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By electronic delivery

28 October, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex R)
600 Pennsylvania Avenue, NW
Washington, DC 20580

To whom it may concern,

Re: **FACTA Prescreen Rule**
R411010
69 *Federal Register* 58861, 1 October 2004

The American Bankers Association ("ABA") respectfully submits our comments to the Federal Trade Commission's ("Commission") proposed rule to improve the required notice to consumers regarding their right to opt out of prescreened solicitations for credit or insurance as required by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"). In addition, the FTC is proposing model forms that may be used to comply with the rule.

The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

The ABA commends the Commission for its efforts regarding this proposal, especially its decision to gain a better understanding of consumer comprehension of prescreen opt-out notices in solicitations by commissioning a consumer study. We believe that the results of the study are helpful in developing language that is easily understood by consumers. We recommend that the Commission adopt its "improved version #2" which provides a single notice containing a simple and easy to understand message about prescreening and opting out. We believe that the proposed "layered version," that is, a short notice on the front side of the first page that explains basic opt-out information and a separate, longer explanation that offers further details, inappropriately focuses too much on the noticeability of the right to opt out and means of doing so and thereby reaches beyond the statutory mandate to make the notice "simple

and easy to understand." The improved version was as effective as the layered version in conveying the key points (and perhaps better at conveying the benefits of receiving prescreened solicitations). However, with this version, it is more likely that consumers will understand the benefits of prescreening before making a decision. Ill-informed choices to opt out will harm individual consumers as well as the competitiveness of the consumer credit market generally.

We are also concerned that certain requirements in the proposal conflict with other rules and guidelines governing credit card disclosures and will make compliance with the proposal and these other rules and guidelines immensely confusing, if not impossible. Moreover, the Commission is, in effect, making a policy decision about the value of the right to opt out, elevating its importance above other information, such as important credit card terms.

ABA also strongly recommends that the Commission allow at least nine months for implementation. Sixty days is insufficient to review the new rule and revise documents. Finally, we believe that the cost of implementation will be far greater than what the Commission estimates.

Background.

In drafting the proposal, the Commission relied in large part on a consumer study conducted to compare noticeability and comprehension of three versions of an opt-out notice. Version # 1 contained almost word for word the language from the FCRA and was placed on the back page of the offer. The improved version #2 used simpler language than version #1. It was placed on the back page of the offer, but was enhanced through contrasting print color and format. Finally, the layered version #3, relied on two notices, a short notice on the first page and a second, more detailed notice elsewhere. The Commission has proposed adopting the layered version.

Under the proposed layered version, users of prescreened lists must provide two notices. The first notice, the short notice, informs consumers about the right to opt out of receiving prescreened solicitations and specifies a toll-free number for consumers to call to opt out. This notice may contain no other information and must be larger than the type size of the "principal" text on the same page, though in no event smaller than 12-point type. It must be on the front side of the first page of the principal promotional document and in a format so that the statement is distinct from other text such as inside a border. It must also be in a typeface that is distinct from other typeface used on the same page.

The second notice, the long notice, provides the additional information FCRA requires. The proposal does not prohibit inclusion of additional information in the long notice so long as it "does not interfere

with, detract from, contradict, or otherwise undermine the purpose of the opt-out notices." This notice must be clear and conspicuous, appear in the solicitation, and be in a type size that is no smaller than the type size of the principal text on the same page, but in no event smaller than the 8-point type.

Understandability of the Commission's key points, not noticeability, is most important.

The Commission, in essence, selected the layered version because it was more noticeable than the improved version, even though the FACT Act did not convey rulemaking authority to address message noticeability. ABA recommends that the Commission instead select the improved version because, as demonstrated by the Commission's own study, it as effectively conveyed the four key points, and consumers are more likely to understand the benefits of receiving prescreened solicitations, an important message, if the messages are combined, as under the improved version.

Section 615(d)(1) of FCRA requires users of prescreened lists to disclose in solicitations certain information about the prescreening process and the consumer's right to "opt-out" of inclusion in prescreened lists along with information on how to opt-out. That paragraph (1) requires that the notice be "clear and conspicuous." The Commission has no rulemaking authority for this provision. A separate paragraph (2), added by the FACT Act, requires that the notice, "be presented and in such format and in such type size and manner as to be *simple and easy to understand*, as established by the Commission . . ." (Emphasis added.)

Thus, the Commission is only directed to address the understandability of the notice, not its noticeability. Simple and easy to understand goes to whether the notice is easily comprehended, not whether it is prominent or easily noticed by the consumer. The noticeability aspect is addressed in paragraph (1), which requires that the statement be clear and conspicuous and for which there is no Commission rulemaking authority.

While the Commission is directed to establish appropriate format, type size, and manner, it is to do so only to the degree such factors make the notice "simple and easy to understand." It should not be inferred that the statute's reference to format, type size, and manner indicates Congressional intent for it to address noticeability. First, type size, format, and manner can make a notice easier to understand by making it easier to read. For example, a minimum type size or particular format can make a message easier to read and thus easier to understand. To illustrate, as was learned after the last Presidential elections, a ballot can be made easier to understand through good formatting, without making any item more noticeable. Second, the noticeability aspect of the message is

addressed elsewhere, in paragraph (1). To interpret paragraph (2) as including noticeability would render the clear and conspicuous requirement in paragraph (1) meaningless. If Congress had wished to direct the Commission to interpret the meaning of clear and conspicuous, it could easily have done so when it amended paragraph (2) of this section.

The improved version is as effective as the layered version in conveying the key points, and perhaps more effective in conveying the benefits of receiving prescreened notices.

The Commission selected the layered version primarily because the Commission's study showed that the short notice of the layered was more noticeable to consumers. Yet, the improved version overall was as effective in conveying the key points tested in the Commission's study.

The study was conducted in two phases. Phase 1, in essence, compared the noticeability of the messages in the three versions. During this phase, the participants were exposed to one of the three versions and were asked to review the offer. After the offers were removed from view, they were asked a series of questions. In phase 2, the participants were given the same version as in phase 1, but the opt-out notice was *highlighted* and they were asked to review only the highlighted portions, in essence, testing the understandability of the notice.

As the Commission points out in the Supplementary Information, "[W]ith respect to the second message, (how to exercise the opt-out right) the layered version was significantly more effective than the improved version *following the initial exposure*, *but not statistically significantly more effective after the forced exposures."* (Emphasis added.) There was even less difference between these two versions after the forced exposure with regard to the effectiveness of the first message, the consumer's right to opt-out.[1] However, though the Commission did not opine on the statistical significance of the differences, the improved version was a bit more effective than the layered version with regard to understanding the benefits of receiving prescreened offers. Thus, the improved version was as good as the layered version with regard to consumer understandability of all key points.

Aggressive promotion of the right to opt out will have an adverse impact on individual consumers and on the competitiveness of the consumer credit market.

ABA is also concerned that the layered approach will encourage ill-informed decisions to opt-out. By focusing so much on the visibility of only

[1] Manoj Hastak, PhD, "The Effectiveness of 'Opt-Out' Disclosures in Pre-Screened Credit Card Offers," September 2004. Page 8. .

the right to opt-out and the means of doing so, more consumers will choose to opt-out without understanding how prescreened solicitations may benefit them. Promoting so strongly the choice to opt out without an explanation of benefits will also significantly reduce the effectiveness of the primary force that makes the U.S. consumer credit market, particularly the credit card market, so competitive and innovative.

As noted earlier, the proposed layered version, by focusing on the noticeability of the right to opt out and the means of doing so, obscures any message conveying the benefits of receiving prescreened solicitations. Yet, those benefits are substantial, both on an individual basis as well as on a broader basis.

Individual consumers benefit because solicitations provide an easy way to shop for and apply for credit, especially credit cards. Solicitations arrive in the mail to be reviewed at a convenient and appropriate moment. The prescreening process also ensures that consumers receive offers that they are most likely to be interested in and qualified for, so they minimize time wasted searching for an appropriate product and submitting applications that will be denied. And mailed solicitations do not pose the same intrusion or irritation as telemarketing calls. Unwanted solicitations are simply discarded.

Prescreened solicitations are particularly important to those consumers who improve their credit eligibility as they demonstrate their ability to repay loans. This is especially true for those new to the credit system. Their credit eligibility can improve significantly, within just one or two years. Prescreened solicitations allow them to learn about and obtain products with better terms, conditions and other features. Before they opt out, consumers should be aware of these benefits.

Promoting opt-out without complete information will also reduce the robust competition of the consumer credit market, particularly the credit card market. Michael Staten, Professor and Director of the Credit Research Center at the McDonough School of Business explains the importance of prescreened solicitations in creating and maintaining a competitive credit market:

> The credit card industry provides a prime example of the pro-competitive effects of nationwide credit reporting in the United States. Through the late 1970s, most credit cardholders acquired their cards through their local finance institutions, often by picking up applications at a branch. Choice was limited to the number of issuers in the local area who happened to offer a card product. Customers in smaller towns had fewer choices than residents of large cities. Local institutions faced little threat of entry into the market by financial institutions outside the state or regions, a fact

that was reflected in higher prices and little variance in card features.

All of this began to change in the early 1980's. A key legal decision in 1978 gave national banks the ability to launch national credit card marketing programs at far lower cost than before. The ability under FCRA to acquire information about potential cardholder prospects, irrespective of location, made it possible for companies, -- both new and established – to enter new geographic markets, often with astounding speed. In particular the use of prescreening to target applicants provided the jet fuel for the acceleration in card offerings and competition. New entrants used credit reports and other externally acquired information to identify and target low-risk borrowers for their low-rate cards through out the United States. Retailers and manufacturers introduced their own "co-branded" bank credit cards as unique alternatives to the traditional Visa and MasterCard products being offered by banks. companies with established products and brands outside the financial services market (General Motors, General Electric, AT&T, Sears) combined data about existing customers of their corporate affiliates with information from credit reports and other external sources to identify and reach likely prospects. . . Thanks to the success of those new market entrants, cards offering frequent traveler miles, rebates, and other consumer benefits have become commonplace.

The wave of new entrants to the bankcard market put great downward pressure on the finance charge rate and annual fees charged by existing issuers. Incumbent issuers were forced to make a choice: either leave their rate unchanged and risk defection of their best customers to the new, low-rate entrants or cut finance charge rates and fees. As a result, between 1991 and 1992 the proportion of all revolving bankcard balances in the United States being charged an APR greater than 18.0 percent plummeted from 70 percent to 44 percent in just twelve months.

The ability of new entrants to use credit data to establish and cultivate relationships with customers thousands of miles away has transformed the competitive landscape in the United States, injecting price and service competition into the credit card market which had not been know for either.[2]

The value of receiving prescreened solicitations was recognized in an exchange between Congressman Spencer Bachus, Chair of the House Financial Services Committee of the Financial Institutions and Consumer

[2] Michael Staten, Fred Cate. "The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation," pp 16, 17.

Credit Subcommittee and Congressman Paul Kanjorksi during final passage of the bill.

> Mr. Kanjorski: Mr. Speaker, does the gentleman share with me the understanding that the FTC's public awareness campaign is to be designed to increase public awareness, not only of the right to opt out of receiving prescreened solicitations, but also of the benefits and consequences of opting out?
>
> Mr. Bachus. Mr. Speaker, yes. I share that understanding. Not only should consumers know they can opt out of getting these offers, they should also know that opting out or not affects their chances of getting additional credit offers with competitive terms.[3]

The lively competition and innovation in the consumer credit industry will diminish if the layered version's aggressive promotion of opt-out without effective conveyance of the value of prescreened solicitations is adopted.

The proposal will create irreconcilable compliance requirements.

The ABA is also concerned that the proposal's font, formatting, and prominence requirements clash with other rules governing credit card solicitations and creates conflicts, confusion, and inconsistencies that will make compliance impossible and expose creditors to claims of violations. Specifically, we are most concerned about the potential conflicts with the Federal Reserve Board's Regulation Z (12 CFR 226) and the Comptroller of the Currency's ("OCC") recently issued Advisory Letter AL 2004-10 that provides "guidance" on how credit card terms should be disclosed in promotional materials.

As the chart below summarizes, the three documents, Regulation Z, the OCC letter, and the proposal require various terms and conditions to be disclosed. Regulation Z requires that they be disclosed "in a prominent location" and in a "clear and conspicuous" manner. The OCC letter requires certain terms to be disclosed "fully and prominently," and the proposal uses the terms "prominent" and "clear and conspicuous."

How does a compliance officer reconcile these numerous, sometimes lengthy items that are battling for prominence and conspicuity? Can they *all* be prominent and conspicuous when there are so many? If one is more prominent or conspicuous, are the others "not prominent" or "not conspicuous"? And is "prominent" more noticeable than "conspicuous"? It seems that the card issuers will always be subject to serious challenge that they are not complying with one or the other

[3] *Congressional Record,* November 21, 2003, page H12219.

requirements simply because by definition, so many terms cannot all be prominent or conspicuous.

Regulation Z	Most important seven terms, (APR, fees for issuance, minimum finance charge, transaction charges, grace period, balance-computation method, charge card statement) to be provided ***in a prominent location*** on or with the application or solicitation . . . in form of a table. If introductory rate is higher than permanent rate, introductory rate must be in table and in at least 18-point type unless permanent rate also disclosed in table. ***Prominent location,*** for example, means they are on the same page as an application reply form. If elsewhere, they are "prominently located" if the reply form contains a clear and conspicuous reference to the location of the disclosures and indication of contents. Remaining disclosures (cash-advance, late-payment, over-the-limit, and balance-transfer fees,) must be in the box or ***clearly and conspicuously*** disclosed elsewhere. ***Clear and conspicuous*** means "a reasonably understandable form and readily noticeable to the consumer." A 12-point type is deemed readily noticeable. Less than 8-point type would likely be too small.
OCC Guidelines	Card issuers must disclose ***"fully and prominently"*** certain information, i.e., material limitations of the applicability of the promotional rate, such as, time rate will be in effect and circumstances that could shorten promotional rate period or cause it to increase, any fees connected to the promotional terms, categories of balance to which rate will not be applied, circumstances when the rate or other fees may increase, and that issuers may change terms.
Proposal	**Short notice**: ***"Prominent, clear, and conspicuous."*** Type size that is larger than the type size of the principal text on the same page, but in no event smaller than 12-point type. On the front side of the first page of the "principal promotional document, or on first screen.

	In a format so that statement is distinct, e.g. as inside a border. In typeface distinct from other typefaces used on the same page, e.g. by bolding italicizing, underlining, and/ or in a color that contrasts with the color of the principal text on the page if it is in more than one color. **Long notice** ***"Clear and conspicuous."*** Type size no smaller than type size of principal text on same page, but no smaller than 8-point type. Type face distinct from other typeface used on same pages, e.g. by bolding, italicizing, underlining, and/or in a color that contrasts with color of principal text on the page Set apart from other text, e.g., including blank line above and below statement and by indenting both margins.

The short notice of the layered version will obscure important credit card information.

We are also concerned that the proposal makes the opt-out message the most important notice in a solicitation, overshadowing other information Congress deemed to be critical with regard to credit card solicitations. The short form of the opt-out notice is made more prominent by the requirement that it be in a set apart, e.g. in a box, on the front page, and that it use distinct typeface and a font larger than that required for the Regulation Z table.

In the Truth in Lending Act, Congress specifically required that certain credit card terms be contained in a *table and that the table have special headings*.[4] Aware of the Truth in Lending table and headings when it passed the FACT Act, it declined to require the opt-out notice to be in a table or include headings, further indicating its view that the terms in the table are more important. Further, there is no suggestion in the legislative history that Congress intended to elevate the opt-out notice above the level of import of the Truth in Lending table.

In addition, when Congress passed the Fair Credit and Charge Card Disclosure Act requiring that solicitations include a table disclosing certain credit card terms, it made a very deliberate decision to *limit* the number of prominent disclosures to be contained in a table to only the

[4] 15 US 1632(c)(2)

most salient terms. Other proposals that required additional terms to be disclosed were rejected. It limited the number of items in the table to ensure that consumers are not distracted by clutter and made impervious to absorbing information because of information overload. This proposal dilutes the effectiveness of the Regulation Z table by adding a more prominent table.

To minimize compliance uncertainty and the risk of violations and to ensure that the prominent short notice does not overshadow the Regulation Z table, we recommend that the Commission adopt its improved version. That version will effectively communicate the key points the Commission studied, including the benefits of receiving prescreened solicitations. The improved version presents fewer compliance conflicts and will be less likely to obscure the Regulation Z table.

Recommendations for the layered version.

If the Commission decides to adopt the layered version, at the very least, it should encourage consumers to read additional information contained in the long notice by moving the toll-free number from the short notice to the long notice. This will at least ensure that consumers see the long notice, which may contain information about the benefits of prescreening.

We also recommend that the Commission incorporate into the regulation itself that the long notice may include other information so long as it does not interfere with, detract from, or contradict the opt out notices. This will make clearer that additional language is permitted in the long notice. The regulation should exclude the language contained in the Supplementary Information, "undermine the purpose of the opt-out notices." This could be broadly interpreted to mean that anything that might persuade a consumer not to opt out "undermines the purpose of the opt-out notice." This could include, for example, including an explanation of the benefits of receiving prescreened solicitations.

The Commission should allow more time for implementation.

The proposal makes the final rule effective 60 days after adoption. We strongly recommend a minimum of nine months. The new requirements, coupled with the OCC's recent letter, will require significant time to review the new requirements and redesign solicitations. Moreover, solicitations are often designed months in advance of a mailing. If the notice must be included in solicitations sixty days after adoption, those already prepared in advance will be unusable. Moreover, the delay poses no significant harm to consumers.

The cost of compliance will be greater than estimated.

The FTC estimates that the costs for *all* affected firms will be between $110,000 and $167,000. We respectfully, but strongly disagree with this estimate. Lawyers and compliance officers will have to review the final regulation to give guidance to marketing staff. Marketing staff will have to redesign numerous solicitations and make adjustments to format, placement of all information, etc. Legal and compliance staff must then again review the final documents.

One mid-size credit card issuer estimates that making the changes required by the proposal would cost $35,000. And that is for a single entity. That figure also excludes the costs for legal review and consultation. Nor does it include indirect costs such as those connected with consumer confusion and customer service. We can expect that some consumers will be surprised to receive solicitations after they have opted out, not understanding that a source other than a consumer reporting agency was used to select them. In addition, it excludes other indirect costs such as the increased costs of marketing and getting new customers if use of prescreening, the most efficient means to market credit cards, is significantly curtailed by the new notice.

Conclusion

ABA commends the Commission's efforts to make the opt out notice easier for consumers to understand. The model language will be especially helpful. We recommend, however, that it adopt the improved version rather than the layered version, as proposed. The improved version overall was as effective in conveying the key points identified by the Commission. However, the improved version will better ensure the viability of prescreening, a critical element for information consumer about their credit choices and for ensuring the continued lively competitiveness of the consumer credit market.

Thank you for the opportunity to comment on this important proposal. We are happy to provide any additional information.

Sincerely,

Nessa Eileen Feddis