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April 14, 2011

<u>**By Electronic Mail**</u>
Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

<u>**By Electronic Submission**</u>
Federal Trade Commission/Office of the Secretary
Room H-113 (Annex M)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

**Re: Fair Credit Reporting Risk-Based Pricing Regulations**
**Board's Docket No. R-1407, RIN 7100-AD66**
**Commission's FCRA Risk-Based Pricing Rule Amendments: Project No. R411009**

**Equal Credit Opportunity**
**Board's Docket No. R-1408, RIN 7100-AD67**

Ladies and Gentlemen:

## I. <u>Introduction and Overview</u>

JPMorgan Chase & Co. and its subsidiaries ("Chase") appreciate the opportunity to comment on the proposal by the Board of Governors of the Federal Reserve System ("Board") to modify the model forms for adverse action notices under Regulation B, *see* 76 Fed. Reg. 13902 (Mar. 15, 2011) (the "Adverse Action Proposal"), and the joint proposal of the Board and the Federal Trade Commission ("FTC") to amend the risk-based pricing regulations under the Fair Credit Reporting Act ("FCRA"), *see* 76 Fed. Reg. 13896 (Mar. 15, 2011) (the "Risk-Based Pricing Proposal").

We strongly support the efforts of the Board and the FTC to provide regulatory guidance on compliance with Section 1100F of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 1100F"). Section 1100F amends both the adverse action rules in Section 615(a) of the FCRA, 15 U.S.C. § 1681m(a) (the "Adverse Action Rules"), and the risk-based pricing notice requirements in Section 615(h) of the FCRA, 15 U.S.C. § 1681m(h) (the "Risk-Based Pricing Rules"). The Board's Adverse Action Proposal and the Board's and the FTC's joint Risk-Based Pricing Proposal (together, the "Proposals") provide important guidance on complying with the terms of Section 1100F.

Set forth below are a number of comments Chase has on the Proposals. We have combined our comments on the two Proposals in this one letter, as a number of them are applicable to both Proposals.

## II. Comments Applicable to Both Proposals

***Obligation if No Credit Score is Obtained.*** When a creditor such as Chase requests a credit score for purposes of underwriting a credit transaction, one of the possible responses from the consumer reporting agency is a "no score." Rather than providing a numerical score, the agency reports to the creditor that the information in the consumer's credit file is insufficient to generate a score.

If the creditor, relying on this report of "no score," declines the transaction, we do not believe that this should trigger the obligation to provide the credit score disclosures. Section 1100F's amendments to the FCRA both require a disclosure "of a numerical credit score … used by such person in" either taking adverse action or making a credit decision. In the case of a no score response, the creditor has not used any numerical credit score in making a decision, because there was no score to use.

We respectfully request that the Board and the FTC clarify that no credit score disclosure is required under the Adverse Action Rules or the Risk-Based Pricing Rules under these circumstances. Creditors would, of course, remain subject to any other applicable disclosure requirements under the Adverse Action Rules or Risk-Based Pricing Rules independent of Section 1100F's requirements.[1]

Although we do not believe that any credit score disclosure is required in these circumstances, we also suggest that the Board and FTC permit creditors, at their option and without losing the benefit of any safe harbor, to notify applicants, in the adverse action letter, that no credit score was available from the credit reporting agency. This will alert applicants that they may want to contact the credit reporting agency for further information regarding the lack of a credit score. The most efficient way for a creditor to provide this notice would be to permit the creditor to print "Not Available from Credit Reporting Agency" in the space available for the credit score and in the space available for the reasons adversely affecting the credit score. This would allow a creditor to (1) use the same form for all adverse action letters in which a credit report has been obtained from a credit reporting agency; (2) alert the consumer; and (3) benefit from the safe harbor of the model form.

***Allow the Use of Graphs and Similar Tools to Convey the Range of Credit Scores.*** One of the items of information that is required to be disclosed in connection with the credit score is "the range of possible credit scores under the model used." FCRA § 609(f)(1)(B). The model forms in the Proposals all provide for a disclosure of this range in a sentence, *e.g.*, "Scores range from a low of ___ to a high of ___." Risk-Based Pricing Proposal, Model Forms H/B-6, H/B-7; Adverse Action Proposal, Model Forms C-1 through -5.

Chase believes that such a disclosure is appropriate, and an effective way for creditors to provide this information. However, creditors should also have the flexibility to provide this information in the form of a chart, graph or similar device, without losing the benefit of the safe harbor of the rule. As long as the chart or graph conveys the required information about the range of scores, it should satisfy the safe harbor. We request that the Board and the FTC clarify that use of such devices instead of, or in conjunction with, a sentence will still fall within the safe harbor for use of the model forms.

***Proprietary Credit Scores.*** The Proposals indicate that Section 1100F does not require disclosure of proprietary credit scores, and we believe that this is the correct result. In that regard, the Adverse Action Proposal states 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.

[1] This is a different situation from the exception in the Risk-Based Pricing Rules that allows a creditor to provide a credit score disclosure to all applicants in lieu of providing risk-based pricing notices. Under that provision, a special disclosure for "no score" applicants is appropriate because the exception is designed to provide all applicants with information about their credit scores. However, under the plain language of Section 1100F, the requirement is applicable only where a credit score is actually used.

Reg. at 13897 (emphasis added). Each of the model adverse action forms, moreover, states that "We also obtained your credit score *from this consumer reporting agency* …." 76 Fed. Reg. at 13900-02 (emphasis added). These phrases speak only to scores obtained from a consumer reporting agency's models, not scores produced by the creditor's own proprietary models.

We believe that this interpretation is consistent with the language of Section 1100F and the FCRA generally. Although Section 1100F amends Sections 615(a) and (h) of the FCRA to add to those sections a requirement to disclose credit score information, Section 1100F does not create a new credit disclosure requirement out of whole cloth. Rather, Section 1100F cross-references an existing section of the FCRA, Section 609(f), for the credit score requirements. Section 609(f) was added by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), Pub. L. 108-159, 117 Stat. 1961, and imposed an obligation on consumer reporting agencies to disclose a credit score to consumers upon request, for a "fair and reasonable fee." Thus, Section 609(f) clearly relates to generic credit scores calculated by an agency using the agency's credit scoring models. It could not relate to creditor proprietary scores, because the consumer reporting agency does not have the rights to such models, and would not be able to disclose such a score to a consumer. That same result should carry over into Section 1100F, given that Section 1100F adopts and incorporates the Section 609(f) provisions.

This is also the correct policy result because disclosing any type of proprietary credit score will lead to consumer confusion and dissatisfaction. Proprietary scoring models can result in very different scores from generic FICO-type credit scores. Many consumers are familiar with the three-digit format used by FICO scores and many other commonly accessed consumer reporting agency scores. There are also readily available, public materials providing helpful background information on these types of scores, to help consumers understand how the models work and what their particular score may mean. But a proprietary score might result in a range from 0 to 100, or a letter from A to G. Or, perhaps even more confusingly, the score might look like a three-digit FICO score but be calculated and scaled in a very different way. Scores within these models are likely to have very little meaning to consumers, and consumers are unlikely to have access to other information to explain a particular score. Although Section 1100F requires creditors to also disclose the range of potential scores, that range is likely to provide minimal aid to consumers in understanding the meaning of a specific score.

We request that the Board and the FTC confirm this interpretation that the Section 1100F requirements apply only to scores from agency-developed generic credit scoring models and not to proprietary credit scores developed by creditors. We believe that such confirmation is important, given that creditors are relying on these statements in the Proposals in developing practices and procedures to comply with the new requirements.

An independent limiting factor on the scope of Section 1100F's requirements is the definition of "credit score" in FCRA § 609(f)(2)(A). Based on the language of § 609(f)(2)(A)(ii), we understand that a "credit score," by definition, is a score calculated solely by reference to data about the consumer derived from a consumer report from a consumer reporting agency. A "credit score," for purposes of the FCRA, does not encompass any score based on non-agency attributes (*e.g.*, a consumer's assets or income), or a score that combines attributes derived from a consumer report with non-consumer report attributes. We respectfully request that the final rules reflect this limitation as well.

Another limitation of the scope of the term "credit score" is the section of the definition addressing whether a particular score is "used … to predict the likelihood of certain credit behaviors, including default…." FCRA § 609(f)(2)(A)(i). We request that the Board and the FTC clarify that this definition does not include scores that are used as part of evaluating an application for reasons other than predicting creditworthiness. In that regard, creditors often use scores to predict the likelihood of fraud or likelihood of false identity.[2] Based on the results of such a score, the application may either be denied or referred for special underwriting, such as the manual intervention of a judgmental underwriter. In either case, these scores are not used to predict "credit behaviors," and therefore should not be included within the definition of "credit score."

We request that the Board and the FTC further address the scope of the term "credit score" as described above. Prior to the release of the Proposals, the definition of "credit score" under § 609(f)(2)(A) had very little interpretive authority, as until now it has had relatively limited application. Previously, the term was relevant only for consumer reporting agencies. Because the term now is relevant to the obligations of creditors generally, we believe that additional guidance is important to ensure clarity, and to promote uniform practices among creditors. Formal guidance in the final regulation about these limitations on the definition of "credit score" would promote uniformity in creditors' approaches to these new requirements.

***Flexibility is Required on Scope of "Key Factors."*** In the FCRA, the term "key factors" is defined as "all relevant elements or reasons adversely affecting the credit score for the particular individual…." FCRA § 609(f)(2)(B). In construing this definition, we believe that it is important not to ignore the word "key" in the defined term "key factors." The purpose of the obligation to list key factors is to provide the consumer with information about the most significant items affecting his or her credit score, so that he or she can (1) correct these matters on his or her consumer report, if there are any errors, and (2) understand the relative importance of certain behaviors in establishing the credit score. These purposes are not well served where the list of key factors includes items that may have "adversely" affected the credit score, but did so to such a trivial degree that their disclosure may serve only to confuse.

Consider the disclosure of the number of inquiries as a key factor. Under a given model, for example, applicants may receive 29 points if their consumer report shows zero inquiries, 28 points if their consumer report shows one inquiry, and 12 points if the report shows two or more inquiries. In this case, the existence of any inquiry would adversely affect the credit score. However, we believe that the reduction of one point, based on one inquiry in the context of the entire scoring model, is trivial. Informing the consumer of this factor as a "key factor" is only likely to cause confusion. If the consumer obtains a copy of his or her consumer report and sees only one inquiry listed, he or she is likely to be very confused as to why that was disclosed as a "key factor."

Providing flexibility on the definition of "key factors" would be consistent with the approach that the Board has historically taken in connection with Regulation B regarding the reasons for adverse action. Regulation B does not set a specific number of reasons that must be disclosed. Instead, the Official Staff Commentary requires creditors to disclose the "principal" reasons, noting that providing more than four reasons is generally not helpful to consumers. 12 C.F.R. pt. 202, Supp. I, comment 9(b)(2)-1. Creditors therefore have flexibility to determine the "principal" reasons, rather than being bound to a specific number that must be listed. We submit that this approach should be followed under Section 1100F.

We note, moreover, that the Board and the FTC have long recognized that over-disclosure can be harmful to consumers, and that providing unimportant information can overwhelm the information that is of real value. These considerations counsel against giving too broad an interpretation to the definition of "key factors," in a way that would lead to consumer confusion instead of increased consumer understanding of credit scores.

The strict numerical limitation under FCRA Section 609(f)(1)(C) to disclose only four key factors (or five, in some cases) does not adequately address this concern for all creditors. In many cases, only one or two factors have any material impact on a credit score (*e.g.*, a major account delinquency, or the total

[2] In fact, disclosure about these anti-fraud scores would be particularly harmful, as disclosures about such scores could allow fraudsters to gain information to help them defeat such critical mechanisms.

number of delinquencies). Beyond those one or two items, any additional factors may have had a trivial (yet still adverse) impact. This is particularly true of the number of inquiries, which must be disclosed in any case where it meets the definition of "key factor." FCRA § 609(f)(9). If, however, the impact of the number of inquiries is trivial, any benefit of disclosing that factor is exceeded by the potential for confusion.

Given this potential for confusion, we ask that the Board and the FTC provide guidance that creditors have discretion to omit factors with a trivial effect and to disclose only those "key" elements or "key" reasons that materially and adversely affected the score, and will still be deemed to meet their obligation to provide the "key factors" required by Section 1100F. Creditors would also have the option, of course, of providing the key factors in the form and number provided by the consumer reporting agency when it provides scores to them. This will give creditors the flexibility to provide to their consumers the disclosure they believe will be most appropriate.

***Applicability of Guidance.*** We understand that the Board and the FTC have broad regulatory authority to implement the FCRA requirement for risk-based pricing notices, including the new requirements added by Section 1100F. FCRA § 615(h)(6). We request that the Board address the issue outlined above in the Risk-Based Pricing Rules.

With respect to the Adverse Action Rules, we request that the Board provide the requested guidance in the Regulation B Official Staff Commentary, in the comments addressing the use of the model forms. Other guidance that the Board provided in the Risk-Based Pricing Proposal in connection with the Section 1100F requirements, such as the notice requirements for consumers for whom the creditor obtains multiple credit scores, should also be added to the Regulation B Commentary. One approach would be to add an express cross-reference, in the Commentary, providing that creditors using the Regulation B model forms could rely on relevant interpretive guidance issued under 615(h) for the Section 1100F requirements. Such guidance would promote uniformity, given the very similar amendments made by Section 1100F to FCRA Sections 615(a) and 615(h).

***Date for Compliance.*** The Proposals were published in the Federal Register on March 15, 2011, which is barely more than four months prior to the effective date of July 21, 2011 for Section 1100F. By the time that final rules are issued, creditors are likely to have very little time to come into compliance with the new requirements. As a result, Chase urges the Board and the FTC to grant additional time to comply with the final rules.

In this regard, compliance with the Proposals is not as simple as modifying the text of a form notice. Rather, entirely new variables need to be added to adverse action notices and risk-based pricing notices that were not previously included, including the credit score and the range of credit scores. It takes time to integrate those data elements into the systems that produce the notices. Any time a creditor is required to alter software code to employ new logic, it must test and revalidate the scoring model. Chase, like most credit card issuers, employs a variety of scoring models and utilizes multiple consumer reporting agencies, each with its own set of challenges. The work to capture, display and store the additional data elements will require significant time and expense.

Most significant among the changes is the requirement to include the key factors that adversely affected the credit score on the adverse action notices. Creditors have not previously had to provide key factors relating to the credit scores that they use, and adding the capability of capturing, storing, and printing those factors is a substantial undertaking. It is true that there is an existing requirement under Regulation B to provide the reasons for the adverse action, and creditors who rely on credit scores to make credit decisions often use "reason codes" produced by scoring systems to satisfy this Regulation B obligation. However, there are a number of differences between the existing Regulation B requirements and the new FCRA requirements:

- The required number of reasons is different. Under Regulation B, as discussed above, creditors are required to disclose the "principal" reasons for the adverse action. 12 C.F.R. pt. 202, Supp. I, comment 9(b)(2)-1. While there is guidance indicating that disclosure of more than four reasons is not generally useful, *id.*, there is no strict requirement for a number of reasons. Many creditors, including Chase, have determined that a smaller number of reasons – for example, three – encompasses the "principal" reasons for the action, and avoids disclosing trivial reasons. On the other hand, Section 1100F provides a more specific requirement of disclosing four, and in some cases five, key factors. This obligation, and particularly building support to provide the fifth key factor relating to number of inquiries (when applicable) imposes a substantial burden upon creditors.

- In addition, the new requirements impose an obligation to disclose a different set of information. As a result, creditors will need to support disclosure of both the reasons for the adverse action and the reasons the score was adversely affected, which may be different.[3]

- Under Regulation B, creditors may choose not to include the reasons in the adverse action letter, and may instead disclose the right to request the reasons. 12 C.F.R. § 202.9(a)(2)(ii). As a result, the "reason codes" need not be integrated into the adverse action letter system, but rather need to be integrated only into the system that produces the smaller number of letters for those applicants who request the reasons.

Of particular concern to Chase is compliance with these obligations to the extent they apply to some (or all) proprietary scoring models. Consumer reporting agencies, which have long been subject to their own disclosure requirements under Section 609(f), presumably have built into their scoring models the ability to generate the "key factors," and can supply them to creditors to allow creditors to meet their new Section 1100F obligations. (Even this still requires that creditors build the capability to receive and store those codes, and ultimately print them on the letters.) Creditors with proprietary models, however, were only required to produce adverse actions reasons consistent with Regulation B, and not "key factors" in accordance with Section 609(f). As a result, in order to comply with Section 1100F, creditors will need to revisit their models to build the ability to generate the list of key factors. This is no small feat.

As a result, Chase respectfully requests that creditors be given twelve months after the publication of a final rule to come into compliance with the new requirements. One year will give creditors time to undertake the significant work required to implement the new rules. Chase further submits that the Board and the FTC have clear authority to provide this transition period under the Risk-Based Pricing Rules, in § 615(h). Indeed, the requirement under that section is subject to the implementing rules issued by the agencies. FCRA § 615(h)(1). With respect to the adverse action requirements, we request that the Board use its authority under the Equal Credit Opportunity Act to provide that creditors may continue to rely on the existing model forms to satisfy their obligations for the one-year period.

## III. <u>Comments Applicable to the Adverse Action Proposal</u>

***<u>Combined List of Reasons/Key Factors</u>.*** In the Adverse Action Proposal, each of Model Forms C-1, C-2, C-3 and C-4 provides for separate listings of the reasons for the adverse action and the "key factors" adversely affecting the credit score. (Form C-5 provides for a disclosure of the right to request the reasons for the adverse action, and then a list of the key factors.) In many cases, however, a creditor's decision to take adverse action is based entirely on the credit score. As a result, the reasons for the adverse action and the key factors adversely affecting the credit score would be the same. In these

[3] As discussed below, we believe that there are some circumstances where creditors should be permitted to combine the two lists. However, this would not apply in all circumstances.

circumstances, creditors should be able to provide a single list of the factors that adversely affected the credit score, as long as they also indicate that the adverse action was taken because of the credit score. Specifically, one approach would be to allow creditors to use the proposed Model Form C-3, but delete the second sentence of the second paragraph under "Reasons for Denial of Credit" ("The reasons you did not score well compared with other applicants were: …"). The form notice, as revised, would inform the applicant that the adverse action was taken because of the credit score, and then would provide a single list of reasons that would satisfy both requirements.

Therefore, Chase respectfully requests that the Board either (1) issue a model form that provides guidance for how to provide a single list in these circumstances, or (2) provide in the Official Staff Commentary authority to use a combined list in these circumstances without losing the benefit of the safe harbor for use of the model form. A creditor should not lose the benefit of a model form based on this variation. Indeed, we believe that consumers are likely to be highly confused by the use of two different lists of reasons for adverse action and key factors affecting the credit score in adverse action letters. Regardless of how clearly the model forms attempt to distinguish the lists, we believe that many consumers will not understand the distinction, and we anticipate increased call volume. For that reason, we believe it is particularly appropriate to allow the use of a single, and less confusing, list in those circumstances where the lists would otherwise be the same.

***Use of Alternate Formats*.** Under the existing Risk-Based Pricing Rules, creditors who prepare a credit score disclosure for all applicants fall within an exception from the requirement to provide risk-based pricing notices. 12 C.F.R. § 222.74(d), (e); 16 C.F.R. § 640.5(d), (e). Often, consumer reporting agencies prepare the credit score disclosure on behalf of creditors, and creditors do not obtain or store all of the information that is required in that notice. This arrangement prevents creditors from having to assume the costs that would be required to directly generate such notices.

Much of the information required to comply with the Section 1100F requirements is the same as the information included in a credit score disclosure. *See* Board's Model Form H-3; FTC's Model Form B-3. As a result, creditors would like to have the flexibility to enter into arrangements to have consumer reporting agencies prepare the disclosure on their behalf. However, agencies often do not have access to the other elements of an adverse action notice under Section 615(a) of the FCRA (such as all of the reasons for the adverse action), and therefore may not be able to complete an adverse action notice following the model forms.

We seek guidance that would allow a creditor to have the credit score disclosure component of the adverse action notice prepared by a third party, such as a consumer reporting agency, and then deliver that notice together with a notice that contains all of the other elements of an adverse action notice. In this way, the applicant would receive all of the information required by Section 1100F and 615(a), even though it may be contained on two separate pieces of paper that are delivered together. For this minimal impact to the applicant-recipient of the notice (receiving two pieces of paper instead of one), the creditor may enjoy a substantial cost savings.

## IV. Conclusion

Chase appreciates the opportunity to comment on the Proposals. We hope that our comments will further shape the Proposals in ways that help improve the clarity and consistency of these new disclosures, helping consumers to better understand credit scores and their use. Please contact me using the contact information at the bottom of the first page or Arthur Hall at (302) 282-3734 with any questions about our comments.

Very truly yours,

Miriam Fried

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