Comments of the

National Consumer Law Center
(On behalf of its Low-Income Clients)

and

Center for Economic Justice
Center for Responsible Lending
Consumer Action
Consumer Federation of America
NAACP
National Fair Housing Alliance
U.S. PIRG

Regarding

Notice of Proposed Rulemaking
Fair Credit Reporting Risk-Based Pricing Regulations

Federal Reserve System
12 CFR Part 222
Docket No. R-1407

Federal Trade Commission
16 CFR Parts 640 and 698
FCRA Risk-Based Pricing Rule Amendments: Project No. R411009

76 Fed. Reg. 13,902 (Mar. 15, 2011)
Submitted April 14, 2011

These comments are submitted by the National Consumer Law Center (on behalf of its low-income clients),[1] Center for Economic Justice,[2] Center for Responsible

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[1]**The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (7th ed. 2010) is one of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Chi Chi Wu, editor of NCLC's *Fair Credit Reporting* treatise, with assistance from Margot Saunders.

[2] The **Center for Economic Justice** is a non-profit organization that works to increase the availability, affordability and accessibility of insurance, credit, utilities, and other economic goods and services for low-income and minority consumers.

Lending,[3] Consumer Action,[4] Consumer Federation of America,[5] NAACP,[6] National Fair Housing Alliance,[7] and U.S. PIRG.[8] They are in response to the March 15, 2011 Notice of Proposed Rulemaking (NRM) issued by the Federal Reserve Board (Board) and Federal Trade Commission (FTC), to implement the amendments made by Section 1100F of the Dodd-Frank Act, Public Law 111-203 to Section 615(h) of the Fair Credit Reporting Act, 15 U.S.C. § 1681m(h).

We appreciate the Board and FTC's efforts to have in place provisions that implement the Dodd-Frank credit score disclosure requirement prior to the effective date of July 21, 2011. However, we have grave concerns about the proposed rule and object to a glaring omission. The proposal is entirely deficient because it fails to remove currently-existing exceptions to the risk-based pricing rule if the creditor makes a credit scoring disclosure. These exceptions, when combined with the new Dodd-Frank credit score disclosure requirement, will effectively nullify the whole risk-based pricing notice. At the same time, this combination of exceptions and the new credit-score disclosure will create a huge loophole allowing creditors to disclose only generic credit scores, contrary to Section 1100F.

We also highlight another issue with the Dodd-Frank credit disclosure requirement, *i.e.*, its impact on adverse action notices. The issue is whether the Dodd-Frank disclosure must be provided by users of credit scores who use the score to for purposes other than the extension of credit, such as insurers. While we recognize that the Board and FTC have no authority to promulgate rules on this matter, we wanted to bring the issue to their attention.

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[3] The **Center for Responsible Lending** is a non-profit organization focused on policy research and advocacy to stop predatory lending practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development lenders, whose mission is to create and protect ownership opportunities for low-wealth families through home and small business ownership. Self-Help has provided $3.8 billion in financing to help over 30,000 low-wealth borrowers buy homes, build businesses and strengthen community resources. Additionally, our affiliate Self-Help Credit Union maintains deposit accounts for individuals, nonprofit and religious organizations, and foundations.

[4] **Consumer Action** (www.consumer-action.org) is a national non-profit education and advocacy organization that has served consumers since 1971. Consumer Action (CA) serves consumers nationwide by advancing consumer rights in the fields of credit, banking, housing, privacy, insurance and utilities. CA offers many free services to consumers and communities. Consumer Action develops free consumer education modules, training, and multi-lingual materials for its network of more than 9,000 community based organizations. The modules include publications in Chinese, English, Korean, Spanish and Vietnamese.

[5] The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education

[6] Founded more than 102 years ago, in 1909, the National Association for the Advancement of Colored People, the **NAACP**, is our nation's oldest, largest, and most widely-recognized grassroots based civil rights organization. We currently have more than 2,200 membership units across the nation, with members in every one of the 50 states.

[7] Founded in 1988 and headquartered in Washington DC, the **National Fair Housing Alliance** (NFHA) is the only national organization dedicated solely to ending discrimination in housing. NFHA works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy and enforcement.

[8] **U.S. PIRG** serves as the federation of state Public Interest Research Groups, which are non-profit, non-partisan public interest advocacy organizations.

A. The Board and FTC Must Remove the Pre-existing Credit Score Disclosure Exceptions Provisions

1. Background and History

Under the Fair Credit Reporting Act, creditors must send a risk-based pricing notice whenever they use a consumer report (including a credit score) in connection with an application for consumer credit, and based on that report, provides credit on terms that are "materially less favorable" than "the most favorable material terms available to a substantial proportion of consumers" through that creditor.[9] The FTC and Board implemented this risk-based pricing notice requirement at 12 C.F.R. Part 222 and 16 C.F.R. Part 640.

Among other things, the FTC/Board's rule creates exceptions in which a creditor is not required to provide a risk-based pricing notice if either: (1) the loan is secured by residential real property and the creditor provides a mortgage score disclosure to the consumer;[10] or (2) the creditor provides every consumer with a copy of her credit score.[11] We will refer to these exceptions as credit score disclosure exceptions.

If the creditor provides a credit score to consumers pursuant to the credit score disclosure exceptions, the creditor is not required to provide a risk-based pricing notice at all. The credit score disclosure exceptions were adopted as part of the risk-based pricing notice rule issued by the Board and FTC on January 15, 2010. At the time, the FTC and Board stated that their believe that these exceptions would benefit consumers, because they would "provide[] a consumer with specific information about his or her own credit history that will likely be more effective than the more generic information about consumer reports that will be included in a risk-based pricing notice."[12]

Subsequently, in July 2010, Congress passed the Dodd-Frank Act. Section 1110F of that Act amended the risk-based pricing notice requirement by requiring that, if the credit decision is based on a credit score, the creditor must provide the credit score that it actually used in the risk-based pricing notice. In addition, the creditor must provide the range of possible scores under the model used, no more than four of the key factors that adversely affected the score[13], the date on which the score was created, and the name of the entity that created the credit score or file on which the score was created.

2. After Dodd-Frank, the Pre-existing Credit Score Disclosure Exceptions Will Become the Exceptions that Swallow the Rule.

The proposed rule has a fundamental deficiency in what it does not do. The FTC and Board have deliberately chosen to keep the pre-existing credit score disclosure

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[9] 12 C.F.R. § 222.72(a); 16 C.F.R. § 640.3(a).
[10] 12 C.F.R. § 222.74(d); 16 C.F.R. § 640.5(d).
[11] 12 C.F.R. § 222.74(e); 16 C.F.R. § 640.5(e).
[12] 73 Fed. Reg. 28966, 28,983 (May 19, 2008).
[13] If one of the factors is the number of inquiries, then the maximum number of reasons is five.

exceptions to the risk-based pricing notice, despite the fact they could create the proverbial exception that swallows the rule.

The logic is very simple: the new Dodd-Frank disclosure requires all creditors that issue risk-based pricing notices to disclose the credit score used by the creditor. Since all creditors must provide a credit score in the risk-based pricing notice, their incentive will be to provide credit scores for all consumers and avoid the complex task of determining which consumers must be provided the risk-based pricing notice. The failure to remove the pre-existing credit score disclosure exceptions will strongly motivate creditors to provide credit scores for all applicants. This means that many consumers who would benefit from a risk-based pricing notice – informing them that they are being offered or paying a higher price for credit based on their credit report and score – will not receive the notice, contrary to as Congress's intent in enacting that requirement. The result will likely be that no creditors will ever provide the risk-based pricing notice (unless in the very rare case that the creditor does not use a credit score).

Indeed, even prior to the passage of Dodd-Frank, there were indications that creditors were being advised to opt for the credit score disclosure exceptions instead of taking the effort to engage in the analysis required by the risk-based pricing notice rule. For example, the Ohio Automobile Dealers Association advised its members: "The credit score exception notice is much simpler than the risk based pricing notice. We believe the vast majority of dealers will provide the credit score exception notice in lieu of the risk based pricing notice."[14]

Prior to the Dodd-Frank Act, the fact that creditors were being advised to choose the credit score disclosure exceptions was justifiable in that consumers would be receiving a benefit – a free credit score – in lieu of the risk-based pricing notice. Indeed, the FTC and Board specifically cited this benefit as the reason for allowing the exception, stating:

> For the reasons discussed below, the Agencies believe that a separate risk-based pricing notice will not provide a significant benefit to consumers who receive a credit score disclosure that satisfies this exception.
> The notice required to qualify for the exception provides consumers with their credit scores without charge along with contextual information to help consumers understand how their credit scores may affect the terms of the offer and how their credit scores compare to the credit scores of other consumers. The credit score disclosure provides tangible value to consumers because free credit scores typically are not available to consumers in connection with non-mortgage transactions. Consumer reporting agencies and other sellers of credit scores typically charge consumers between $6 and $10 for a credit score. [15]

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[14] Ohio Automobile Dealers Ass'n, *Risk-Based Pricing: Forms Available*, undated, at http://associationdatabase.com/aws/OADA/pt/sd/news_article/37742/_PARENT/layout_details/false.
[15] 73 Fed. Reg. 28966, 28,983 (May 19, 2008).

However, with the addition of the requirement of a free score disclosure by Section 1100F of Dodd-Frank, there is no longer any tangible benefit from the exceptions for credit score disclosures to consumers who were subject to risk-based pricing. The exceptions should be removed, as they no longer meeting the legal standard under Section 615(h)(6)(iii) of the FCRA, 15 U.S.C. § 1681m(h)(6)(iii), because they no longer represent classes of transactions for which "the risk-based pricing notice will not significantly benefit consumers."

From the Supplementary Information, it appears the FTC and Board were aware of the conundrum created by the interaction of the Dodd-Frank credit score disclosure requirement and the pre-existing credit score disclosure exceptions. Yet the Agencies did not provide any good reason for keeping the exceptions, simply stating:

> Finally, the Agencies note that the January 2010 Final Rule provides exceptions to the requirements to provide general risk-based pricing notices for persons that provide credit score disclosure exception notices to consumers who request credit. See §§ 222.74(d), (e), and (f); §§ 640.5(d), (e), and (f). Nothing in section 1100F of the Dodd-Frank Act or this proposal limits the ability of creditors to provide these exception notices in lieu of the general risk-based pricing notice.[16]

However, this rationale does not make sense. There was no reason that Section 1100F should have addressed the pre-existing credit score disclosure exceptions, because these exceptions were the creature of regulation, invented by the FTC and Board itself. Congress left it to the administrative agencies to straighten out the logical inconsistencies in the agencies' own rules.

The problems with the pre-existing credit score disclosure exceptions are exacerbated by the fact that they do not require the disclosure of the credit score used by the creditor, but permit disclosure of a generic score. Section 222.74(d)(1)(ii)(D)/640.5(d)(1)(ii)(D) only requires disclosure of "[t]he information required to be disclosed to the consumer pursuant to section 609(g) of the FCRA." Section 609(g) of the FCRA in turn permits disclosure of a generic credit score, at paragraph (1)(C).[17] Similarly, Section 222.74(e)(1)(ii)(D)/640.5(e)(1)(ii)(D) only requires disclosure of the "current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the consumer reporting agency for a purpose related to the extension of credit." The latter alternative permits disclosure of a generic credit score, as it is the same language as Section 609(f)(1)(A), which currently permits the CRAs to supply VantageScore and not FICO scores in response to a consumer's request for a credit score.

These provisions create a serious loophole to the Dodd-Frank credit score disclosure, which requires disclosure of the actual credit score "used by such person in

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[16] 76 Fed. Reg. 13902, 13905.

[17] That paragraph states that a mortgage lender "that uses a credit score, other than a credit score provided by a consumer reporting agency, may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency."

making the credit decision." 15 U.S.C. § 1681m(h)(5)(E) A creditor that engages in risk-based pricing could avoid sending the risk-based pricing notice, instead sending a notice pursuant to the pre-existing exceptions that only discloses a generic score. This notice would not disclose the actual credit score upon which the creditor relies, and yet the creditor would be in compliance with the regulation. This contravenes both the letter and intent of Section 1100F of the Dodd-Frank Act, which was specifically written to require disclosure of the actual score used by the creditor. We strongly recommend that the exceptions to the risk-based pricing notice for credit score disclosures be removed.

B. Insurers and Other Non-Creditor Users of Credit Scores Should Be Required To Provide the Credit Scores They Use

We wanted to bring attention to another issue raised by the Dodd-Frank credit disclosure requirement in the context of adverse action notices. As the FTC and Board are aware, the adverse action notice requirements of Section 615(a) of the FCRA are broader than the risk –based pricing requirements, in that the former applies to all users of credit reports, while the latter only covers creditors. Thus, the issue is whether the Dodd-Frank credit score disclosure requirement applies to adverse action notices when uses other than extensions of credit are involved, most particularly with respect to credit-based insurance scores.

We recognize that this issue is not within the Board or the FTC's authority to resolve, since neither agency has rulemaking authority over adverse action notices.[18] The CFPB will have authority to write rules to implement any provision of the FCRA, with certain limited exceptions. However, it is important for the Board and FTC to be aware of the issue.

The issue arises because Section 1100F defines a "credit score" by referencing Section 609(f)(2)(A) of the FCRA, 15 U.S.C. § 1681g(f)(2)(A). That section in turn defines a credit score as a "numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors."

Thus, one could argue that only creditors, and not other users of credit scores, are required to make the Dodd-Frank credit score disclosure in adverse action notices. However, this argument is undermined by the fact that, for adverse action notices, Section 1100F of Dodd Frank specifically refers to disclosure of any credit score "used by such person in taking *any adverse action*" in 15 U.S.C. § 1681m(a)(2)(A) (emphasis added). In contrast, for risk-based pricing notices, Section 1100F of Dodd-Frank specifically refers to disclosure of the credit score "used by such person in making *the credit decision*" in 15 U.S.C. § 1681m(h)(5)(E)(emphasis added). Thus, the scope of the credit score disclosure requirement should be much broader for adverse action notices,

[18] The Board has addressed the Dodd-Frank Act's impact on adverse action notices by promulgating new model forms to meet the notice requirements of the Equal Credit Opportunity Act. However, the ECOA only covers creditors.

since Congress was so much more specific when it required risk-based pricing notices only in relation to credit decisions.

Of course, this issue could be decisively settled through rulemaking, and we would urge that it be done so that non-creditor users of credit scores are required to make the Dodd-Frank credit score disclosure when sending adverse action notices. The Consumer Financial Protection Bureau will have broad authority to promulgate regulations under the FCRA to "prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of this title, and to prevent evasions thereof or to facilitate compliance therewith." 15 U.S.C. § 1681s(e).

In particular, we urge that users of credit-based insurance scores be required to disclose those scores when sending adverse action notices. As you know, while these scores are used for insurance purposes, they are based primarily or even solely upon credit information in consumer reports.

Credit-based insurance scores play a critical role in the financial lives of consumers. A poor score can result in a consumer being denied auto or homeowner's insurance, or being required to pay unaffordable prices. That can have devastating results for consumers. In many states, a consumer cannot legally drive without auto insurance. Homeowners insurance is essential to owning a home. As the Seventh Circuit Court of Appeals once described it succinctly: "'no insurance, no loan; no loan, no house."[19]

Despite the important of credit-based insurance scores, consumers of insurance currently have no right to obtain these scores. They can legally be left in the dark about a number that can make the difference as to whether they can own or keep their home, or be able to drive to work or school. That can be changed, at least for consumers who are denied insurance or given a higher rate, if Section 1100F of the Dodd-Frank Act is interpreted to apply to credit-based insurance scores.

C. Other Comments

In addition to our primary comments above, we have the following comments on specific sections of the proposed rule:

1. Explanation of Credit Scores

In addition to the disclosures required by Section 1100F of the Dodd-Frank Act, proposed §§ 222.73(a)(1)(ix)(A)/640.4(a)(1)(ix)(A) and 22.73(a)(2)(ix)(A)/640.4(a)(1)(ix)(A) would require an additional piece of information, *i.e.*, a statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history. We support this additional statement, and think it is useful information for consumers. However, we urge the FTC and Board to further require a explanation to be provided to the consumer which states that a consumer does not have a

[19] NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992).

single credit score, and that the score can vary depending on which consumer reporting agency issues the score, the scoring model provider, or the particular credit product being applied for.

As the Agencies know, a consumer's credit score depends on all of these factors – the CRA that issues the score, the scoring model provider, and the actual scoring model used (industry-specific, proprietary, etc.). Consumers are accustomed to receiving a generic or educational credit score. While more consumers are learning that their scores may differ between the Big Three nationwide CRAs, very few consumers also realize their credit scores may vary depending on what type of credit they are applying for (since each type of creditor might use an industry-specific model) or even the creditor (in the case of proprietary scores).

Section 1100F of Dodd-Frank Act requires disclosure of the actual score used by the creditor. It does not provide anyway leeway for a creditor to provide a generic or educational score, a requirement that we support, since disclosure of the actual score is much more important than a generic score. For example, it is not useful for a consumer to know her generic VantageScore score if she was given a higher rate on an auto loan due to a low FICO Auto Industry Option model score. However, as they are receiving their actual credit scores, consumers need information as to why they are receiving a particular score that may not be the same as a generic score.

2. <u>Rules for multiple credit scores</u>.

Proposed § 222.73(d)(1)/640.4(d) provides rules for when multiple scores are obtained by the creditor. If only one score is used (e.g. the high, low, most recent), then the one used must be disclosed. We have no objection to this proposal

However, proposed § 222.73(d)(1)/640.4(d) also provides that if multiple scores are obtained and used (e.g. by computing the average of multiple scores), then only one score must be disclosed. We do object to this provision because it could permit deceptive practices by a creditor. Consider an example similar to proposed §222.73(d)(2)(ii)/640.4(d)(2)(ii) involving auto lending, in which a dealer regularly requests credit scores from multiple CRAs. The dealer uses each of these scores to determine with which lender to shop the loan or to determine the material terms it will offer to the consumer. Proposed §222.73(d)(2)(ii)/640.4(d)(2)(ii) would permit the dealer to select the lowest score to disclose to the consumer, and use that low score to explain why he directed the loan to a higher-rate lender, when in fact, a dealer mark-up was the real explanation for the higher-rate.

3. <u>Rules for multiple customers</u>.

Proposed § 222.75(c)/640.6(c) provides that if there are joint applicants, each consumer must be provided a separate notice with his or her own score. Furthermore, if the creditor relied upon the credit score of a proposed guarantor or co-signer, the consumer would not receive information about the guarantor or co-signer's credit score, though the general risk-pricing notice would be required. We support both of these provisions. The proposed rule respects the privacy of each individual consumer while providing them with information about their own credit scores and the occurrence of the risk-based pricing.