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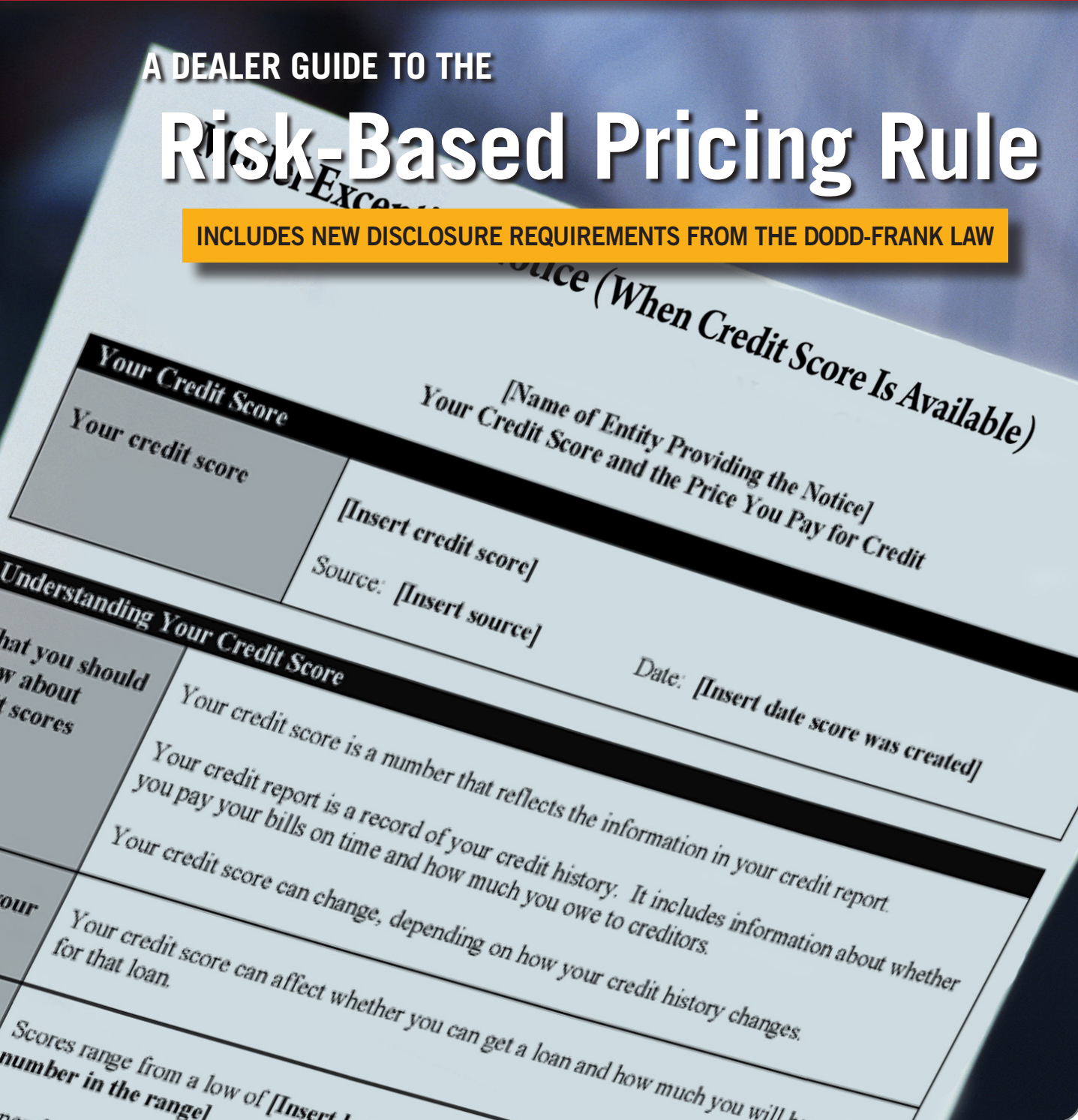
NADA MANAGEMENT SERIES

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A DEALER GUIDE TO THE

Risk-Based Pricing Rule

INCLUDES NEW DISCLOSURE REQUIREMENTS FROM THE DODD-FRANK LAW



NATIONAL
AUTOMOBILE
DEALERS
ASSOCIATION

This guide explains the general application of the federal Risk-Based Pricing Rule to franchised car and truck dealers. The rule was jointly issued by the Board of Governors of the Federal Reserve and the Federal Trade Commission and took effect January 1, 2011. Except as otherwise noted, this guide focuses on franchised dealers who (i) use consumer credit reports, (ii) engage in three-party vehicle financing transactions, and (iii) issue a Credit Score Disclosure Exception Notice to their consumer credit customers to satisfy their obligations under the Risk-Based Pricing Rule. It generally does not address other federal and state compliance requirements that apply to franchised dealers.

Nothing in this guide is intended as legal advice. It is essential that dealers consult with counsel that is familiar with this requirement and their operations to determine the actions they must take to comply with the Risk-Based Pricing Rule.

The National Automobile Dealers Association has prepared this management guide to assist its dealer members in being as efficient as possible in the operation of their dealerships. The presentation of this information is not intended to encourage concerted action among competitors or any other action on the part of dealers that would in any manner fix or stabilize the price or any element of the price of any good or service.

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A DEALER GUIDE TO THE
**Risk-Based
Pricing Rule**

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A DEALER GUIDE TO THE Risk-Based Pricing Rule

EXECUTIVE SUMMARY

The federal Risk-Based Pricing Rule (RBPR) generally requires franchised car and truck dealers and other businesses that use credit reports and extend credit to consumers to provide a new notice, known as a Risk-Based Pricing Notice (RBPN), to consumers who receive credit from them but on credit terms that are less favorable than the terms received by a “substantial proportion” of their other credit customers. The rule implements a 2003 federal law that is designed to enhance the accuracy of credit reports. Because of the significant implementation challenges this creates for dealers and other creditors in trying to determine which subgroup of approved credit customers must receive RBPNs, the rule permits creditors to issue an alternative notice, known as a Credit Score Disclosure Exception Notice, to all of their consumer credit applicants. This “Exception Notice,” which is the compliance option chosen by most covered dealers, may be issued in lieu of a RBPN and must contain the consumer’s credit score, certain information to put the credit score in context, and boilerplate language to educate the notice recipient about credit scores and credit reports.

Regarding what it means to “use” a credit report, the agencies that issued the RBPR clarified in July 2011 that dealers may “use” a credit report even though they do not order a credit report based on the finance source’s use of a credit report. This clarification, which is discussed in Section III.A of the guide, means that dealers who do not order credit reports may nevertheless be required to comply with the RBPR if they also meet the rule’s other coverage requirements.

Beginning July 21, 2011, a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 requires covered dealers who issue RBPNs and use a credit score to set the credit terms to include in their RBPNs additional disclosures related to the consumer’s credit score. The new disclosures, which are set forth in the summary of requirements for issuing RBPNs in Appendix C1, do not apply to Exception Notices. Consequently, covered dealers who issue Exception Notices are not affected by this change.

This guide primarily focuses (in Section IV) on the specific requirements for using the Exception Notice, such as to whom it must be issued, what disclosures it must contain, and when it must be provided to credit applicants. The guide includes (in Appendix B) two model notices that the rule provides for making the necessary disclosures (one model notice for when the consumer’s credit score is available and another model notice for when the credit score is unavailable). The guide also contains a number of other features to assist dealers with better understanding and implementing the RBPR. These include background information on the federal law mandating the notice requirement (Section II), a brief summary of the RBPR (Section III), an explanation of “Rules of Construction” governing how the rule applies to credit transactions involving multiple creditors (Section V), a non-exclusive list of Risk-Based Pricing Rule “Compliance Procedures” dealers should consider adopting (Section VI), a Risk-Based Pricing Rule Compliance Chart (Appendix A), and a summary of the requirements for issuing RBPNs (and model RBPNs) for covered dealers that choose not to issue Exception Notices (Appendix C). Should dealers or their counsel wish to conduct a more thorough review of any of these topics, they may consult the citations contained in the guide’s Endnotes.

A DEALER GUIDE TO THE Risk-Based Pricing Rule

I. INTRODUCTION & OVERVIEW

Since January 1, 2011, the federal Risk-Based Pricing Rule (RBPR) has generally required franchised car and truck dealers and other businesses that use credit reports (also known as consumer reports) and extend credit to consumers to provide a notice, known as a Risk-Based Pricing Notice (RBPN), to consumers who receive credit from them but on credit terms that are less favorable than the terms received by a “substantial proportion” of their other credit customers. The Board of Governors of the Federal Reserve (FRB) and the Federal Trade Commission (FTC) jointly issued the rule as required by a 2003 federal law that seeks to alert consumers who receive unfavorable credit terms to negative information in their credit reports that they can check for accuracy and, if warranted, correct. Because of the significant implementation challenges this creates for dealers in trying to determine which subgroup of approved credit customers must receive RBPNs, NADA recommended that the agencies permit dealers and other creditors to issue a notice to all of their customers who apply for credit. The agencies subsequently provided for an alternative notice that may be issued to all consumer credit applicants as a compliance option in the RBPR. This notice, known as the Credit Score Disclosure Exception Notice (Exception Notice), may be issued in lieu of a RBPN and must contain the consumer’s credit score, certain information to put the credit score in context, and boilerplate language to educate the notice recipient about credit scores and credit reports.

Most covered dealers opt to issue to their consumer credit applicants the Exception Notice instead of the RBPN. Consequently, this guide primarily focuses on the Exception Notice, which is explained in detail in Section IV. The guide also explains the RBPN, albeit in a more limited fashion, in Appendix C.¹ Of course, it is important that covered dealers, in consultation with their legal counsel, make their own determination regarding which notice to issue and their general compliance duties under the RBPR.²

II. BACKGROUND

A. Section 311 of the FACT Act

1. Threshold Requirement

The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) significantly amends the Fair Credit Reporting Act (FCRA), which is the federal law that governs consumer credit reports. The FACT Act creates a number of new duties for dealers, many of which pertain to identify theft prevention.³ Title III of the FACT Act creates a separate set of obligations that are designed to enhance the accuracy of the information contained in credit reports. It includes Section 311, which sets forth the following new notice requirement for users of credit reports:

... 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 this subsection.

This language contains several ambiguous and undefined terms that, among other things, fail to provide a clear view of which credit customers must receive the new notice – which Section 311 refers to as a Risk-Based Pricing Notice. However, when considering the purpose and other features of the RBPN requirement, it begins to come into focus.

Section 311 is intended to “complement” the FCRA’s adverse action notice requirement, which requires creditors that deny a consumer’s credit application based in whole or in part on information in a credit report to provide those consumers with information about their credit reports. (For information on the FCRA’s adverse action notice requirement and the separate adverse action notice requirement under the Equal Credit Opportunity Act, see NADA’s *Driven: A Dealer Guide to Adverse Action Notices*.) The FCRA’s adverse action notice requirement typically arises in the context of a credit turndown. Section 311, on the other hand, arises in the context of a credit grant. However, Section 311 is not intended for everyone who is granted credit, but rather only those who are granted credit on less favorable terms. Thus, in creating Section 311, Congress determined that persons whose credit applications are turned down are not the only persons who need to be educated about their credit reports; it decided that the same need also exists for persons who secure credit but on relatively unfavorable terms.

This provides some context to Section 311, but it does not define the subgroup of approved credit customers who must receive a RBPN. Indeed, as explained below, the inability to define this subgroup is what prompted NADA to urge the agencies to permit dealers to issue a notice to all of their credit customers.

2. Other Elements of Section 311

Section 311, which is set forth in its entirety in Appendix D, also contains several other provisions pertaining to RBPNS, including: timing, content, and delivery requirements; exceptions to the RBPN requirement; and the relationship between RBPNS and adverse action notices issued under the FCRA. Section 311 requires the FRB and FTC to issue joint implementing rules and, importantly, it permits the agencies to determine classes of persons or transactions that should be exempt from the RBPN requirement. As explained below, the agencies used this authority to create the Exception Notice for dealers and other initial creditors.

3. Enforcement

There is no federal private right of action for violating Section 311. Enforcement rests with the FTC. However, beginning on the date on which the newly created Bureau of Consumer Financial Protection assumes its consumer financial protection functions, the Bureau (in conjunction with the FTC) will enforce Section 311 for dealers engaged in Buy Here Pay Here or other financing that does not involve an unrelated third-party finance source.⁴

All FTC enforcement matters begin with an investigation. When the facts indicate a violation of Section 311 (including the RBPN), the investigation can lead to an administrative settlement. These settlements can include both (i) injunctions that require the dealer to comply with the Rule and satisfy other reporting obligations and (ii) civil penalties of up to \$3,500 for each “knowing” violation. If the dealer fails to comply with that order, the agency could file a federal lawsuit seeking fines of up to \$16,000 for each future violation, injunctive relief, and/or a long-term consent decree. The civil penalties (up to \$3,500 per violation) that may be demanded to resolve the investigation could apply to past violations, while fines stemming from a lawsuit are limited to future violations. If the parties do not reach a settlement, the agency can bring an action in federal district court for civil penalties and injunctive relief.

In addition, it also is possible that violations could subject a dealer to state law claims (including class action claims) under state “unfair and deceptive acts or practices” (UDAP) statutes. These laws typically permit the recovery of actual and punitive damages, as well as attorneys’ fees and costs.

Although Section 311 authorizes the federal enforcement mechanisms described above, it also provides that creditors are not liable for failing to perform the duties it imposes if, at the time of the failure, the creditor maintained reasonable compliance policies and procedures. This important provision is discussed in more detail in Section VI.

B. NADA Advocacy

1. Implementation Challenges

When the FACT Act was enacted in December 2003, NADA recognized that Section 311’s ambiguous language would create implementation challenges for franchised car and truck dealers. As a preliminary matter, it was not clear to many industry analysts whether Section 311 would even apply to dealers engaged in three-party financing (i.e., the standard indirect vehicle financing transaction in which the dealer enters into a credit contract with a consumer and then assigns it to a third-party finance source) as the RBPN requirement is, as the name suggests, applicable only to creditors that engage in risk-based pricing (a process many in the industry associate with the finance source). Assuming the RBPN requirement did apply, it was also difficult to determine which subgroup of credit customers must receive RBPNs.

Consequently, beginning in February 2004, NADA initiated a series of meetings with the agencies to discuss these issues. Ultimately, the agencies concluded that dealers who use credit reports and are the original creditor in a three-party financing transaction engage in risk-based pricing.⁵ However, the agencies were responsive to NADA’s concerns about the inability of dealers to identify the correct subgroup of credit recipients who must receive a RBPN.

NADA urged the agencies to permit dealers to satisfy Section 311 by issuing a RBPN or a similar notice to all of their credit customers. The agencies believed that permitting creditors to issue RBPNs to all credit customers would be inconsistent with Section 311,⁶ but they recognized that their exception authority under Section 311 allowed them the flexibility to develop an alternative notice that could accommodate industry’s compliance concerns while ensuring that the educational goals of Section 311 are fulfilled.⁷ They focused on a requirement in another section of the FCRA that generally requires mortgage lenders to provide all consumers applying for a residential mortgage with a notice containing the applicant’s credit score and certain information to put the credit score in context.⁸ While this requirement already applied to the mortgage industry, the agencies requested NADA’s input about how it would apply to the auto industry. NADA informed the agencies that the auto industry already contained a laboratory for analyzing this type of requirement in that California dealers have had to issue a similar type of notice to consumers since July 2006.

2. The California Experience

The California Car Buyers Bill of Rights generally has required auto dealers who obtain credit scores in connection with a consumer application for vehicle financing to provide the consumer prior to the transaction with a written notice that contains the consumer’s credit score, certain information to put the score in context, and boilerplate information intended to educate the consumer about the importance of credit scores.⁹ Because of the similarity of this requirement to the Exception Notice being considered by the agencies, NADA coordinated several conference calls between the agencies and the California New Car Dealers Association (CNCDA) to familiarize the agencies with the California experience. During those discussions, CNCDA (i) explained that California dealers generally found the credit score disclosure requirement to be manageable and (ii) identified certain compliance issues the agencies should address in the final RBPR. After receiving this input, the agencies published the final RBPR on January 15, 2010 and provided in the final rule

that dealers and other original creditors may provide an Exception Notice in lieu of a RBPN in order to comply with the RBPR.

What applies to California dealers?

An amendment to California law provides that, effective January 1, 2011, dealers who were required to provide consumers with a California credit score disclosure form instead must provide the new federal Exception Notice. This requirement applies whenever a dealer obtains a credit score for use in connection with a credit application for a personal (non-business) vehicle purchase or lease. To comply with the California law, the Exception Notice must be provided for each credit score obtained and used by the dealer. For more information concerning California's credit score disclosure requirements, contact CNCDA at (916) 441-2599.

III. FINAL RISK-BASED PRICING RULE

A. Persons Covered

The RBPR generally applies to “[a]ny creditor that engages in risk-based pricing and uses a [credit] report to set the terms on which credit is extended to consumers.”¹⁰ It does not apply to lease transactions or to the extension of business credit.

Thus, this rule applies to dealers if they both (i) use credit reports¹¹ and (ii) engage in risk-based pricing.

With regard to the first requirement, the agencies clarified in July 2011 that dealers may “use” a credit report even though they do not order a credit report based on the finance source’s use of a credit report. More specifically, the agencies stated that in a three-party financing transaction in which (i) the dealer obtains a consumer’s credit application without obtaining a credit report and then forwards the consumer’s credit application to a finance source, (ii) the finance source obtains a credit report as part of its underwriting process, (iii) the finance

source provides the dealer with an approval of the consumer’s application and a wholesale buy rate at which it will purchase the credit contract from the dealer, and (iv) the dealer incorporates the buy rate into the retail rate that it offers to the consumer, then the dealer has “used” a credit report and thus met the first element of the scope requirement.¹²

With regard to the second requirement, the agencies previously determined that “[t]he automobile dealer’s use of a consumer report to determine which third-party financing source is likely to purchase the retail installment sales contract and at what ‘buy rate,’ and to set the annual percentage rate based in part on the ‘buy rate,’ is conduct that fits squarely within the description of risk-based pricing.”¹³ Dealers who use credit reports and extend credit to consumers without the involvement of a third-party finance source also would likely be considered to engage in risk-based pricing.

Consequently, dealers who use credit reports and extend credit (whether they subsequently assign it to a finance source or not) should consider themselves covered by the RBPR.¹⁴

B. Risk-Based Pricing Notice

Covered dealers who do not issue the Exception Notice must issue a RBPN to credit customers to whom they grant credit on less favorable terms. The RBPR provides three methods for identifying this subset of credit customers: the direct comparison method, the credit score proxy method, and the tiered pricing method. These methods, along with the form, content, and timing requirements for RBPNS, are summarized in Appendix C. Included in the summary of the content requirements is a description of new credit score-related disclosures that are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Law). These new disclosures apply only to RBPNS (they do not apply to Exception Notices).

C. Exceptions

The RBPR does not require creditors to issue a RBPN in any of the following circumstances (in

addition to lease transactions and the extension of business credit):

(i) when a consumer applies for and receives a specific material credit term (e.g., 4.9% APR), but this does not apply if the creditor specified the term only after the consumer applied for credit and after the creditor obtained the consumer's credit report;

(ii) when the creditor issues to the consumer an adverse action notice under the FCRA;

(iii) when the creditor obtains a credit report that is a prescreened list under the FCRA and then uses the credit report to make a "firm offer of credit" to the consumer (however, this exception does not extend to consumer applications for credit that are in response to a firm offer of credit made to the consumer); and

(iv) when the creditor issues an Exception Notice to its consumer credit applicants.

If an exception (other than the last) applies, creditors are not required to issue either a RBPN or an Exception Notice. However, the timing requirement for issuing an Exception Notice may be triggered before the creditor will know if one of the exceptions applies.¹⁵

D. Model Notices

An appendix to the RBPR contains seven model notices. Four pertain to the RBPN, one pertains to an exception notice authorized for the extension of mortgage credit, and two pertain to the Exception Notice creditors may issue in lieu of a RBPN (one when a credit score is available for the consumer credit applicant and one when a credit score is unavailable). Appropriate use of the forms provides the creditor with safe harbor protection (i.e., the form is deemed to satisfy the form and disclosure requirements contained in the RBPR).

E. Effective Date

The RBPR took effect January 1, 2011.

IV. THE EXCEPTION NOTICE

Covered creditors may only use the Exception Notice in lieu of the RBPN if they satisfy the full range of requirements applicable to the Exception Notice, as summarized below.¹⁶

A. Recipients

The Exception Notice generally must be provided to every consumer who applies for credit. If two consumers jointly apply for credit, a separate Exception Notice must be provided to each credit applicant (even if they reside at the same address). Each separate notice must contain only the credit score of the consumer (and not the joint applicant) to whom the notice is provided. A separate notice is not required for a "guarantor, co-signer, surety, or endorser" as these persons are not applying for credit but rather are only supporting and assuming liability for those who are.¹⁷

B. Form

The Exception Notice must be clear and conspicuous, segregated from other information provided to the consumer, and provided to the consumer in writing in a form the consumer may keep. Creditors may issue the Exception Notice electronically as permitted by the consumer consent and other requirements of the federal E-SIGN Act.¹⁸

C. Content

1. Required Disclosures

The Exception Notice must contain –

- (a) the consumer's current credit score;
- (b) the date on which the credit score was created;
- (c) the name of the credit reporting agency (CRA) or other person that provided the score;
- (d) the range of possible credit scores in the credit scoring model used to generate the credit score;
- (e) either –
 - (1) a bar graph that breaks down the range of possible credit scores into at least six bars with each bar indicating the percentage of consumers with credit scores that fall within

the range of scores for that bar (as illustrated in the model notice in Appendix B1), or
(2) a clear statement indicating how the consumer's credit score compares to other consumers (e.g., "Your credit score ranks higher than ___ % of U.S. consumers"); and
(f) boilerplate information that educates the consumer about credit reports and credit scores, including contact information for the centralized source from which consumers may obtain their free annual consumer reports and references to the FRB and FTC websites (as illustrated in the model notice in Appendix B1).

2. Use of Multiple Credit Scores

Creditors that obtain two or more credit scores from CRAs may disclose more than one score as long as they provide the contextual information (items "b" through "e" above) for each score they disclose. However, except for dealers in California (see box in Section II) and potentially other jurisdictions, disclosing multiple credit scores is not required. The RBPR only requires these creditors to disclose a single credit score as "requiring disclosure of multiple scores would unnecessarily increase the complexity of the notices and increase the compliance burden for creditors."¹⁹

If creditors who obtain multiple credit scores choose to disclose a single credit score, they must disclose the score they used to set the credit terms (recall that the agencies view setting the credit terms as including, in the context of a three-party vehicle financing transaction, the dealer's use of a credit report to decide the finance sources to which it will send the consumer's credit application). The agencies provide the following examples of how this may apply: (i) creditors that select the low, middle, high, or most recent credit score to set the credit terms must disclose that score and the information that puts it in context; and (ii) creditors that average the credit scores they obtain in setting the credit terms must include one of those credit scores and the information that puts it in context.²⁰

3. Source of Contextual Information

Creditors are not expected to prepare their own bar graph or the alternative credit score comparison statement (item "e" above). Rather, even though creditors may obtain this information from any source, the agencies "expect that many creditors will obtain the information from the person from whom the credit score is obtained" and the rule provides that use of a bar graph or comparison statement with the required information that is obtained from such person meets this disclosure requirement.²¹ Consequently, dealers should consult with the CRA from which they order the score (or the company through which they obtain the score) concerning how they may obtain this information.

The RBPR does not specify how frequently the contextual information must be updated. Rather, "the Agencies expect that the persons providing the information to the creditors will update the information periodically as necessary."²²

Dealers who order credit reports but not credit scores

Covered dealers who use a credit report, but not a credit score, in the credit evaluation process may issue an Exception Notice in lieu of a RBPN only if they purchase and provide to the consumer a credit score and the associated information they obtain from an entity regularly engaged in the business of selling credit scores.

D. Unavailability of Credit Score

When a creditor who regularly obtains credit scores from a CRA and issues Exception Notices to its credit customers finds that a credit score for a particular customer is unavailable from that CRA, the creditor is permitted to issue a different type of Exception Notice (which we'll refer to as an Alternative Exception Notice) that is similar to the Exception Notice but does not contain the consumer's credit score or the information that puts it in context. The required disclosures for the Alternative Exception Notice are illustrated in the model form in Appendix B2.²³

If creditors have obtained a credit score for the same consumer from another CRA, they may not use the Alternative Exception Notice (and may only use the Exception Notice in lieu of the RBPN). However, when a credit score is unavailable from the CRA that regularly provides the credit score, there is no requirement that creditors attempt to obtain another credit score for the same consumer. Nor is there a requirement that creditors attempt to obtain from the CRA that regularly provides them with credit scores a type of credit score that is different from the credit score they regularly order from that CRA.²⁴

E. Timing

The Exception Notice must be provided to consumer credit applicants “as soon as reasonably practicable after the credit score has been obtained, but in any event at or before consummation in the case of closed-end credit....” Although the RBPR does not further define this requirement, the agencies state that “what is a reasonably practicable time period may differ depending on the circumstances of the transaction and the type of credit.”²⁵ The agencies provide some guidance on how this standard may apply to mortgage transactions, but they do not provide guidance on how it may apply to vehicle financing transactions.

Based on informal conversations with staff at the agencies, the following would appear to satisfy the timing requirement for Exception Notices that is set forth in the RBPR: If a dealer enters into a credit contract with a consumer within a short period of time (such as one or two days) after obtaining the consumer’s credit score, the dealer may deliver the Exception Notice to the consumer at the time the dealer presents the credit contract to the consumer for his or her review and signature. If, however, the consumer does not enter into a credit contract within one or two days after the dealer obtains the consumer’s credit score, the dealer should deliver the Exception Notice to the consumer without further delay and should not wait to provide the Exception Notice until the consumer enters into the credit contract.

Keep in mind that dealers are not required to provide the Exception Notice if the consumer has withdrawn the credit application. Dealers should verify and document any such withdrawal.

F. Model Exception Notices

The optional model notice for the Exception Notice (for use when a credit score is available) is set forth in Appendix B1, while the optional model notice for the Alternative Exception Notice (for use when a credit score is not available) is set forth in Appendix B2. The model forms contain the required disclosures for each of these notices. Users of these forms must insert appropriate entries where the brackets appear. Appendix B3 identifies modifications to the model forms that may be made without losing the safe harbor protection afforded by the model forms.

V. RULES OF CONSTRUCTION

A. One Notice Per Credit Extension

The RBPR only entitles consumers to one RBPN or Exception Notice per credit transaction.²⁶

B. Duties of Original v. Assignee Creditors

In a multi-party credit transaction involving more than one creditor (such as the three-party vehicle financing transactions discussed above), the person to whom the credit obligation is initially payable (i.e., the original creditor) is responsible for issuing the RBPN or Exception Notice. The person that takes assignment of the credit contract (i.e., the assignee creditor) is not required to provide such notice.

Keep in mind that, although franchised dealers typically are the original creditor in credit transactions with consumers that involve a finance source, this is not always the case. The finance source may enter into a credit contract directly with the consumer (an example of two-party financing) and retain the dealer to arrange (but not enter into) the credit transaction. In this instance, the finance source would be the original creditor and thus responsible for issuing a RBPN or Exception Notice to the consumer.

Although the dealer is not required to issue a RBPN or Exception Notice when it is not the original creditor in a credit transaction that it arranges, the finance source may nevertheless require the dealer by contract to issue the required notice on its behalf to ensure that it meets the notice's timing requirement. Recognizing that finance sources may have this need, the RBPR provides that finance sources that act as the original creditor may satisfy their notice responsibilities by (i) arranging to have the dealer provide the required notice on the finance source's behalf, and (ii) maintaining reasonable policies and procedures to verify that the dealer provides such notice to the consumer in a timely fashion.²⁷

The agencies further recognize that dealers may not use the same credit score that the finance source uses. Accordingly, when dealers issue an Exception Notice on behalf of the finance source, the rule states that the finance source's notice obligation is satisfied if the dealer delivers a notice that contains the credit score that the dealer obtained for the consumer (even if it differs from the credit score obtained by the finance source).²⁸

Dealers should review their credit contracts, dealer-finance source agreements, and state law and consult with knowledgeable counsel to ensure they understand their status and corresponding duties under the RBPR.

VI. COMPLIANCE PROCEDURES

Section 311 provides that creditors are not liable for failing to perform the duties it imposes if, at the time of the failure, the creditor maintained reasonable compliance policies and procedures. The RBPR does not specify what should be included in those policies, but covered dealers should consider adopting a RBPR Compliance Policy that, at a minimum, contains the following:

- A statement that, in consumer credit transactions where the dealer is either (i) the original creditor or (ii) not the original creditor but arranges financing

for a finance source which is the original creditor and which contractually requires the dealer to deliver an Exception Notice, the dealer will deliver Exception Notices (or Alternative Exception Notices when a credit score is unavailable) to consumer credit applicants as soon as reasonably practicable after the credit score has been obtained, but in any event at or before consummation of the credit transaction;

- An appointment of a RBPR Compliance Officer who will be responsible for developing, implementing, and overseeing the dealership's procedures for complying with the RBPR;
- Procedures (including assigning responsibility to appropriate personnel) to ensure that the Exception Notice and Alternative Exception Notice contain the required disclosures and are presented to consumer credit applicants in a timely manner;
- Procedures mandating initial and periodic training to ensure that all relevant personnel, and any service providers to which related tasks are outsourced, are familiar with the RBPR and the dealer's RBPR Compliance Policy; and
- Procedures mandating periodic audits and specifying the retention of specific records to demonstrate the dealer's compliance with the RBPR Compliance Policy. Records that should be retained include: (i) initial and subsequent versions of the RBPR Compliance Policy and documents used in the process of creating the RBPR Compliance Policy; (ii) documents supporting the administration of the RBPR Compliance Policy, including training outlines, training attendance sheets, and audit records; and (iii) copies of the Exception Notices and Alternative Exception Notices provided to consumers. The documents described in (i) and (ii) should be retained indefinitely, while the documents in (iii) should be retained for the full statute of limitation (SOL) period under applicable federal law (the SOL under the FCRA can extend up to five years from the date of a FCRA violation) and state law.

Appendices

Appendix A

Risk-Based Pricing Rule Compliance Chart

Below are 9 steps that may assist dealers in complying with the RBPR. This chart is designed for covered dealers (i.e., generally those who use credit reports and extend credit to consumers) who choose to issue Exception Notices in lieu of RBPNs. If you decide to issue RBPNs, review Appendix C and the RBPR for an explanation of your responsibilities. In all cases, consult an attorney who is knowledgeable about the rule and your operations concerning appropriate compliance procedures to adopt for your dealership.

Step 1. Confirm

Confirm that the Risk-Based Pricing Rule (RBPR) applies to your dealership. (See Section III.A.)

Step 2. Appoint

Appoint a senior manager to serve as the dealership's RBPR Compliance Officer who will be responsible for developing, implementing, and overseeing the dealership's procedures for complying with the RBPR.

Step 3. Know

Become thoroughly familiar with the requirements that apply to the Exception Notice (which must be issued to consumer credit applicants for whom a credit score is available) and the Alternative Exception Notice (which must be issued to consumer credit applicants for whom a credit score is unavailable), including the required form, content, and timing of the notices. (See Section IV.)

Step 4. Consult

Consult with the CRA from which (or the company through which) the dealership obtains consumer credit scores to determine how the CRA (or other company) will provide the contextual information that must accompany the credit score on the Exception Notice. (See Section IV.C.3.)

Step 5. Adopt

Adopt the Model Exception Notice in Appendix B1 and the Model Alternative Exception Notice in Appendix B2 and insert the appropriate information where the brackets appear on each form. Ensure that any modifications made to the model form are among those that may be made without losing the safe harbor protection that the form affords for the form and content of the required disclosures. (See Appendix B3.)

Step 6. Create

Create and adopt appropriate RBPR Compliance Procedures. (See Section VI.)

Step 7. Train

Conduct training for employees and service providers with responsibilities under the dealership's RBPR Compliance Policy.

Step 8. Issue

Issue Exception Notices (and Alternative Exception Notices) to consumer credit applicants as required by the RBPR.

Step 9. Document

Document the dealership's compliance with the RBPR. (See Section VI.)

Appendix B1

Model Exception Notice (When Credit Score is Available)

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	[Insert credit score] Source: [Insert source] Date: [Insert date score was created]

Understanding Your Credit Score															
What you should know about credit scores	<p>Your credit score is a number that reflects the information in your credit report.</p> <p>Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.</p> <p>Your credit score can change, depending on how your credit history changes.</p>														
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.														
The range of scores	<p>Scores range from a low of [Insert bottom number in the range] to a high of [Insert top number in the range].</p> <p>Generally, the higher your score, the more likely you are to be offered better credit terms.</p>														
How your score compares to the scores of other consumers	<div style="text-align: center;"> <table border="1" style="margin: 0 auto;"> <caption>Percentage of Consumers by Score Range</caption> <thead> <tr> <th>Score Range</th> <th>% of Consumers</th> </tr> </thead> <tbody> <tr> <td>[0-100]</td> <td>10%</td> </tr> <tr> <td>[101-200]</td> <td>15%</td> </tr> <tr> <td>[201-300]</td> <td>20%</td> </tr> <tr> <td>[301-400]</td> <td>30%</td> </tr> <tr> <td>[401-500]</td> <td>15%</td> </tr> <tr> <td>[501-600]</td> <td>10%</td> </tr> </tbody> </table> </div> <p>[or] [Your credit score ranks higher than [X] percent of U.S. consumers.]</p>	Score Range	% of Consumers	[0-100]	10%	[101-200]	15%	[201-300]	20%	[301-400]	30%	[401-500]	15%	[501-600]	10%
Score Range	% of Consumers														
[0-100]	10%														
[101-200]	15%														
[201-300]	20%														
[301-400]	30%														
[401-500]	15%														
[501-600]	10%														

Checking Your Credit Report	
What if there are mistakes in your credit report?	<p>You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency.</p> <p>It is a good idea to check your credit report to make sure the information it contains is accurate.</p>
How can you obtain a copy of your credit report?	<p>Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year.</p> <p>To order your free annual credit report—</p> <p><i>By telephone:</i> Call toll-free: 1-877-322-8228</p> <p><i>On the web:</i> Visit www.annualcreditreport.com</p> <p><i>By mail:</i> Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/bcp/online/include/requestformfinal.pdf) to:</p> <p style="text-align: center;">Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281</p>
How can you get more information?	<p>For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.</p>

Appendix B2

Model Alternative Exception Notice (When Credit Score is Unavailable)

[Name of Entity Providing the Notice]
Credit Scores and the Price You Pay for Credit

Your Credit Score	
Your credit score	Your credit score is not available from [Insert name of CRA], which is a consumer reporting agency, because they may not have enough information about your credit history to calculate a score.
What you should know about credit scores	<p>A credit score is a number that reflects the information in a credit report.</p> <p>A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.</p> <p>A credit score can change, depending on how a consumer's credit history changes.</p>
Why credit scores are important	<p>Credit scores are important because consumers who have higher credit scores generally will get more favorable credit terms.</p> <p>Not having a credit score can affect whether you can get a loan and how much you will have to pay for that loan.</p>
Checking Your Credit Report	
What if there are mistakes in your credit report?	<p>You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency.</p> <p>It is a good idea to check your credit report to make sure the information it contains is accurate.</p>
How can you obtain a copy of your credit report?	<p>Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year.</p> <p>To order your free annual credit report—</p> <p><i>By telephone:</i> Call toll-free: 1-877-322-8228</p> <p><i>On the web:</i> Visit www.annualcreditreport.com</p> <p><i>By mail:</i> Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/bcp/conline/include/requestformfinal.pdf) to:</p> <p style="text-align: center;">Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281</p>
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov , or the Federal Trade Commission's web site at www.ftc.gov .

Appendix B3

Permitted Modifications to Model Forms

[The following extract from the RBPR²⁹ explains acceptable and unacceptable changes to the model forms for purposes of the safe harbor protection afforded for appropriate use of the model forms.]

3. A person may change the forms by rearranging the format or by making technical modifications to the language of the forms, in each case without modifying the substance of the disclosures. Any such rearrangement or modification of the language of the model forms may not be so extensive as to materially affect the substance, clarity, comprehensibility, or meaningful sequence of the forms. Persons making revisions with that effect will lose the benefit of the safe harbor for appropriate use of [the] model forms. A person is not required to conduct consumer testing when rearranging the format of the model forms.
 - a. Acceptable changes include, for example:
 - i. Corrections or updates to telephone numbers, mailing addresses, or website addresses that may change over time.
 - ii. The addition of graphics or icons, such as the person'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.
 - v. Substitution of the words "credit" and "creditor" or "finance" and "finance company" for the terms "loan" and "lender."
 - vi. Including pre-printed lists of the sources of consumer reports or consumer reporting agencies in a "check-the-box" format.
 - vii. Including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains.
 - viii. Including the name of an agent, such as an auto dealer or other party, when providing the "Name of the Entity Providing the Notice."
 - b. Unacceptable changes include, for example:
 - i. Providing model forms on register receipts or interspersed with other disclosures.
 - ii. Eliminating empty lines and extra spaces between sentences within the same section.
4. Optional language in [the model form in Appendix C3] may be used to direct the consumer to the entity (which may be a consumer reporting agency or the creditor itself, for a proprietary score that meets the definition of a credit score) that provided the credit score for any questions about the credit score, along with the entity's contact information. Creditors may use or not use the additional language without losing the safe harbor, since the language is optional.

Appendix C1

Summary of Risk-Based Pricing Notice

Unless an exception applies (including issuing an Exception Notice to all consumer credit applicants), covered dealers must issue a RBPN to consumers to whom they grant credit “on material terms that are materially less favorable than the most favorable terms available to a substantial proportion” of the dealer’s other credit customers.³⁰

Several of the terms in this standard are defined in the regulation. “Material terms” refers to the annual percentage rate (APR) in the case of closed-end credit, while “materially less favorable” refers to material terms (i.e., the APR) that result in a significantly greater cost of credit to one of the creditor’s customers over another. Factors relevant to determining the significance of a cost difference include the type of credit product, its term, and the extent of the difference between the material terms. The RBPR identifies new automobile loans and used automobile loans as examples of specific types of credit products.³¹

The information below briefly summarizes the allowable methods for determining the credit customers to whom a RBPN must be provided along with the form, content, and timing requirements and model forms available for RBPNS. Consult the RBPR for more specific information about each of these topics.³²

Recipients

1. Direct Comparison Method

Covered creditors who issue RBPNS may determine the subset of credit customers who must receive the notice by “directly comparing” the material terms offered to its credit customers. The RBPR does not provide a quantitative standard or specific methodology for making the direct comparison. Instead, the agencies list some general expectations for creditors who use this method, such as the need (i) to identify the appropriate subset of current or past customers to compare to any given customer, (ii) for the subset to be an adequate sample of consumers who have applied for a specific type of credit product, (iii) to ensure the comparison disregards any underwriting criteria that do not depend on credit report information, (iv) to account for changes in the creditor’s customer base, product offerings, and underwriting criteria over time, and (v) to account for changes to terms offered to consumers in the past that are not presently offered to consumers.³³

The agencies recognize that “it may not be operationally feasible for many persons subject to the rule to make such direct comparisons between consumers.”³⁴ Consequently, for creditors that choose to issue a RBPN instead of an Exception Notice, they developed the two alternative methods described below for determining which credit customers must receive a RBPN. Creditors must use the same method to evaluate customers for each specific type of credit product.

2. Credit Score Proxy Method

Covered creditors who issue RBPNS may determine the subset of credit customers to whom a notice must be provided by evaluating its customers’ credit scores, identifying a cutoff score that represents the point at which approximately 40% of its credit customers have higher credit scores and approximately 60% have lower credit scores, and issuing a RBPN to each credit customer with a credit score lower than the cutoff

score (i.e., those in the 60% category). If the creditor grants credit on the most favorable terms to more than 40% of its credit customers, the creditor may set the cutoff score at a point that ensures that a RBPN is received by the approximate percentage of customers who historically have been granted credit on less than the most favorable terms.³⁵

Creditors using this method must calculate the cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted credit for a specific type of credit product (e.g., new automobile loans). A secondary approach for determining the cutoff score is available to a business that is “a new entrant into the credit business, introduces new credit products, or starts to use risk-based pricing with respect to credit products it currently offers.” These businesses may “initially determine the cutoff score based on information derived from market research or relevant third-party sources for a specific type of credit product, such as research or data from companies that develop credit scores.” The rule sets forth specific time frames within which creditors using this method must recalculate the cutoff score.³⁶

The rule further (i) addresses how to calculate the cutoff score if the creditor uses two or more credit scores, (ii) states that creditors using this method must provide a RBPN to customers for whom a credit score is unavailable, and (iii) provides examples of how the method applies to different fact patterns.³⁷

3. Tiered Pricing Method

Covered creditors who issue RBPNs and set the material credit terms by placing consumers within one of a discrete number of pricing tiers may satisfy the RBPN requirement by issuing the notice to each consumer who is not placed

- (i) in the top pricing tier (i.e., the lowest-priced tier) if the creditor uses four or fewer pricing tiers, or
- (ii) in the top two pricing tiers (or more tiers if the number of top tiers comprise between 30% and 40% of the total number of tiers) if the creditor uses five or more pricing tiers.

For example, if a creditor chooses this method and uses a tiered pricing structure with APRs at 8%, 10%, 12%, and 14%, it must issue a RBPN to each consumer to whom it grants credit at 10%, 12%, and 14%. If a creditor uses nine pricing tiers, it would have to issue a RBPN to each consumer to whom it grants credit that is not placed in the top three pricing tiers (because three pricing tiers is 33% [or between 30% and 40%] of the total number of pricing tiers used by that creditor).³⁸

Form

RBPNs must be clear and conspicuous and provided to consumers in oral, written, or electronic form.

Content

RBPNs must include eight boilerplate statements set forth in the RBPR,³⁹ as illustrated in the rule's model RBPN in Appendix C2.

In addition, Section 1100F of the Dodd-Frank Law, which was enacted after the RBPR was issued, also requires covered creditors who use a credit score to set the credit terms to include in the RBPN several additional disclosures related to the consumer's credit score. The additional disclosures, which these creditors must include in RBPNs beginning July 21, 2011,⁴⁰ consist of: (i) the credit score used by the creditor in making the credit decision; (ii) the range of possible credit scores under the model used to generate the credit score; (iii) all of the key factors that adversely affected the credit score, which shall not exceed four factors, except if one of the key factors is the number of inquiries made with respect to the consumer report, the number of key factors shall not exceed five; (iv) the date on which the credit score was created; and (v) the name of the CRA or other person that provided the credit score. On July 15, 2011, the agencies amended the RBPR to add these disclosures along with a statement that a credit score is a number that takes into account information in a consumer report, that the consumer's credit score was used to set the terms of credit offered, and that a credit score can change over time to reflect changes in the consumer's credit history.⁴¹ The credit score-related disclosures and this statement are set forth in the rule's model RBPN in Appendix C3 of this guide. Also set forth in this model form is optional language directing the consumer to the credit score provider for any questions about the credit score, along with the provider's contact information.⁴²

The amended RBPR also sets forth and provides examples of how to provide the new disclosures when obtaining multiple credit scores and when extending credit to joint credit applicants.⁴³

Timing

RBPNs must be provided to consumers before the transaction is consummated, but not earlier than the time the decision to approve a credit application is communicated to the consumer. RBPNs may not be provided to the consumer at the time of application.

For a description of how a finance source may fulfill this requirement in a two-party financing transaction with a consumer (in which the finance source, and not the dealer that arranged the financing, is the original creditor), see Section V.B above.

Model RBPN

Appendix C2 of this guide contains the rule's model RBPN for an extension of credit in which the creditor does not use a credit score to set the credit terms. Appendix C3 of this guide contains the rule's model RBPN for an extension of credit in which the creditor does use a credit score to set the credit terms. Users of the model form must insert appropriate entries where the brackets appear. While use of the model form is optional, its appropriate use provides the creditor with safe harbor protection for the rule's form and content requirements. Permitted modifications to the form are set forth in Appendix B3.

Appendix C2

Model Risk-Based Pricing Notice Without Credit Score-related Disclosures

[Name of Entity Providing the Notice]
Your Credit Report[s] and the Price You Pay for Credit

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment]. The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact [insert name of CRA(s)] , which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact [insert name of CRA(s)] : <i>By telephone:</i> Call toll-free: 1-877-xxx-xxxx <i>By mail:</i> Mail your written request to: [Insert address] <i>On the web:</i> Visit [insert web site address]
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov , or the Federal Trade Commission's web site at www.ftc.gov .

Appendix C3

Model Risk-Based Pricing Notice With Credit Score-related Disclosures

[Name of Entity Providing the Notice]
Your Credit Report[s] and the Price You Pay for Credit

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment]. The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact [insert name of CRA(s)] , which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact [insert name of CRA(s)] : <i>By telephone:</i> Call toll-free: 1-877-xxx-xxxx <i>By mail:</i> Mail your written request to: [Insert address] <i>On the web:</i> Visit [insert web site address]
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov , or the Federal Trade Commission's web site at www.ftc.gov .

Model Risk-Based Pricing Notice With Credit Score-related Disclosures continued

Your Credit Score and Understanding Your Credit Score

<p>Your credit score</p>	<p>[Insert credit score]</p> <p>Source: [Insert source] Date: [Insert date score was created]</p>
<p>What you should know about credit scores</p>	<p>Your credit score is a number that reflects the information in your credit report. We used your credit score to set the terms of credit we are offering you.</p> <p>Your credit score can change, depending on how your credit history changes.</p>
<p>The range of scores</p>	<p>Scores range from a low of [Insert bottom number in the range] to a high of [Insert top number in the range].</p>
<p>Key <u>factors</u> that adversely affected your credit score</p>	<p>[Insert first factor] [Insert second factor] [Insert third factor] [Insert fourth factor] [Insert number of enquiries as a key factor, if applicable]</p>
<p>[How can you get more information about your credit score?]</p>	<p>[If you have any questions regarding your credit score, you should contact [entity that provided the credit score] at: Address: _____ _____</p> <p>[Toll-free] Telephone number: _____]</p>

Appendix D

Section 311 of the FACT Act

SEC. 311. RISK-BASED PRICING NOTICE.

(a) DUTIES OF USERS.—Section 615 of the Fair Credit Reporting Act (15 U.S.C. 1681m), as amended by this Act, is amended by adding at the end the following:

“(h) DUTIES OF USERS IN CERTAIN CREDIT TRANSACTIONS.—

- (1) IN GENERAL.—Subject to rules prescribed as provided in paragraph (6), 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 this subsection.
- (2) TIMING.—The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).
- (3) EXCEPTIONS.—No notice shall be required from a person under this subsection if—
 - (A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or
 - (B) the person has provided or will provide a notice to the consumer under subsection (a) in connection with the transaction.
- (4) OTHER NOTICE NOT SUFFICIENT.—A person that is required to provide a notice under subsection (a) cannot meet that requirement by providing a notice under this subsection.
- (5) CONTENT AND DELIVERY OF NOTICE.—A notice under this subsection 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; and
 - (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 Section 603(p)).
- (6) RULEMAKING.—
 - (A) RULES REQUIRED.—The Commission and the Board shall jointly prescribe rules.
 - (B) CONTENT.—Rules required by subparagraph (A) shall address, but are not limited to—
 - (i) the form, content, time, and manner of delivery of any notice under this subsection;

- (ii) clarification of the meaning of terms used in this subsection, including what credit terms are material, and when credit terms are materially less favorable;
 - (iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;
 - (iv) a model notice that may be used to comply with this subsection; and
 - (v) the timing of the notice required under paragraph (1), 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.
 - (7) COMPLIANCE.—A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.
 - (8) ENFORCEMENT.—
 - (A) NO CIVIL ACTIONS.—Sections 616 and 617 shall not apply to any failure by any person to comply with this section.
 - (B) ADMINISTRATIVE ENFORCEMENT.—This section shall be enforced exclusively under Section 621 by the Federal agencies and officials identified in that section.”
- (b) RELATION TO STATE LAWS.—Section 625(b)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681t(b)(1)), as so designated by Section 214 of this Act, is amended by adding at the end the following:
- “(I) Section 615(h), relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;”

ENDNOTES

¹ Unless otherwise noted, all references to appendices refer to the appendices to this guide and not the appendices contained at the end of the RBPR.

² The Final RBPR, 16 C.F.R. Part 640, is published in the *Federal Register*, 75 Fed. Reg. 2,724–2,784 (Jan. 15, 2010), as amended by 76 Fed. Reg. 41,602–41,626 (Jul. 15, 2011). These documents currently may be accessed at <http://edocket.access.gpo.gov/2010/pdf/E9-30678.pdf> (see pages 2,769 - 2,784) and <http://www.gpo.gov/fdsys/pkg/FR-2011-07-15/pdf/2011-17649.pdf> (see pages 41,621 – 41,626).

³ The FACT Act is codified at 15 U.S.C. §§ 1681, *et. seq.* Examples of other FACT Act duties include: § 112, Fraud alerts and active duty alerts; § 113, Truncation of credit card and debit card account numbers; § 114, Establishment of procedures for the identification of possible instances of identity theft (Red Flags Rule); § 151, Summary of rights of identity theft victims (Responding to Victim Requests for Records); § 213, Enhanced disclosure of the means available to opt-out of prescreened lists (Opt-Out Disclosure Rule); § 214, Affiliate sharing (Affiliate Marketing Rule); § 216, Disposal of consumer report information and records (Disposal Rule); § 315, Reconciling addresses (Address Discrepancy Rule); and § 411, Protection of medical information in the financial system (Reg FF - Medical Information Rule).

⁴ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1029, 1088 (2010) [hereinafter Dodd-Frank Law]. The date on which the Bureau of Consumer Financial Protection assumes its consumer financial protection functions, which the Dodd-Frank Law refers to as the “Designated Transfer Date,” is currently scheduled for July 21, 2011. See 75 Fed. Reg. 57,252 – 57,253 (Sep. 20, 2010).

⁵ This was confirmed in the Supplementary Information to the Final Risk-Based Pricing Regulations, where the agencies stated, in part:

“Some commenters asserted that in three-party financing transactions, automobile dealers are not engaged in risk-based pricing and therefore should not be subject to the requirements of the rules. These commenters stated that, although the dealer obtains a consumer credit report in a three-party financing transaction, it does so in order to determine which third-party creditors to send the consumer’s credit application, and not to set the terms of the retail installment sales contract. According to these commenters, the rate offered to the consumer by the automobile dealer is not based on the consumer’s credit-worthiness, but rather on the combination of the ‘buy’ rate – the wholesale rate at which the third-party creditor has indicated it will purchase the consumer’s loan (which is determined, in part, by the third-party creditor’s underwriting standards) – and the retail margin the dealer has been able to negotiate with the consumer. These commenters stated that in such circumstances, the automobile dealer is not engaged in risk-based pricing because it is the third-party creditor, not the dealer, who analyzes the consumer’s credit-worthiness.

The Agencies disagree with the commenters’ contention that three-party financing does not involve risk-based pricing by the automobile dealer. In the examples provided by the commenters, the automobile dealer uses a consumer report in connection with an application for credit to determine which third-party financing source it will attempt to assign the retail installment sales contract, and on what material terms. The material terms of the sales contract – specifically the annual percentage rate of the automobile loan, are based, in part, on the ‘buy’ rate offered or expected to be offered by the third-party financing source. The automobile dealer’s use of a consumer report to determine which third-party financing source is likely to purchase the retail installment sales contract and at what ‘buy rate,’ and to set the annual percentage rate based in part on the ‘buy rate,’ is conduct that fits squarely within the description of risk-based pricing in ... the final rules. Thus, automobile dealers that are original creditors in a three-party financing transaction must provide risk-based pricing notices to consumers, in accordance with the [final] rules.” 75 Fed. Reg. at 2,730.

⁶ See 75 Fed. Reg. at 2,730 – 2,731 (“[T]he statute’s general rule does not suggest that a notice should be provided to every consumer who applies for credit... The Agencies believe that providing a notice to all consumers who apply for credit would diminish the impact of notifying a subset of consumers that they received credit on less than the best terms based on information in a credit report...”).

⁷ 75 Fed. Reg. at 2,742.

⁸ Section 609(g) of the FCRA.

⁹ Cal. Veh. Code § 11713.20.

¹⁰ 75 Fed. Reg. at 2,748; 16 C.F.R. § 640.1(a).

¹¹ As noted, this first requirement applies when a dealer uses a credit report “to set the terms on which credit is extended to consumers.” 75 Fed. Reg. at 2,748. For ease of reference, this publication refers to the first requirement as applying when a dealer uses a credit report.

¹² See the Supplementary Information to the agencies final rules to implement the Dodd-Frank Law credit score disclosure requirements, 76 Fed. Reg. at 41,606 – 41,607.

¹³ 75 Fed. Reg. at 2,730.

¹⁴ *Id.*; Fed. Reg. at 41,606 – 41,607.

¹⁵ 75 Fed. Reg. at 2,743.

¹⁶ The specific provisions governing the Exception Notice are set forth at 16 C.F.R. § 640.5(e).

¹⁷ See 75 Fed. Reg. at 2,731.

¹⁸ Electronic Signature in Global and National Commerce Act, 15 U.S.C. §§ 7001, *et. seq.* (2010).

¹⁹ 75 Fed. Reg. at 2,743.

²⁰ *Id.*

²¹ Id; 16 C.F.R. § 640.5(e)(1)(ii)(F).

²² Id.

²³ The specific provisions governing the Alternative Exception Notice are set forth at 16 C.F.R. § 640.5(f).

²⁴ 75 Fed. Reg. at 2,744 – 2,745 (“For example, a person that regularly requests a credit score from a consumer reporting agency that is based on traditional forms of data, such as credit card, mortgage, and installment loan accounts, would not have to request a different score that takes into consideration non-traditional forms of data, such as rental payment history, telephone service payment history, and utility service payment history.”)

²⁵ 75 Fed. Reg. at 2,743.

²⁶ However, even if a RBPN has been previously issued, creditors (such as credit card issuers) who use a credit report to conduct an account review that results in an increase to a consumer’s APR must issue the consumer another RBPN. 16 C.F.R. § 640.6(a).

²⁷ 16 C.F.R. § 640.6(3); 75 Fed. Reg. at 2,738.

²⁸ 75 Fed. Reg. at 2,738. In addition, because a dealer in this instance is acting as an agent of the finance source, the dealer may provide the finance source with copies of any notice it provides to a consumer, including a credit score disclosure, without becoming (and having to assume the obligations of) a CRA. Id.

²⁹ 16 C.F.R. Part 698, Appendix B.

³⁰ 16 C.F.R. § 640.3(a).

³¹ 16 C.F.R. § 640.2(n) and (o), and § 640.3(b).

³² The specific provisions governing RBPNS are set forth at 16 C.F.R. §§ 640.3 and 640.4.

³³ 16 C.F.R. § 640.3(b); 75 Fed. Reg. at 2,731.

³⁴ 75 Fed. Reg. at 2,725.

³⁵ 16 C.F.R. § 640.3(b)(1)(i) and (ii).

³⁶ 16 C.F.R. § 640.3(b)(1)(iii).

³⁷ 16 C.F.R. § 640.3(b)(1)(iii)(D), (iv), and (v).

³⁸ 16 C.F.R. § 640.3(b)(2).

³⁹ 16 C.F.R. § 640.4(a)(1)(i)-(viii).

⁴⁰ Dodd-Frank Law, § 1100H. See Endnote 4 for the scheduled Designated Transfer Date.

⁴¹ 16 C.F.R. § 640.4(a)(1)(ix).

⁴² 16 C.F.R. Part 698, Appendix B, Instruction 4.

⁴³ 16 C.F.R. § 640.4(d), § 640.6(c). The agencies also address the use of proprietary sources 76 Fed. Reg. at 41,605 – 41,606, and situations in which a credit score is unavailable. 76 Fed. Reg. at 41,610.

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