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Via E-Mail
April 14, 2011

Jennifer J. Johnson
Secretary, Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket Nos. R-1407 and R-1408 and RIN No. RIN 7100-AD66
regs.comments@federalreserve.gov

Re: Federal Reserve Board Docket Nos. R-1407 and R-1408 and RIN No. RIN 7100-AD66
Regulation B (Equal Credit Opportunity) and Regulation V (Fair Credit Reporting Risk-Based Pricing Regulations)

Dear Ms. Johnson:

This letter is submitted by Davis Wright Tremaine LLP ("DWT") on behalf of a client and its affiliates (collectively, "Client") in response to the proposed revisions to 12 C.F.R. Part 222 ("Regulation V") and 12 C.F.R. Part 202 ("Regulation B") that were published in the Federal Register on March 15, 2011 (collectively, the "Proposal") by the Board of Governors of the Federal Reserve System (the "Board").

The Proposal is intended to implement the amendments to the Fair Credit Reporting Act ("FCRA"), relating to the disclosures of credit scores, made by Section 1100F of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

DWT and our Client commend the Proposal and appreciate the opportunity to comment on it. However, we recommend that the Board confirm that use of a credit score derived from algorithms employed exclusively by the user of such score ("Proprietary Credit Score") does not trigger the disclosure requirements in the Proposal. Additionally, we recommend that the Board clarify that, in the event a person uses a commercially available consumer credit score, such as a FICO score ("Commercially

Available Credit Score"), as one of several inputs to a Proprietary Credit Score, disclosure of the Commercially Available Credit Score and related information are not required. Finally, we request that the Board postpone the effective date of the final rule in view of the complex systems changes that will be needed for compliance.

I. Disclosure of Proprietary Credit Scores

The Proposal would amend §§222.73(a)(1) and (2) of Regulation V, and make conforming changes to Appendix C and Comment 9(b)(2)-9 of Regulation B, to require a person providing a risk-based pricing notice to disclose a credit score used in setting the material terms of credit or increasing an annual percentage rate, as well as information relating to such credit score, including all the key factors that adversely affected the score (the "Disclosures"). Section 1100F cross-references a definition of the term "credit score" as "a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default."

Because this definition, read literally, could be construed to apply to a Proprietary Credit Score as well as a Commercially Available Credit Score, the Proposal could be interpreted as requiring the Disclosures regarding a Proprietary Credit Score. However, the Proposal is not clear as to whether such disclosures are required. For example, the Proposal would expressly permit a person using both a Proprietary Credit Score and a Commercially Available Credit Score to provide the Disclosures only with respect to the Commercially Available Credit Score, suggesting that disclosure of the Proprietary Credit Score is not required. We recommend that the Board confirm that persons using a Proprietary Credit Score are not required to provide the Disclosures for purposes of Regulation V and Regulation B with respect to that score.

While consumers are generally familiar with Commercially Available Credit Scores, they are generally not familiar with Proprietary Credit Scores and, as a result, may become confused by a score that is in a format or on a scale that is unfamiliar. The Proposal appears to acknowledge this, stating that "discussing two different types of credit scoring systems . . . could be confusing for consumers." Also, providing a consumer with a Proprietary Credit Score will not afford insight into how that consumer's creditworthiness is generally perceived in the marketplace or what the consumer can do to cause the perception to be more favorable. A consumer may arguably benefit from disclosure of the four most significant factors adversely affecting the Proprietary Credit Score, but substantially equivalent disclosures are already required by Regulation B. See, e.g., Form C-3.

In addition, requiring disclosure of the Proprietary Credit Score itself and the range alongside the factors adversely affecting that score may allow competitors to reverse

engineer proprietary decision management algorithms relating to the derivation of Proprietary Credit Scores.[1]

Moreover, while the Proposal does not expressly exempt Proprietary Credit Scores, several aspects of the Dodd-Frank Act and of the Proposal appear to reflect the view that Proprietary Credit Scores are not "credit scores." For example, the Proposal acknowledges that "Section 1100F of the Dodd-Frank Act requires information regarding a credit score *that is obtained from a consumer reporting agency* to be included on an adverse action notice." 76 Fed. Reg. (March 15, 2011) (emphasis added). Similarly, §§222.73(a)(1)(ix)(F) and (2)(ix)(F) would require disclosure of "*the name of the consumer reporting agency or other person* that provided the credit score" (emphasis added), suggesting that, unless a credit score is obtained from a third party and not generated by the person using the score, such score is not required to be disclosed. (While a Proprietary Credit Score can be obtained from a third party contractor that has been given a person's proprietary algorithms, the quoted language appears to contemplate that a credit score "obtained from a consumer reporting agency" is one generated using a scoring system resident at the agency for use by multiple persons rather than the proprietary scoring system of the person using the score.)

Section 1078 similarly appears to equate "credit scores" with commercially available third-party scores, in requiring the Bureau to "conduct a study on the nature, range, and size of variations between the credit scores sold to creditors and those sold to consumers by consumer reporting agencies . . . and whether such variations disadvantage consumers." Each of the revised Regulation B model forms would require a person to state "we also obtained your credit score from this consumer reporting agency." See, e.g., Regulation B, Form C-1. Even Section 1100F cross-references a definition of the term "credit score" which in context applies exclusively to Commercially Available Credit Scores. For these reasons, we request that the Board confirm that, for purposes of the Disclosures, the term "credit score" applies only to Commercially Available Credit Scores.

II. Use of a Commercially Available Credit Score as a Factor in Proprietary Scoring Model

Under proposed §§222.73(a)(1)(ix)(F) and (2)(ix)(F) of Regulation V, and the proposed conforming changes to Paragraph 2 of Appendix C and comment 9(b)(2)-9 of Regulation B, the Disclosures are required when a credit score is used in "setting the material terms of credit" or "in increasing the annual percentage rate," respectively. We recommend that the Board clarify that the Disclosures are not required with respect to a Commercially Available Credit Score if such score is used as an input to a Proprietary Credit Score.

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[1] A person is not required (and cannot be compelled by the Bureau of Consumer Financial Protection ("Bureau")) to provide "any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors" to a consumer. Sections 1033(b)(1) and 1034(c)(2)(A).

Persons may use a Commercially Available Credit Score as one of a number of inputs to a model that in turn is used to establish a Proprietary Credit Score. However, in these instances, the Commercially Available Credit Score is often not determinative. For example, a Commercially Available Credit Score may affect a Proprietary Credit Score positively, but not enough to avoid the necessity of an adverse action notice. Alternatively, a Commercially Available Credit Score may be immaterial to the adverse action.

In these circumstances, if the user of the Commercially Available Credit Score were required to provide the Disclosures with respect to such score, the consumer could be misled into thinking that such score was material to the adverse action. The consumer could also be confused about the impact of the Commercially Available Credit Score, particularly if the Commercially Available Credit Score is at the high end of the disclosed range. Moreover, even if the Commercially Available Credit Score is material, focusing on the Commercially Available Credit Score alone could be misleading since the Commercially Available Credit Score may be only one of several factors negatively influencing the Proprietary Credit Score.

If the Board believes that providing the Disclosures with respect to a Commercially Available Credit Score used as an input to a Proprietary Credit Score is consistent with the Dodd-Frank Act and is useful to consumers, then we recommend that the Disclosures be provided solely with respect to the Commercially Available Credit Score and only if such score is one of the four most important factors adversely affecting the Proprietary Credit Score. Otherwise, consumers may be misled for the reasons described above.

If the Board requires the Disclosures with respect to use of a Proprietary Credit Score and also requires the Disclosures with respect to use of a Commercially Available Credit Score employed as an input to a model used in determining a Proprietary Credit Score, we recommend that the Board revise §222.73(d)(1) of Regulation V, and the conforming changes to Paragraph 2 of Appendix C and comment 9(b)(2)-9 of Regulation B, to clarify that a person, at its option, may provide the Disclosures with respect to *either* the Proprietary Credit Score *or* the Commercially Available Credit Score used to determine that Proprietary Credit Score, but not both. This clarification would be consistent with the Board's position that "discussing two different types of credit scoring systems . . . could be confusing for consumers," which would apply when one credit scoring system is based at least in part on the other. In that circumstance, a person would be required to disclose four factors that adversely affected the Proprietary Credit Score – together with four additional factors adversely affecting the Commercially Available Credit Score. This likely would confuse consumers, particularly if the factors are overlapping, duplicative or conflicting.

III. Delayed Effective Date

We request that the Board delay the effective date of the final rule until January 1, 2012 to allow affected persons to timely implement the operational and systems changes that will be needed to comply. The proposed requirements are complex and, for persons

employing automated procedures, will require extensive technological adjustments. For example, such persons will need to build new dynamic fields to capture credit scores and the other disclosable information, as well as to redesign system feeds so that the new fields will properly generate the compliant Disclosures on adverse action letters and risk-based pricing notices. Additionally, even if affected persons can begin to implement such systems adjustments based on the Proposal, the finalization of any such adjustments will necessarily be delayed until issuance of the final rule.

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We thank the Board for the opportunity to comment on the Proposal and invite the staff to contact us to discuss our comments further.

Sincerely,

James H. Mann
Davis Wright Tremaine LLP