

# Privacy Rights Clearinghouse

3100 – 5<sup>th</sup> Ave., Suite B              Voice: (619) 298-3396    E-mail: [bgivens@privacyrights.org](mailto:bgivens@privacyrights.org)  
San Diego, CA 92103              Fax: (619) 298-5681    Web: [www.privacyrights.org](http://www.privacyrights.org)

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Federal Trade Commission  
Office of the Secretary, Room H-159 (Annex H)  
600 Pennsylvania Avenue, N.W.,  
Washington, D.C. 20580

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## **RE: Comments on FACTA Prescreen Rule, Project No. R411010**

The Privacy Rights Clearinghouse (PRC)<sup>1</sup> appreciates the opportunity to comment on the Federal Trade Commission's (FTC or Commission) proposed regulations to improve prescreen opt-out notices. Generally, we believe the notice scheme included in the proposal shows great improvement over existing notices. We also commend the FTC for developing the proposal based upon consumer testing.

Still, the Commission *can* and *should* do more. As discussed below, our main concerns are that the proposal allows companies too much flexibility to alter the notice and to include extraneous information, threatening to dilute the important message the notice is intended to deliver. We provide the following comments on ways the Commission can improve on this important consumer notice.

1. Introduction
2. Purpose of the Notice
3. Proposed Notice
4. Additional Information in the Long Notice
5. Conclusions

### **1. Introduction**

There's nothing new about consumer rights to notice and opt-out for prescreened credit and insurance offers. For years, consumers have received such offers with required notices and opt-out telephone numbers buried in fine print along with other mandatory legal notices. The result: Consumers seldom saw these notices and relatively few called the required opt-out number.

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<sup>1</sup> The Privacy Rights Clearinghouse is a nonprofit consumer education and advocacy organization based in San Diego, CA, and established in 1992. The PRC advises consumers on a variety of informational privacy issues, including financial privacy, medical privacy and identity theft, through a series of fact sheets as well as individual counseling available via telephone and e-mail. It represents consumers' interests in legislative and regulatory proceedings on the state and federal levels. [www.privacyrights.org](http://www.privacyrights.org)

Recognizing the inadequacy of the existing notice scheme along with the importance of this notice, Congress amended the Fair Credit Reporting Act (FCRA) Section 615(d) to improve consumers' chances of seeing the notice and acting to stop unwanted solicitations. The Fair and Accurate Credit Transaction Act of 2003, Pub. L. 108-159, 117 Stat. 1952 (FACTA) adds the requirement that prescreened offers "...be presented in such format and in such type size and manner as to be simple and easy to understand..." with details to be implemented by the Commission in coordination with the federal banking agencies and the National Credit Union Administration (NCUA).

The Congressional mandate in FACTA for notices that are "simple and easy to understand" sends a strong signal from Congress that: (1) the message intended by the new FCRA §615 contains an important consumer right; and (2) existing notices fail to give consumers sufficient information necessary to exercise those rights. Congress has given the Commission wide latitude to adopt strong protective measures to carry out the purpose of the new FACT §615(d)(2)(B). A straightforward explanation of rights and choices is modest compensation for consumers already disadvantaged by this opt-out scheme.

## **2. Purpose of the Notice**

The Commission's proposal to implement the stricter notice requirements required by FACTA notes that the purpose of the change is to "enhance disclosure of the means available to opt out of prescreened lists." Unfortunately, the Commission's proposal does not go beyond this surface explanation to discuss *why* enhanced disclosure is desirable and necessary.

We believe there are two important public policy reasons behind the need for enhanced disclosure, namely: (1) the need to address public backlash against unwanted marketing, and (2) to aid in identity theft prevention.

Consumer sentiment has come out strongly in recent years against intrusions of unwanted marketing. This includes telemarketing calls, junk faxes, e-mail or spam, and the deluge of unwanted solicitations consumers receive in their postal mailboxes each day. Both Congress and the Commission, along with other federal agencies, have addressed consumer concerns about unwanted marketing in a number of ways. Indeed, Congress recognized consumer frustration with unwanted marketing in FACTA when it added §624 to the FCRA, giving consumers another opt-out to stop sharing of personal information among corporate affiliates for marketing purposes.

Still, when it comes to unsolicited marketing, prescreened credit and insurance offers are in a category all their own. First, *billions* of such offers are mailed to individuals each year. Second, these offers are anything but random. Recipients of prescreened offers are targeted based upon credit standing derived directly from the three national credit reporting agencies – Experian, TransUnion, and Equifax. – repositories of a consumer's complete credit history.

The circumstances under which these offers are generated include elements ripe for identity theft: (1) The offers, clearly distinguishable from the mailing envelope itself, flag a consumer who is, at least preliminarily, considered a good credit risk. (2) The offers are mailed without prior warning to the consumer, who has no way to predict that the offers are in the mail. Thus, consumers have no means of early warning that an offer may have been stolen and a fraudulent account opened.

We know of no reports or studies that provide statistics about identify theft cases that result from fraudulent use of prescreened credit offers. In fact, most victims do not know how the thief obtained their personal information. However, the unique opportunity for identity thieves created by unsolicited offers has resulted in the inclusion in nearly every list of identity theft prevention tips advice on opting out of such offers and on shredding offers before disposing of them. Experience has shown that once a thief has basic information in hand, it is quite easy to change an address and apply for credit fraudulently.

We *do know*, and the Commission's consumer publications agree, that theft of mail is frequently the means by which a thief gets personal information. The Commission's publication, *Understanding Identity Theft*, in explaining how identity theft happens, states as follows:

- They steal mail, including bank and credit card statements, prescreened credit offers, new checks, or tax information.
- They complete a "change of address form" to divert mail to another location.

[www.consumer.gov/idtheft/understanding\\_idt.html#2](http://www.consumer.gov/idtheft/understanding_idt.html#2)

In short, enhanced notice is necessary because consumers want to curtail unwanted marketing and because prescreened credit offers present a unique opportunity for identity thieves who steal mail.

### **3. Proposed Notice**

We support the Commission's proposal to provide a layered notice. The proposal calls for a "short notice" on the principal promotional document. The short notice includes the most important information, including opt-out telephone number, with direction to a  "long notice" located elsewhere in the solicitation.

In response to questions posed by the Commission for comment, we offer the following as way to improve the notices:

- The final rule should define "principal promotional document" as the cover letter or other document the consumer sees first when opening the solicitation.
- The short notice should include the statement in Spanish that notice is also available in Spanish. We appreciate that the Commission's proposal includes a Spanish language version of the notice. However, we see nothing in the proposed rule that requires notice that this choice is available.

- Standards for both the short and long notice should be mandatory rather than discretionary. The final rule, for example, should *require* rather than *suggest* that the short form notice be inside a border.
- The long notice should be on the reverse side of where the short notice appears. Consumers should not have to search through multiple solicitation documents that could be included in a prescreened offer. The long notice when clearly identified on the reverse side of the principal promotion document would be most likely to be seen.
- The long notice should include contact information for the three national consumer reporting agencies. This should include telephone numbers, mailing address, and web site.
- The minimum 8-point type size for the long notice is too small. Even with the enhancements shown on the sample notice, the long notice can be overlooked in the dense text, some of which is also intended and captioned. We recommend that the type size for the long notice be at least 10 point, preferably 12 point. Readability experts these days are even recommending that publications be in 14 point for the growing population over age 50.

#### **4. Additional Information in the Long Notice**

The proposed rule prohibits additional information in the short notice, but allows extraneous information to be included in the long notice. We *strongly* disagree with this proposal and urge the Commission to change this in the final rule.

The Commission's discussion and proposed Rule §642.3(b) allows additional information in the long notice that does not interfere with, detract from, contradict, or otherwise undermine the purpose of the opt-out notice. This is a subjective standard, guaranteed to infuse the required notice with confusing marketing messages, the very problem the notice intends to overcome.

More troubling still are examples of what the Commission believes would be appropriate messages to be included in the long notice. The Commission cites three examples of appropriate items to be included in the long notice:

- The possible usefulness of prescreened offers in making product choices.
- The fact that opting out would not eliminate all mailed solicitations for credit or insurance.
- The need to provide a Social Security number when calling the opt-out phone number.

Allowing marketers to point out the benefits of prescreened offers in the same text as the opt-out notice does precisely what the proposed rule says it should not do: It undermines the purpose of the notice with the intent of persuading the consumer *not* to opt-out. If the Commission continues to allow this in the final rule, it should also *require counter statements* about the reasons to opt-out. For example:

- Opting out will stop most unwanted solicitations generated by lists from credit bureaus.
- Opting out could reduce your risk of identity theft from stolen mail.

The sample statement about Social Security numbers especially works to undermine the purpose of the notice. Consumers are consistently advised to guard their Social Security number as a way to protect against identity theft. Implicit in the item the Commission finds appropriate, is the message that consumers who choose to opt-out may face an increased risk of fraud. What this message fails to tell consumers is that the opt-out is with the national credit bureaus, not the financial institution that sent the solicitation. And, credit bureaus are required by law to safeguard consumer data, including the Social Security number.

Over the years, the PRC has been contacted by many consumers who are concerned about supplying the Social Security number when opting out of prescreened offers. Our response to them is in two parts. First, we tell them that we believe that the SSN should *not* be a requirement of opting out. We add that we have discussed this requirement with the industry association CDIA and with the FTC on several occasions, to encourage them to change the policy. We also tell those who've complained about the SSN requirement that to date we and other consumer organizations who have protested the SSN requirement have not been successful in getting the policy changed. Second, we assuage the concerns of individuals who have complained to us by stating that to the best of our knowledge no one has become a victim of identity theft by providing the SSN when opting out of prescreened offers of credit. We add that in our opinion, there is a greater threat from *not* opting out because prescreened offers are a target of mailbox thieves.

As an aside, if the credit reporting industry and the FTC continue to insist that the SSN is a required part of the opt-out process, we recommend that only the last four (4) digits of the SSN be required of individuals who take advantage of the opt-out opportunity.

## **5. Conclusions**

Overall, we believe the Commission's proposal to improve opt-out notices for prescreened credit and insurance offers makes great strides in improving consumer choice and in increasing the number of individuals who take advantage of opt-out opportunities.

We are particularly encouraged by the Commission's proposed reliance on consumer testing in developing the prescreening opt-out rule. We urge the Commission to follow this direction in developing other consumer notices such as the one required by Gramm-Leach-Bliley.

Sincerely,

Beth Givens, Director

Tena Friery, Research Director  
Privacy Rights Clearinghouse