, “use of either one of the methods that the person regularly uses or the average credit score of each consumer is deemed to be a reasonable means of calculating the cutoff score.” (Note, the preamble appears to more clearly reflect the intent, as the agencies state that the proposed rules provide “a safe harbor to a creditor that uses either a method that the creditor regularly uses or the average credit score for each consumer as the means of calculating the cutoff score.”)

iv. **Lack of Available Credit Score.** A person using the credit score proxy method who grants, extends, or otherwise provides credit to a consumer for whom a credit score is not available would be required to assume that the consumer receives credit on material terms that are materially less favorable than the most favorable credit terms offered to a substantial proportion of consumers from or through that person, and would be required to provide a risk-based pricing notice to the consumer.

v. **Cutoff Score Examples.**

A. **Sampling Approach.** A credit card issuer offers annual percentage rates to consumers based in whole or in part on a credit score. The credit card issuer takes a representative sample of the credit scores of consumers to whom it issued credit cards within the preceding three months. The issuer determines that 40% of the sampled consumers have a score at or above 720 (on a scale of 350 to 850) and approximately 60% of the sampled consumers have a credit score below 720. Thus, 720 is an appropriate cutoff score for the issuer.

The issuer obtains the credit score of a consumer who applies for a credit card, and the score is 700. The issuer provides a risk-based pricing notice to the consumer because the score is below the cutoff score.

B. **Credit Score Not Available.** An automobile lender engaged in risk-based pricing obtains credit scores from a nationwide consumer reporting agency and uses the credit score proxy method to determine the consumers who must receive a risk-based pricing notice. A consumer applies for credit to finance the purchase of an automobile,

and a credit score is not available from the agency used by the lender. The lender nevertheless extends credit to the consumer. The lender must provide a risk-based pricing notice to the consumer.

d. ***Tiered Pricing Method Details.*** The requirements of the tiered pricing method would vary based on the number of pricing tiers used by the person.

i. ***Four or Fewer Tiers.*** For a person using the tiered pricing method that has four or fewer pricing tiers, the person would be required to provide a risk-based pricing notice to each consumer who does not qualify for the top tier (i.e., the lowest-priced tier). For example, a creditor that uses a tiered pricing structure with annual percentage rates of 8%, 10%, 12% and 14% would provide a risk-based pricing notice to consumers who are granted credit at annual percentage rates of 10%, 12% or 14% based in whole or part on information from a consumer report.

ii. ***Five or More Tiers.*** For a person using the tiered pricing method that has five or more pricing tiers, the person would be required to provide a risk-based pricing notice to each consumer who does not qualify for the top two tiers (i.e., the two lowest-priced tiers) or any other tier that, together with the two top tiers, comprise no less than 30%, but no more than 40%, of the total number of tiers. For example, if a creditor has nine pricing tiers, the top three tiers comprise no less than 30% but no more than 40% of the tiers, and the creditor must provide a risk-based pricing notice to each consumer placed within the bottom six tiers.

### 3. ***Requirement for Credit Card Situations.***

a. ***Requirement.*** Unless an exception applies, a credit card issuer would be required to provide a risk-based pricing notice to a consumer if:

i. A consumer applies for a credit card either in connection with a program, such as a direct-mail offer or a take-one application, or in response to a solicitation under Regulation Z Section 226.5a, and more than a single possible purchase annual percentage rate may apply under the program or solicitation; and

ii. Based in whole or in part on a consumer report, the issuer provides a credit card to the consumer with a purchase annual percentage rate that is greater than the lowest purchase annual percentage rate available under the application or solicitation.

b. ***Technical Application of General Credit Situation Requirements.*** Technically, credit card users would be subject to the general credit situation requirements, but the method of determining whether a risk-based pricing notice must be provided would differ from the method under the general requirements.

c. ***Circumstances in Which a Notice is Not Required.*** A credit card issuer would not be subject to the general credit situation requirements, and would not be required to provide a risk-based pricing notice to a consumer, if:

i. The consumer applies for a credit card for which the creditor provides a single purchase annual percentage rate (exclusive of a temporary discounted rate and a penalty rate that applies only after one or more specific events occur, such as a late payment); or

ii. The issuer offers the consumer the lowest purchase annual percentage rate available under the credit card offer for which the consumer applied, even if a lower purchase annual percentage rate is available under a different credit card offer issued by the credit card issuer.

d. **Example.** A credit card issuer sends a solicitation to a consumer that discloses several possible purchase annual percentage rates that may apply, such as 10%, 12% or 14% or a range from 10% to 14%. The consumer applies for a credit card in response to the solicitation. Based in whole or in part on a consumer report, the issuer provides a credit card with a 12% purchase annual percentage rate. Unless an exception applies, the issuer must provide a risk-based pricing notice. If, however, the issuer provided a credit card with a 10% purchase annual percentage rate, the issuer would not be required to provide a risk-based pricing notice, even if under a different credit card solicitation that consumer or other consumers might qualify for an 8% purchase annual percentage rate.

4. **Requirement for Account Review Situations.**

a. **Requirement.** Unless an exception applies, a person would be required to provide a risk-based pricing notice to a consumer if:

i. The person uses a consumer report in connection with a review of credit that has been extended to the consumer; and

ii. Based in whole or in part on a consumer report, the person increases the annual percentage rate, or the purchase annual percentage rate with a credit card.

b. **Technical Application of General Credit Situation Requirements.** Technically, persons reviewing accounts would be subject to the general credit situation requirements, but the method of determining whether a risk-based pricing notice must be provided would differ from the method under the general requirements.

c. **Example.** A credit card issuer periodically obtains consumer reports for the purpose of reviewing the terms of credit it has extended to consumers in connection with credit cards. As a result of the review, the issuer increases the purchase annual percentage rate applicable to a consumer's credit card based in whole or in part on a consumer report. The card issuer must provide a risk-based pricing notice.

**D. Content, Form and Timing of Risk-Based Pricing Notices**

**1. Content.**

a. **General Credit Situation and Credit Card Situation Notices.** The risk-based pricing notice for general credit situations and for credit card situations would be required to include:

i. A statement informing the consumer that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history.

ii. A statement informing the consumer that the terms offered, such as the annual percentage rate, have been set based on information from a consumer report.

iii. A statement informing the consumer that the terms offered may be less favorable than the terms offered to consumers with better credit histories.

iv. A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report.

v. The identity of each consumer reporting agency that furnished a consumer report used in the credit decision.

vi. A statement that federal law gives the consumer the right to obtain a copy of a consumer report from that consumer reporting agency without charge for 60 days after receipt of the notice.

vii. A statement informing the consumer how to obtain such a consumer report from the consumer reporting agency identified in the notice and providing contact information (including a toll-free telephone number, when applicable) specified by the consumer reporting agency.

viii. A statement directing consumers to the web sites of the Board and FTC to obtain more information about consumer reports.

a. **Account Review Situation Notices.** The risk-based pricing notice for account review situations must include:

i. A statement informing the consumer that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history.

ii. A statement that the person has conducted a review of the account based in whole or in part on information from a consumer report.

iii. A statement informing the consumer that as a result of the review, the annual percentage rate on the account has been increased based on information from a consumer report.

iv. A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report.

v. The identity of each consumer reporting agency that furnished a consumer report used in the account review.

vi. A statement that federal law gives the consumer the right to obtain a copy of a consumer report from that consumer reporting agency without charge for 60 days after receipt of the notice.

vii. A statement informing the consumer how to obtain such a consumer report from the consumer reporting agency identified in the notice and providing contact information (including a toll-free telephone number, when applicable) specified by the consumer reporting agency.

viii. A statement directing consumers to the web sites of the Board and FTC to obtain more information about consumer reports.

## 2. ***Form.***

a. ***General.*** The risk-based pricing notice for general credit situations, credit card situations and account review situations would need to be:

i. Clear and conspicuous.

ii. Provided to the consumer in oral, written or electronic form.  
(Note, the notice need not be provided in a form that the consumer can keep.)

b. ***Model Forms.*** The proposed rules contain a model form of risk-based pricing notice for general credit situations and for credit card situations, and a separate model form of risk-based pricing notice for account review situations. Appropriate use of a model form would be deemed to comply with the risk-based pricing notice requirements. Use of a model form would be optional.

3. ***Timing.*** Under the proposed rules, a risk-based pricing notice would need to be provided to the consumer:

a. ***Closed-End Credit Extension.*** In the case of a grant, extension or other provision of closed-end credit, before the consummation of the transaction, but not earlier than

the time that the decision to approve an application for, or grant, extension or other provision of, credit is communicated to the consumer by the person required to provide the notice.

b. ***Open-End Credit Extension.*** In the case of credit granted, extended or provided under an open-end credit plan, before the first transaction is made under the plan, but not earlier than the time that the decision to approve an application for, or grant, extension or other provision of, credit is communicated to the consumer by the person required to provide the notice.

c. ***Account Review.*** In the case of a review of credit that has been extended to the consumer, at the time the decision to increase the annual percentage rate (or the purchase annual percentage rate with a credit card) based on a consumer report is communicated to the consumer by the person required to provide the notice. If no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change in the annual percentage rate, the risk-based pricing notice would need to be provided no later than five days after the effective date of the change in the annual percentage rate.

#### ***E. Exceptions to Risk-Based Notice Requirements***

##### ***1. Specific Terms Exception.***

a. ***Exception.*** A person would not have to provide a risk-based pricing notice under the general credit situation requirements or credit card situation requirements if the consumer applies for “specific material terms” and is granted those terms, unless those terms were specified by the person using the consumer report after (i) the consumer applied for or requested credit, and (ii) the person obtained the consumer report.

b. ***Specific Material Terms.*** “Specific material terms” would be defined as a single material term, or set of material terms, such as an annual percentage rate of 10%, and not a range of alternatives, such as an annual percentage rate that may be 8%, 10% or 12%, or between 8% and 12%, based in whole or in part upon the consumer’s creditworthiness as reflected in a consumer report.

c. ***Example.*** A consumer receives a firm offer of credit solicitation from a credit card issuer. The terms of the solicitation are based in whole or in part on a consumer report obtained in accordance with the firm offer of credit provisions of the FCRA. The solicitation offers a single purchase annual percentage rate of interest of 12%. Other customers with the same credit card have a 10% purchase annual percentage rate of interest.

The exception would apply because the consumer applied for specific material terms and was granted those terms. Although the credit card issuer specified the material term(s) based on information from a consumer report, the term(s) were specified before the consumer applied for or requested credit. (Note that there is a separate exception for prescreened solicitations.)

2. ***Adverse Action Notice Exception.*** A person would not have to provide a risk-based pricing notice under the general credit situation requirements, credit card situation requirements or account review situation requirements if the person provides an adverse action notice to the consumer pursuant FCRA Section 615(a).

3. ***Prescreened Solicitation Exception.***

a. ***Exception.*** A person would not have to provide a risk-based pricing notice under the general credit situation requirements or credit card situation requirements if the person obtains a consumer report that is a prescreened list (as described in FCRA Section 604(c)(2)), and uses the report for the purpose of making a firm offer of credit to the consumer (as described in FCRA Section 603(l)), without regard to the material terms that the person includes in *other* firm offers of credit.

b. ***Example.*** A credit card issuer obtains two prescreened lists from a consumer reporting agency—one with consumers who have high credit scores and one with consumers who have low credit scores. The firm offer of credit mailed to the high credit score consumers offers a single purchase annual percentage rate of 10%, and the firm offer of credit mailed to the low credit score consumers offers a single purchase annual percentage rate of 14%. The issuer is not required to provide a risk-based pricing notice to the consumers who receive the 14% offer because the use of a consumer report to make a firm offer of credit on different material terms does not trigger the notice requirement.

4. ***Residential Real Property Loans—Consumer Report & Credit Score Notice Exception.***

a. ***Exception.*** A person would not have to provide a risk-based pricing notice under the general credit situation or credit card situation requirements if the credit requested by the consumer involves an extension of credit that is or will be secured by one to four units of residential real property, and the person provides the consumer with a notice that contains specified information regarding consumer reports and credit scores, including the information required by FCRA Section 609(g).

b. ***Content of Consumer Report & Credit Score Notice.*** The consumer report/credit score notice would be required to contain the following:

i. A statement informing the consumer that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors.

ii. A statement informing the consumer that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history.

iii. A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be.

iv. The information required to be disclosed to the consumer pursuant to FCRA Section 609(g).

v. The distribution of credit scores among all consumers using the same scale as that of the credit score that is provided to the consumer, presented in the form of:

A. A bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar, or by other clear and readily understandable graphical means; or

B. A clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers.

The use of a graph or statement meeting such requirements that is obtained from the person that provides the credit score would be deemed to comply with the requirements.

vi. A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report.

vii. A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period.

viii. Contact information for the centralized source from which consumers may obtain their free annual consumer reports.

ix. A statement directing consumers to the web sites of the Board and FTC to obtain more information about consumer reports.

c. ***Form of Notice.*** The notice would have to be:

i. Clear and conspicuous.

ii. Provided on or with the notice required by FCRA Section 609(g).

iii. Segregated from other information provided to the consumer, except for the notice required by FCRA Section 609(g).

iv. Provided to the consumer in writing and in a form that the consumer may keep. (Note, contrary to the risk-based pricing notice, the consumer report/credit score notice must be provided in a form that the consumer may keep.)

d. **Timing of Notice.** The consumer report/credit score notice would be provided at the time the disclosure required by FCRA Section 609(g) must be provided, and in any event (i) at or before consummation for a closed-end transaction or (ii) before the first transaction is made for an open-end transaction.

e. **Model Form.** The proposed rules contain a model form of consumer report/credit score notice that is consolidated with the notice required by FCRA Section 609(g). Appropriate use of the model form would be deemed to comply with the notice requirement for the exception. Use of the model form would be optional.

5. **Non-Residential Mortgage Credit Extensions—Consumer Report & Credit Score Notice Exception.**

a. **Exception.** A person would not have to provide a notice under the general credit situation requirements or credit card situation requirements if the credit requested by the consumer involves credit *other than* an extension of credit that is or will be secured by one to four units of residential real property, and the person provides the consumer with a notice that contains specified information regarding consumer reports and credit scores.

b. **Content of Consumer Report & Credit Score Notice.** The consumer report/credit score notice would be required to contain the following:

i. A statement informing the consumer that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors.

ii. A statement informing the consumer that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history.

iii. A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be.

iv. The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the consumer reporting agency for a purpose related to the extension of credit.

v. The range of possible credit scores under the model used to generate the credit score.

vi. The distribution of credit scores among all consumers using the same scale as that of the credit score that is provided to the consumer, presented in the form of:

A. A bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar, or by other clear and readily understandable graphical means; or

B. A clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers.

The use of a graph or statement meeting such requirements that is obtained from the person that provides the credit score would be deemed to comply with the requirements.

vii. The date on which the credit score was created.

viii. The name of the consumer reporting agency or other person providing the credit score.

ix. A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report.

x. A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period.

xi. Contact information for the centralized source from which consumers may obtain their free annual consumer reports.

xii. A statement directing consumers to the web sites of the Board and FTC to obtain more information about consumer reports.

c. ***Form of Notice.*** The notice would have to be:

i. Clear and conspicuous.

ii. Segregated from other information provided to the consumer.

iii. Provided to the consumer in writing and in a form that the consumer may keep. (Note, contrary to the risk-based pricing notice, the consumer report/credit score notice must be provided in a form that the consumer may keep.)

d. ***Timing of Notice.*** The notice would be provided as soon as reasonably practicable after the credit score has been obtained, and in any event (i) at or before consummation for a closed-end transaction or (ii) before the first transaction is made for an open-end transaction.

e. ***Model Form.*** The proposed rules contain a model form of notice. Appropriate use of the model form would be deemed to comply with the notice requirement for the exception. Use of the model form would be optional.

6. ***Credit Score Not Available—General Consumer Report & Credit Score Notice Exception.***

a. ***Exception.*** A person would not have to provide a risk-based pricing notice under the general credit situation requirements or credit card situation requirements if:

i. The person regularly obtains credit scores from a consumer reporting agency and provides notices in accordance with the exception for a consumer report/credit score notice with loans secured by residential real property, or the exception for a credit report/credit score notice with non-residential mortgage credit extensions;

ii. A credit score is not available from the consumer reporting agency regularly used by the person for a consumer to whom the person grants, extends or otherwise provides credit based in whole or in part on information in a consumer report;

iii. The person does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or otherwise providing credit to the consumer; and

iv. The person provides the consumer with a notice that contains specified information regarding consumer reports and credit scores.

b. ***Example.*** A person that uses consumer reports to set the material terms of non-mortgage credit granted, extended or otherwise provided to consumers regularly requests credit scores from a particular consumer reporting agency and provides those credit scores and additional information to consumers to satisfy the requirements of the exception for a consumer report/credit score disclosure with non-mortgage credit extensions. The consumer reporting agency provides the person with a consumer report on a particular consumer that contains one trade line, but no credit score. If the person does not obtain a credit score from another agency and, based in whole or in part on information in a consumer report, grants, extends or otherwise provides credit to the consumer, the person may provide the notice under the no credit score exception.

If, however, the person obtains a credit score from another consumer reporting agency, the person may not rely on the no credit score exception, but may satisfy the requirements of the non-residential mortgage credit extension exception. (The agencies note in the preamble that a creditor is under no obligation to attempt to obtain a credit score from another source.)

c. ***Content of General Consumer Report & Credit Score Notice.*** The notice would be required to contain the following:

i. A statement informing the consumer that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history.

ii. A statement informing the consumer that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time in response to changes in the consumer's credit history.

iii. A statement informing the consumer that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms.

iv. A statement informing the consumer that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be.

v. A statement that the person was not able to obtain a credit score about the consumer from a consumer reporting agency, which must be identified by name, generally due to insufficient information regarding the consumer's credit history.

vi. A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report.

vii. A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period.

viii. The contact information for the centralized source from which consumers may obtain their free annual consumer reports.

ix. A statement directing consumers to the web sites of the Board and FTC to obtain more information about consumer reports.

d. ***Form of Notice.*** The notice would have to be:

i. Clear and conspicuous.

ii. Segregated from other information provided to the consumer.

iii. Provided to the consumer in writing and in a form that the consumer may keep. (Note, contrary to the risk-based pricing notice, the consumer report/credit score notice must be provided in a form that the consumer may keep.)

e. ***Timing of Notice.*** The notice would be provided as soon as reasonably practicable after the person requested the credit score, and in any event *not later than* consummation for a closed-end transaction or *when* the first transaction is made for an open-end transaction.

i. Note: In the preamble, the agencies state that notice must be provided as soon as reasonably practicable after the credit score has been requested, and in any event *before* consummation for a closed-end transaction or *before* the first transaction is made for an open-end transaction. The agencies also state that the timing requirement is intended to be consistent with the timing requirements for the notices required under the residential real property credit and non-residential mortgage credit exceptions discussed above. Under such requirements, the respective notices must be provided (i) at or before consummation for a closed-end transaction or (ii) before the first transaction is made for an open-end transaction.

f. **Model Form.** The proposed rules contain a model form of notice. Appropriate use of the model form would be deemed to comply with the notice requirement for the exception. Use of the model form would be optional.

**G. Rules of Construction.** The proposed rules contain rules of construction that address the number of notices required for any single credit extension, the party required to provide a notice, and the obligations of purchasers or assignees of credit extensions.

1. **Single Notice.**

a. **General.** For each grant, extension or other provision of credit a consumer would be entitled to only:

i. One risk-based pricing notice under the general credit situation requirements or credit card situation requirements; or

ii. One notice under the exceptions for (A) a consumer report/credit score disclosure with loans secured by residential real property, (B) a consumer report/credit score disclosure with non-residential mortgage credit extensions, or (C) a general consumer report/credit score disclosure when a credit score is not available.

b. **Exception to Single Notice Rule—Account Review.** Even if a consumer has received a risk-based pricing notice in connection with a grant, extension or other provision of credit, another risk-based pricing notice would be required if the conditions for providing a notice under the account review requirements are satisfied.

2. **Multiple Parties.**

a. **Person to Whom Obligation Initially Payable.** The person to whom a credit obligation is initially payable would be required to provide the risk-based pricing notice under:

i. The general credit situation requirements or credit card situation requirements; or

ii. The exceptions for (A) a consumer report/credit score disclosure with loans secured by residential real property, (B) a consumer report/credit score disclosure with non-residential mortgage credit extensions, or (C) a general consumer report/credit score disclosure when a credit score is not available.

This is the case even if the person immediately assigns the credit agreement to a third party and the person is not the source of funding for the credit.

b. ***Purchasers or Assignees.*** A purchaser or assignee of a credit contract with a consumer would not be subject to the requirements of the proposed rule, even if the purchaser or assignee is the source of funding for the credit. (The preamble makes clear that a purchaser or assignee is not subject to the requirements even if it provides the funding.)

c. ***Examples.***

i. A consumer obtains credit to finance the purchase of an automobile. If the automobile dealer is the person to whom the obligation is initially payable, such as when the dealer is the original creditor under a retail installment sales contract, the dealer would be required to provide the risk-based pricing notice to the consumer (or satisfy one of the exceptions and provide the applicable notice), even if the dealer immediately assigns the loan to a bank or finance company. The bank or finance company is an assignee and would have no duty to provide a risk-based pricing notice to the consumer.

ii. A consumer obtains credit to finance the purchase of an automobile. If a bank or finance company is the person to whom the obligation is initially payable, the bank or finance company would be required to provide the risk-based pricing notice to the consumer (or satisfy one of the exceptions and provide the applicable notice) based on the terms offered by the bank or finance company only. The automobile dealer would have no duty to provide a risk-based pricing notice to the consumer.

***H. Model Forms.***

1. ***The Forms.*** An appendix to the proposed rules contains five model forms. The first two forms are designed for the risk-based pricing notice requirements, and the last three forms are designed for the disclosures pursuant to the exceptions to the risk-based pricing notice requirements. The five model forms are as follows:

- a. Risk-based pricing notice, for use in general credit situations and credit card situations..
- b. Account review risk-based pricing notice.
- c. Residential real property credit, consumer report/credit score disclosure.
- d. Non-residential mortgage credit, consumer report/credit score disclosure.

- e. Credit score not available, general consumer report/credit score disclosure.

2. **Modifications.**

a. **General.** A creditor could change the model forms by rearranging the format without modifying the substance of the forms. The rearrangement could not be so extensive as to materially affect the substance, clarity, comprehensibility, or meaningful sequence of the forms. Creditors that make revisions with such a material affect would lose the safe harbor for the appropriate use of a model form.

b. **Acceptable Change Examples.** Examples of acceptable changes would include:

- i. Corrections or updates to telephone numbers, mailing addresses, or web site addresses that may change over time.

- ii. The addition of graphics or icons, such as the creditor's corporate logo.

- iii. Alteration of the shading or color contained in the model forms.

- iv. Use of a different form of graphical presentation to depict the distribution of credit scores.

c. **Consumer Testing.** A creditor would not be required to conduct consumer testing when rearranging the format of the model forms.

d. **Compliance.**

- i. **General.** The appropriate use of a model form, including a form that has been modified in accordance with the proposed rules, would be deemed to be acting in compliance with the rules.

- ii. **FCRA Section 609(g).** Appropriate use of the model form for the residential real property credit, consumer report/credit score disclosure also would be compliant with the requirements for a disclosure under FCRA Section 609(g).

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