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March 21, 2019

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Office of Housing and Regulatory Policy
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Washington, D.C. 20219

Re: Comments/RIN 2590-AA98: Proposed Rule regarding Validation and Approval of Credit Scoring Models

Dear Mr. Pollard:

This letter comments on the proposed rule promulgated by the Federal Housing Finance Agency ("FHFA") in response to the enactment of Section 310 of the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018. Section 310 was intended to permit a competitive market among credit score model developers in the mortgage market (where none has ever existed) in order to drive innovation, benefit future consumers, and provide lenders with choice. The original bill from which Section 310 was adapted was actually entitled the "Credit Score Competition Act" and the thrust of the legislation has been to end the government-sanctioned monopoly in the mortgage arena.

The FHFA proposed rule would allow, at least theoretically, competition among credit score model developers and lender choice regarding the credit scoring models to be used when originating mortgages that will in turn be sold to Fannie Mae or Freddie Mac.

Section 310's fundamental purpose is the promotion of competition in the mortgage arena. The FHFA rule as proposed, however, is anti-competitive. It "would prohibit...any credit score model developed by a company that is related to a consumer data provider through any common ownership or control."

This prohibition in the proposed rule will eliminate any consideration of VantageScore® Solutions, LLC ("VantageScore Solutions"), which is owned by TransUnion LLC ("TransUnion"), Experian Information Solutions, Inc. ("Experian"), and Equifax, Inc. ("Equifax"), the three national credit reporting agencies ("CRAs").

VantageScore Solutions, however, is currently the only company which develops credit scoring models that are viable competitors to FICO's credit scoring models in this space. In other words, the direct effect of the proposed prohibition is to bar from the mortgage arena one of the two competitors.

There is a less direct effect as well. As discussed below, the prohibition runs contrary to the rulings in a federal court action which FICO lost.

I have represented VantageScore Solutions since 2006, when I defended the company in that lawsuit, which FICO brought against it and its three owners (the "FICO lawsuit").[1] As the appellate court observed in the FICO lawsuit, VantageScore Solutions was formed in part to introduce some viable competition to FICO's dominance[2] in the relevant market of generic credit scores.[3]

FICO nonetheless sued VantageScore Solutions and its three owners within months of its formation, asserting a number of claims, including antitrust claims. FICO argued that the CRAs' goal in forming VantageScore Solutions "was not merely to

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[1] *See Fair Isaac Corp. v. Experian Information Solutions Inc.*, Civ. No. 06-4112 ADM/JSM (D. Minn.). I am with the law firm of Berens & Miller, P.A. in Minneapolis.

[2] *See Fair Isaac Corp. v. Experian Information Solutions Inc.*, 650 F.3d 1139, 1144 (8th Cir. 2011)(the credit bureaus joined to develop a "credit score algorithm that could compete with FICO and reduce the amount the credit bureaus paid as royalty for using FICO's algorithms"). Market participants had also expressed a desire for a legitimate alternative to FICO.

[3] Many critics have focused on the CRAs' alleged dominance in the market for consumer credit data. The market for consumer credit data, however, is not the relevant market for purposes of analyzing any potential antitrust threat in the mortgage sector, as was determined in FICO's litigation against VantageScore. The relevant market is instead the market for generic consumer credit scores, a market in which FICO has repeatedly claimed dominance. *Accord Fair Isaac Corp. v. Experian Information Solutions Inc.*, 645 F. Supp. 2d 734, 738 (D. Minn. 2009)(stating that FICO "quickly became dominant in the credit scoring market"); *id.* at 754 (noting that three years after VantageScore's introduction, FICO's "dominant position has experienced very little change").

compete with FICO scores but to eliminate FICO scores from the credit scoring market entirely" by improperly exercising the CRAs' market power.[4] FICO asked the court to put VantageScore Solutions out of business.[5]

After a jury trial, VantageScore and its two owners that were still involved in the litigation prevailed.[6] Before trial, the district court had rejected FICO's antitrust claims as a matter of law, ruling that:

> Fair Isaac's antitrust claims suffer from a fundamental, indeed fatal, flaw. The alleged conspiracy does not employ tactics that seek to destroy or cut off competition before it *even has a chance to take hold*; rather, the alleged conspiracy is dependent on convincing the market...that greater value can be realized by switching from FICO scores to VantageScore credit scores. This is the very essence of competition....[7]

The court's ruling and the jury's verdict were affirmed by the federal appellate court.[8]

This letter responds to a number of criticisms commonly levied against VantageScore Solutions' ownership structure, criticisms that may be the root of the current prohibition in the proposed rule. Many of those criticisms were already raised by FICO and rejected in the context of the FICO lawsuit.

FICO acknowledged, in the FICO lawsuit, that its Classic score was "the dominant credit score,"[9] which at that time represented "more than 94% of the business-to-business

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[4] *Fair Isaac Corp.*, 645 F. Supp. 2d at 739. The Court rejected FICO's allegation when finding that it lacked antitrust standing. *Id.* at 753.

[5] FICO'S Third Amended Complaint, in the Prayer for Relief, asked among other things that "The Defendants be ordered to dissolve VantageScore...." *Fair Isaac Corp.*, Civ. No. 06-4112 ADM/JSM (Nov. 10, 2008)(Dkt. No. 436). FICO also claimed that its trade secrets had been copied in the development of VantageScore's algorithm, but FICO dropped that claim after one of its experts found no evidence to support that theory.

[6] One of VantageScore Solutions' owners had settled with FICO before the case went to trial, entering into a "preferred partnership" with FICO. *Fair Isaac Corp.*, 645 F. Supp. 2d at 755; *id.* at 741 (discussing settlement).

[7] *Fair Isaac Corp.*, 645 F. Supp. 2d at 752.

[8] *Fair Isaac Corp.*, 650 F.3d at 1144.

[9] *Fair Isaac Corp.*, 645 F. Supp. 2d at 764 n.2 (FICO is the "'dominant credit score'") (citing FICO 3d Am. Compl. ¶¶ 22, 40).

segment" of the credit scoring market.[10] The introduction of VantageScore credit scores has not changed FICO's dominance.[11] More than thirteen years later, the competitive landscape, according to FICO, remains largely unchanged. For example, FICO claims today, as it has for years, that its credit scores are used in 90% of all of the lending decisions in the United States.[12]

Public statements also confirm that FICO's business has continued to boom in the thirteen years since VantageScore credit scores were introduced. For example, in FICO's November 9, 2017 10-K, p. 31, FICO reported that:

> Scores segment revenues increased $25.3 million in fiscal 2017 from 2016 due to a $14.2 million increase in our business-to-business scores revenues and an $11.1 million increase in our business-to-consumer services revenue.[13]

Barclay's analysts, in a report dated March 11, 2019, projected FICO's continued growth: "On the Scores side, we think +LDD growth for the next several years is reasonable (similar to our +13% in FY19; & upside to our +7% 2020-2022); given ***a) B2B pricing power, which remains a matter of 'when' & not 'if' for re-pricing (maybe not the triple-digit increases seen in mortgages last year,[14] but significant)*** and

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[10] *Id.* at 738.

[11] *Id.* at 754-55 (detailing FICO's continued dominance in the credit scoring market despite the introduction of the first VantageScore credit scoring model three years earlier).

[12] *See Credit Where Credit is Due, DSNews* (Feb. 1, 2018)(interview with FICO's Joanne Gaskins), available at http:/dsnews.com/daily-dose/02-01-2018/future-fico-gses; *see also* Mercator Press Release, *FICO® Scores Used in Over 90% of Lending Decisions According to New Study* (Feb. 27, 2018)("New research from Mercator Advisory Group has found that in the United States, FICO® Scores were in 2016 used in more than 90% of lending decisions, including credit cards, mortgages, and automobile financing."), available at https://www.mercatoradvisorygroup.com/.

[13] This represents business that, by FICO's own admission, is sold through VantageScore's three owners.

[14] During an earnings call on November 3, 2018, FICO CEO Will Lansing explained FICO's burgeoning revenues in 2018 as follows: "the majority of that growth rate of course came from the mortgage repricing." That is the luxury of monopoly power, another reality admitted to by Lansing. Earlier, when he was asked whether FICO should worry about its status with the GSEs, Lansing replied "Fannie and Freddie have

inflation+ from there on (with the ability to flex more in periods of volume slowdown)." (emphasis added).

The strength of FICO's current earnings; its recent, unilateral, and "historical" price increases, particularly in the mortgage market;[15] and its self-proclaimed dominant position in the marketplace underscore FICO's continued ability to compete successfully in all of those industries in which VantageScore credit scores are also accepted.

Moreover, there is no evidence that the three CRAs' ownership of VantageScore Solutions has harmed FICO during the last thirteen years. The actual record instead clearly demonstrates that FICO continues to benefit by its longstanding relationships with the CRAs. FICO has entered into joint, well-publicized initiatives with Experian, such as the partnership involving Experian, FICO, and Finicity to develop and offer an UltraFICO credit scoring model. FICO and Equifax have jointly developed and are selling the FICO XD credit score.

FICO has also acknowledged that the CRAs are substantial sellers of its scoring products. Thus, the sizable growth in FICO's score revenue further confirms that the three CRAs' ownership of VantageScore Solutions has not harmed FICO.[16]

Moreover, an examination of every other industry in which the two companies' credit scores compete demonstrates via concrete evidence, as opposed to some hypothetical notion, that VantageScore's acceptance and use in those other industries has not resulted in FICO's elimination from those markets.

Despite the lack of any evidence of actual harm to FICO over the past thirteen years, FHFA has expressed concern that a "vertical integration with a credit score model

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mandated that FICO Scores have to be part of a mortgage origination. So that puts you in a very low risk territory." Lansing's Remarks at the Morgan Stanley Technology, Media and Telecom Conference at The Palace Hotel in San Francisco, Calif. (Feb. 27, 2013); transcript prepared by Seeking Alpha (www.seekingalpha.com).

[15] FICO's recent price increases put the lie to the notion that the CRAs somehow control (or even could control) the pricing of an entity that has monopoly power.

[16] Equifax's CEO, Mark Begor, had been on FICO's board of directors for two years before joining Equifax. *See* Jenny Surane, *Equifax Names Mark Begor CEO* (Bloomberg Mar. 28, 2018).

developer could, in theory or practice, permit the CRA to sell credit scores constructed from data that the CRA owns more cheaply."[17]

As a threshold matter, the FHFA seeks to prevent what is only a theoretical possibility and by doing so, ends up protecting instead an actual monopoly because its rule, as currently proposed, will eliminate the only viable competitive credit score.

FICO also raised this theoretical harm in the FICO litigation.[18] The district court ruled that such future harm, despite FICO's argument that VantageScore and its owners would violate the antitrust laws in the future, when "'the Court is not looking,'" was only speculative and thus nonactionable.[19] The court further stated that if such anticompetitive activities did occur at some future date, FICO "can presumably take action at that time to protect itself." *Id.* Indeed, it has been a number of years since the court has no longer been "looking," and those speculative harms have never matured.

Moreover, the antitrust laws are designed to protect competition (and not competitors), to ensure that antitrust violations do not occur, and to empower those alleging antitrust injury to seek redress. Should VantageScore or any of the three CRAs commit an antitrust violation, past history reveals that FICO is both willing and able to file suit under the federal antitrust laws.

Stallings has also argued that the FICO litigation against VantageScore Solutions is without much significance because the federal district court ruled, and the United States Court of Appeals for the Eighth Circuit affirmed, the dismissal of FICO's antitrust

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[17] FICO's outside attorneys have focused on this theoretical specter in various writings. For example, William Stallings, of Mayer Brown LLP, claimed that if VantageScore credit scores were permitted in the mortgage arena, it would create a competition issue "similar to those that frequently arise in connection with vertical mergers or vertical integrations." William Stallings, Mayer Brown, LLP, Comment Letter on Credit Score Request for Input issued by FHFA (Mar. 13, 2018), *Competition Considerations in Changing Mortgage Finance Credit Score Requirements* at 2 (hereinafter "*Competitive Considerations*"). Although Stallings conceded that "many" examples "of vertical integration or vertical transactions" were admittedly "procompetitive," permitting the use of VantageScore would "harm" the competitive process. *Id.* This is ironic given that the mortgage arena is currently bereft of any competition at all. Indeed, as Stallings acknowledged: "The Enterprises have long required the use of FICO® Scores in connection with mortgage finance credit applications." *Id.* at 1.

[18] *Fair Isaac Corp.*, 645 F. Supp. 2d at 748, 754.

[19] *Fair Isaac Corp.*, 645 F. Supp. 2d at 755.

claims on the basis of its lack of standing.[20] That argument underplays the significance of the courts' ruling that FICO lacked "antitrust standing."[21] To find a party lacks antitrust standing, a court must conclude that the complainant did not suffer "antitrust injury."[22] Such a finding goes directly to a principal element of a viable antitrust claim, that is, that the party bringing the action must be harmed in a manner that is forbidden under the antitrust laws.[23] As a result, a finding of an absence of antitrust standing is deemed a ruling on the merits.[24]

Given that the antitrust laws stand ready to protect any entity that is harmed by actionable anticompetitive behavior,[25] unfounded scare tactics should not tip the balance when all evidence regarding the value of competition supports choice rather than exclusivity. I therefore ask that the FHFA remove the prohibition to exclude from consideration "any credit score model developed by a company that is related to a consumer data provider through any common ownership or control."

Very truly yours,

Barbara Podlucky Berens/NMC

Barbara Podlucky Berens

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[20] *Competitive Considerations* at 8.

[21] *Fair Isaac Corp.*, 645 F. Supp. 2d at 753, *aff'd* 650 F.3d at 1146.

[22] "An antitrust injury is 'injury of a type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Fair Isaac Corp.*, 650 F.3d at 1144-45 (citation omitted).

[23] *See, e.g., Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 232 & n.15 (3d Cir. 2013)("antitrust standing 'is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place'")(quotation omitted).

[24] *Id.* ("failure to establish antitrust standing is a merits issue").

[25] For example, sales of credit data or credit reports are deemed to be services subject to the protections of the Sherman Act and the Federal Trade Commission Act, as well as portions of the Clayton Act. *See, e.g., Credit Bureau Reports, Inc. v. Retail Credit Co.*, 476 F.2d 989, 991 (5th Cir. 1973)(affirming injunctive relief against company selling credit reports for violations of Sections 1 and 2 of the Sherman Act and Sections 7 and 16 of the Clayton Act); *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 235 F. Supp. 3d 1054, 1060 (N.D. Ill. 2017)(FTC action against company that offered credit monitoring services and online credit scores which alleged violations of the Federal Trade Commission Act and other laws).