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

Re: ***FACTA Prescreen Rule, Project No. R411010***

Discover Bank submits these comments in response to the Commission's Notice of Proposed Rulemaking on the implementation of the Fair Credit Reporting Act requirement regarding notices of consumers' right to opt out of prescreened solicitations for credit or insurance. Our comments address credit prescreening only.

Discover Bank, the sole issuer of the Discover Card, is one of the largest issuers of general-purpose credit cards, and a major user of prescreened credit card solicitations. Prescreening is the principal tool used by Discover Card and other major card issuers to identify creditworthy consumers and offer them credit products most suitable for their individual needs. It has played a major role in enhancing competitiveness among creditors, increasing the availability of credit, and lowering consumers' credit costs. It is therefore vitally important that the value of prescreening not be impaired so that this tool can continue to benefit the largest number of consumers.

Introduction and Summary

In implementing the FACT Act requirement that prescreening opt out notices be "simple and easy to understand," the Commission should be mindful of two objectives. The first is to craft a rule that provides adequate guidance to entities that engage in prescreening, principally regulated financial institutions.[1] The second is to ensure that the rule, consistent with the Commission's consumer protection mission, encourages consumers to make decisions about prescreening that are in their best interest.

We believe that adoption of the proposed definition of "simple and easy to understand" would foster both of these objectives. It would ensure that financial institutions understand that prescreening opt-out notice cannot be printed in an unreadable font size, buried in footnotes, written in "legalese" or captioned in a manner that is not understandable to the average consumer. It would also provide guidelines for consumer notices that provide a clear and understandable information about the right to opt out of receiving prescreened offers.

On the other hand, we believe strongly that the notice format requirements in the proposed Rule are not in the best interest of consumers. The proposal contemplates an opt out notification that is more prominent than the credit offer itself and that dwarfs other consumer disclosures, such as the APR and "Schumer box" disclosures. It requires, in effect, a brief disclosure in a "cigarette warning label" format on the first page of every prescreened solicitation, while expressly prohibiting the inclusion in that notice of information about the benefits of prescreening. Together, these requirements step over the line of making policy rather than implementing it. They create the impression that prescreening is somehow an evil that consumers should avoid, an impression that could influence large numbers of consumers to opt out of credit prescreening without understanding the consequences of that decision. This would inevitably harm consumers and impair competition among financial services firms. It is a result that Congress clearly did not intend.

We urge the Commission to limit the rule to providing guidance as to the meaning of "simple and easy to understand" opt out notices. Prescriptive format requirements, notice placement mandates, and model disclosure forms should not be adopted in the absence of clear evidence that they would not have unintended negative consequences. [2]

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[1] Credit prescreening is used principally by banks that are regulated and examined by federal and state regulators. Since prescreened offers originate largely from regulated entities that are examined for compliance with the Fair Credit Reporting Act, including the prescreening rules, the need for prescriptive guidance from the Commission is less important than would be the case for business practices engaged in by entities not subject to financial regulation and examination.

[2] Federal Reserve Board is currently conducting a study of prescreening pursuant to Section 213 of the FACT Act. While the Board has not yet completed its study (the results are to be reported to Congress in December), the comment period has closed. We urge the Commission and staff to review the comments that have been filed with the Board (including comments filed by Discover Bank) as it develops the prescreening notice rule. The comments contain useful information about the consumer right to opt out of prescreening, and responses to the Board's questions about whether consumers incur costs or other adverse effects as a result of prescreening and the implications of policies that would restrict prescreening. It is revealing that the comment record is devoid of information suggesting that an increased rate of consumer opt outs would be beneficial.

The Proposed Notice Should Not Advocate Opting Out of Prescreening

The Commission's sole role here is to ensure that consumers receive simple and understandable prescreening opt out notices. The Commission should avoid actions, both in developing the notice rule and in conducting the prescreening "public awareness campaign" required by the FACT Act, that would have the effect of suggesting that opting out is beneficial or encouraging consumers to exercise this right. Such action would not be in the best interest of consumers and would be contrary to the intent of Congress.

Prescreening is not telemarketing. The Commission's success in implementing the National Do-Not-Call list should not inform its implementation of the prescreening rule. The success of the current rule should not be measured in terms of the number of consumers who exercise their right to opt-out of prescreening.

Opting out may be an appropriate response to telemarketing calls a consumer regards as intrusive or annoying. But opting out of credit prescreening provides no demonstrable value, and can actually be detrimental to most customers. Opting out will not even spare consumers the minimal inconvenience of discarding unwanted mail (since non-prescreened invitations to apply for credit will not be affected). While avoiding prescreening may be of some interest to high net worth individuals who feel they will never have a future need for credit at better terms than they currently enjoy, this questionable benefit hardly justifies a notice that would suggest that opting out of prescreening is a benefit to consumers generally.

The supposed benefits of avoiding prescreened credit offers have little basis in fact. For example, claims that opting out of prescreened credit offers will reduce a consumer's exposure to the risk of identity theft are simply inconsistent with the fact that "information from prescreened solicitations is rarely used to commit identity theft."[3] This is principally because in order to obtain credit via a prescreened application, a would-be thief must take several steps that would trigger fraud investigations and ultimately prevent the issuance of the credit card or other extension of credit to the thief. (These include replacing the intended recipient's address with his own, attempting to guess the intended recipient's Social Security number, or submitting one that differs from the number associated with the intended recipient, and supplying other identification information.) The generic invitations to apply for credit that replace prescreened offers when consumers opt out are more, not less, susceptible than prescreened offers to abuse by identity thieves.

Concerns that prescreening involves unwarranted invasions of privacy are also misplaced. They are based on the incorrect assumption that the FCRA allows creditors to obtain "full" credit reports and look through them for prospective customers. Consumer

[3] M. Turner, *"The Fair Credit Reporting Act: Access, Efficiency & Opportunity" (Information Policy Institute, 2003),* at pp. 61-62. Dr. Turner's study concluded that proposals to ban prescreening as a means of stemming identity theft "would likely result in an increase in fraud and identity theft – precisely the opposite of the intended effect." (*Id*.)

privacy is protected by the FCRA prescreening requirements that permit consumer reporting agencies to do no more than prepare lists of individuals who meet a creditor's pre-established lending criteria, and obligate the lender to make a "firm offer of credit" to all individuals who satisfy the criteria. Other information in a consumer report about the individual is not divulged.

Similarly, it is untrue that opting out of prescreened offers will reduce the volume of solicitations that an individual may receive. True, preapproved offers will be blocked, but an opt out will not stop the receipt of *invitations to apply* for credit that are not based on consumer report information and are targeted instead on the basis of other information about the consumer (e.g., location of residence, occupation, club memberships, alumni status, reading habits). Indeed, an individual who, upon receipt of a bank's prescreened offer, opts out of future prescreening is likely to receive invitations to apply for credit from the same institutions that had been sending prescreened offers of credit. These invitations to apply often look very similar to prescreened offers (and might lead the consumer to conclude that his or her opt out request had not been implemented), but they are not the same. Because the lender does not have information about the consumer's creditworthiness, the invitation is not "preapproved" and may promote less favorable card terms than the same individual would receive in a prescreened offer.

For most consumers, opting out of prescreening will have the adverse effect of depriving them of information they may value in the future and that may not be available other than through prescreened offers. (If the "best" offers were communicated to the general public through advertising or other means, large numbers of unqualified individuals might apply, forcing lenders to incur the costs of obtaining credit reports on these individuals, as well as the costs attendant with adverse action procedures and the furnishing of free credit reports to those whose applications are denied).

Opting out of prescreening will insulate most consumers from more favorable credit offers that become available as the consumer's creditworthiness improves over time and as credit needs and products evolve. A young consumer who opts out of prescreening because he "does not need" an additional credit card will be deprived of information that may be of interest later, when he or she may have a full-time job, a new family, a different credit profile, and an interest in additional unsecured credit, an automobile loan or a home mortgage. This individual may not realize that an opt-out decision made years earlier is blocking useful information about financial services appropriate to his or her current financial situation.

Worse, consumers who opt out of prescreening and subsequently shop for credit by mailing applications to lenders who they believe are offering favorable terms may actually drive down their own credit scores and reduce their ability to find better credit. Consumers who do not receive prescreened solicitations are not in a position to compare real offers (i.e., offers at the specific terms for which the consumer qualifies). Instead, they must search for loan products, and when they find appealing ones, submit loan applications to find out if they qualify. This is not just an inconvenience, but can impair the consumer's creditworthiness.

Credit applications submitted by a consumer are reflected on the consumer's credit report as "inquiries." Other creditors may view multiple inquiries as an indicator of increased risk.[4] Prescreening inquiries, on the other hand, though disclosed to consumers who obtain copies of their own credit reports, are not reported to other creditors, and do not affect the consumer's credit profile. Thus, consumers who opt out of prescreening may not only lose the opportunity to learn about the attractive credit products for which they qualify, they may find that other efforts to find the best deals can reduce their chances of qualifying.

Finally, to the extent that the proposed rule would encourage large numbers of consumers to opt out of prescreened solicitations, it will have an adverse impact on competition. Prescreening is a highly efficient and cost-effective way for financial institutions to offer credit to individuals who are most likely to be both interested and qualified (creditworthy). As a result, it is a tool commonly used by financial institutions to compete with other lenders on a regional or nationwide basis. Prescreening has enabled these institutions to offer credit to consumers who once shopped for credit primarily by comparing products offered by local banks where they maintained checking or savings accounts. If a significant number of consumers construe the layered notice as a message that prescreening is harmful, and opt out, lenders will be forced to use less efficient and more expensive methods to find new customers. The result would be a less competitive market.

Congress Did Not Authorize or Intend the Commission to Regulate the Placement of the Prescreening Notice

Section 213 of the FACT Act authorizes the Commission to write rules to ensure that the prescreening notice is "presented in such format and in such type size and manner as to be simple and easy to understand." This language does not contemplate a rule that directs the notice to be placed on the first page of each prescreened solicitation, or anywhere else for that matter. A placement requirement could have easily been included in the statutory language had Congress intended to mandate it.

The concept of a "simple and easy to understand" notice clearly does not relate to the location of the disclosure, but rather to its readability, the complexity of the language used, and its appearance (e.g., the type size or font). The Commission has properly addressed these matters in the proposed definition of that term (Section 642.2 (a)). A notice that is complex or confusing can be improved only by changing the wording, syntax or punctuation: it does not become "simple and easy to understand" by moving it from one page of a solicitation to another or by changing its placement on the page.

[4] The Federal Trade Commission has observed that new account applications may be regarded as "inquiries" on the consumer's credit report and adversely impact the consumer's credit score. (Notice of Proposed Rulemaking implementing the FACT Act's identity theft provisions (RIN 3084-AA94)).

Any authority to address the placement or prominence of the prescreening notice emanates not from the "simple and easy to understand" requirement of the FCRA, but from its requirement that the prescreening notice be "clear and conspicuous." The conspicuousness requirement prevents a lender from placing the notice where it will not be noticed or printing it in type size that minimizes its importance. This requirement has never been interpreted as an affirmative directive on where the notice must be placed in a solicitation.

That Congress did not authorize the Commission to regulate the prominence or format of the notice is evident from other sections of the FACT Act where the statute expressly confers this regulatory authority. For example:

> Section 151 - Directs regulators to devise a "<u>model summary of rights</u>" for the Act's identity theft notice.
>
> Section 212 – Statute <u>specifies content of notice</u> about the availability of credit scores.
>
> Section 217 - Requires Federal Reserve Board to "<u>prescribe a brief</u> <u>model disclosure</u>" regarding the furnishing of information to consumer reporting agencies by creditors and other furnishers.
>
> Sec. 311 – Requires the Commission and the Federal Reserve Board to <u>prescribe a "model notice"</u> addressing risk-based pricing.

These provisions illustrate that in writing the FACT Act, Congress knew how to direct the agencies implementing the law to mandate the placement and content of required notices or to issue model forms. Section 213 does not contain comparable language directing the Commission to do so.

The Commission's Prominent Placement Requirement Conflicts with Other Disclosure Requirements.

In implementing disclosure requirements of the Truth in Lending Act and other provisions of the Consumer Credit Protection Act, federal financial regulators have long balanced the requirement that these disclosures be "clear and conspicuous" with the need to give the appropriate level of prominence to the most important disclosures.

There is some statutory guidance regarding the prominence of some of these disclosures. This indicates that when Congress intends to impose a prominence or placement requirement on a disclosure it does so explicitly. For example, Section 122(a) of the Truth in Lending Act requires the annual percentage rate and finance charge to be disclosed "*more conspicuously* than other terms." The Fair Credit and Charge Card Disclosure Act requires certain key terms in credit card applications and solicitations to be displayed "*in a tabular format*" and other information to be displayed "in a conspicuous *and prominent* location." None of these provisions, including the "prominent location" requirement, has been construed as requiring the information to be displayed on the front page of a solicitation.

A mandate to include a prominent prescreening notice on the first page of a credit card solicitation would elevate this notification to a placement that is more noticeable than other important consumer disclosures. It would, for example, become more prominent than the annual percentage rate and finance charge disclosures that have long been regarded as the most important information that must be disclosed to the consumer, because they are essential to understanding the cost of the credit product and comparing the offering to others. There is no indication that Congress intended the prescreening notice to take precedence over the APR or other credit card disclosures, [5] and the Commission has cited none.

In the mind of the consumer, prominence is equated with importance. In addition, consumers have come to associate prominent notices required by the government (such as the cigarette warning label and labels on drugs) with a government recognition of a danger. The enhanced prominence of the prescreening notice surely would signal to some, and perhaps many, that prescreening is a threat to the consumer and that the prescreening opt out number is the most important information the consumer needs in evaluating the solicitation. Other information - such as the features of the credit card, the costs and fees associated with using it, and the consequences of calling the prescreening opt out number – would all receive less attention.

The Rule Mandates the Suppression of Valuable Information About Prescreening

We firmly believe that the most important thing that a consumer should understand about opting out of credit prescreening is not the procedure for doing so, but the consequences of that decision. The proposed "layered notice" makes it unlikely that this information can be adequately conveyed. It mandates a front-page prominent opt-out disclosure that includes the toll-free number consumers may use for that purpose, while prohibiting lenders from explaining the benefits of prescreening or the consequences of opting out.

Allowing financial institutions to include supplementary information only as part of the "long notice" is not an adequate way to provide a useful disclosure. The prominence given to the short notice, and the inclusion of the toll free number in that notice, makes it very likely that many consumers will call the opt-out number without ever reading the more detailed information in the long notice. The "educatable moment" on whether to opt out of prescreening is not *after* the decision to opt out has been made.

[5] For other lenders, such as home equity lenders, the proposed requirement also creates confusion about the interrelationship of the prescreening disclosure to the others. The APR must appear "more conspicuously" than other information. Does a mandate to place the prescreening notice on the first page of a solicitation mean that the APR disclosure must appear on that page as well? Must the "Schumer Box" disclosures also be moved to the first page to insure that they are disclosed in a "prominent location"?

While there is limited legislative history about the purpose of the "simple and easy to understand" provision, there is nothing to indicate that Congress intended the Commission to devise a rule that prohibits the effective communication of important information about prescreening. To the contrary, the record reflects the recognition that consumers need balanced information about prescreening in order to make informed decisions about it. For example, during the House of Representatives debate on the FACT Act and the FTC's role in conducting a public awareness campaign about prescreening, Rep. Spencer Bachus, Chairman of the Financial Institutions and Consumer Credit Subcommittee, observed that:

> "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."[6]

Chairman Bachus and Rep. Paul Kanjorski recently reiterated this concern. In an October 12, 2004 letter to Commission Chairman Majoras addressing the proposed opt out rule, they stated it is not enough to inform consumers "only about the mechanics for opting out of prescreened offers of credit." In order for consumers to make an informed decision, they said, "consumers must have all relevant information *at the time they exercise their [opt out] preference*." (Emphasis added). The letter concludes:

> "Without balanced information about the prescreening option *at the time it is presented*, consumers could deprive themselves of opportunities for better credit offers." [7]

The layered notice proposal is inconsistent with the goal of providing consumers with information at the time it is most useful to them: before they call the toll-free opt-out number. For that reason, the layered notice approach to the prescreening disclosure is not appropriate. Moreover, as discussed above, it is neither proper nor necessary for the Commission to mandate, for the first time, the content of the opt out notice. That matter that is already addressed by the proposed rule provision that clarifies the meaning of "simple and easy to understand." [8] However, should the Commission elect to prescribe the substance of the notice, the rule should expressly permit the inclusion of a statement similar to the following:

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[6] Cong. Rec.H12119 (November 21, 2003).

[7] Letter of Rep. Spencer Bachus and Rep. Paul Kanjorski to Hon. Deborah Platt Majoras, October 12, 2004 (emphasis added).

[8] References in the FACT Act language to the "format" and "type size" of the prescreening notice are not a mandate to the Commission to write a rule specifying the format and type size that must be used. These issues could be addressed through guidance in the "simple and easy to understand" definition. This could take the form of a directive that incorporates the statutory language, or a provision requiring the notice to avoid the use of type size, placement or format that makes the notice difficult to find, read or understand.

> “Opting out of prescreening reduces the opportunity to learn about credit offers at competitive terms for which you qualify. These offers may not be available through other sources.”

The Consumer Study Does Not Support the Layered Notice Approach

The study utilized by the Commission in the development of the layered notice is flawed for two reasons. It studied only the ability of consumers to comprehend different versions of a notice (and used an inappropriate method for testing comprehension), and it failed to study the most important question about the notice, i.e., the message about prescreening that consumers perceive from the notice options. In any event, it fails to make the case for a mandatory layered notice.

The Study Does Not Support the Conclusion that a Layered Notice is Preferable

Even under the artificial methodology used in the study (discussed below), the differences in consumers’ ability to the recall the messages in the “improved” versions of the notices, as opposed to the “layered” notice, are not material. For example, the study found that recall rate on the ability to opt out was 30% for the layered notice verses 27.5% for the improved notice, a difference the study noted that “is not statistically significant.” Similarly, recall of that message by consumers who were given a “forced exposure” to different versions of the disclosure was 74.4% for the “layered” notice versus 69.1% for the “improved.” This difference, too, is “not statistically significant” according to the study.

Differences of this magnitude, particularly differences that are not “statistically significant” are not adequate to support a new legal mandate requiring layered notices.

Methodological Flaws in the Study

The study conducted on behalf of the Commission was in essence a study of consumers’ short-term memory. It demonstrates little more than the obvious point that consumers can recall a short message better than a lengthy one.

The study involved consumers “intercepted” in shopping malls, although it is unclear if any of these were individuals were likely recipients of prescreened offers.[9] Participants

[9] Survey participants were asked if they had received in the mail “an invitation to apply for a credit card.” (Report of Mankj Hastak, September 2004, Appendix B.) This question does not distinguish between recipients of prescreened *offers of credit* and recipients of *invitations to apply* for credit that did not involve prescreening, so it is unclear whether any actual or likely recipients of prescreened offers were surveyed. We note that consumers who were employed by “banks or financial services companies” (or had family members employed in the financial services industry) were excluded. This was presumably done to avoid

were shown offers containing different versions of prescreening notices. Then, in a move more appropriate to a Three Card Monte game, the notices were "removed from view," and the consumers were asked a series of questions about the document they had seen. Even the "forced exposure" phase of the study (where consumers were shown highlighted versions of the disclosures) also involved asking consumers to look at the disclosures, and asking questions about the notices after they were "removed from view." Despite what it purports to show, the only legitimate conclusion that can be drawn from this study technique is that, not surprisingly, a shorter notice is easier to remember.

Testing consumers' short-term recall it is not a useful way to measure their ability to comprehend offers that are received in the mail and can be read when someone will not "remove them from view." The methodology used in the study may be an appropriate way to gauge consumers' comprehension of radio or television advertising or disclosures, where the message is heard or seen momentarily. But prescreened offers are not disseminated in this manner: they arrive in the mail and consumers can read them in full, reread them, and retain them if they care to do so.

Consumers do not routinely look at preapproved offers while standing in a shopping mall, and the contents of prescreened offers, in real life, are not hidden from the recipient's view after the consumer first sees them. Thus, the study's claim to have assessed consumer understanding "under fairly natural viewing conditions" is wholly inconsistent with what really occurred.

Another questionable aspect of the study was its attempt to measure consumers' comprehension of the fact "that opting out of prescreened solicitations will not stop all solicitations" (Q. 10). Unfortunately, the question actually posed to survey respondents did not ask them about "solicitations" but asked instead about credit "offers." According to the study's author, the "correct" answer to the question is that individuals who opt out of prescreening will "continue to receive some <u>offers</u>" (emphasis added). But this is actually incorrect. In reality, individuals who opt out of prescreening will no longer receive any preapproved offers. The solicitations that they may continue to receive are not firm offers of credit that the lender is legally obliged to extend to all qualified respondents, but only *invitations to apply* for credit. The survey's confusing question is based on an incorrect premise and should not be the basis for any conclusions.

The Study Did Not Explore the Real Questions About Opting Out of Prescreened Offers

A more important area of inquiry is the message that is conveyed to consumers who are exposed to different versions of a prescreening notice. Do consumers know what "prescreening" is, and if not, does the notice help them to understand it (or at least not mislead them)? Does a prominent opt out message convey the impression that the consumer would benefit by opting out of prescreening? Does the "cigarette warning

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biased responses, though it was unnecessarily broad for that purpose (e.g., it exclude stockbrokers and many others not involved in prescreening). The survey model did not attempt to exclude other individuals who might have opinions about credit cards or prescreening that might bias them against prescreening.

label" format suggest that the government has concluded that prescreening is harmful to consumers? Does the notice impair consumers' ability to understand the benefits of prescreening and/or the potential negative consequences of opting out?

Understanding whether a notice is likely to motivate consumer behavior (i.e., make them more or less likely to exercise their opt out right) would be a more useful tool than a study of what consumers remember after looking at a notice. The study fails to look at this. It should not be a basis for a notice requirement that could fundamentally change consumer behavior and the competitive environment.

The study missed an opportunity to explore the ability of different notices to improve consumers' understanding of the benefits of prescreened offers. In the single question addressing this issue (Q. 13), consumers were asked whether the notices they had been shown (but were no loner permitted to read) "said or suggested" that receiving prescreened offers could be useful in allowing the consumer to "compare rates or terms for different offers" or "improve your credit rating." Consumer understanding of other potential benefits of prescreening and were not tested by the two-option question. Moreover, one of the two options that consumer could select (improved credit scores) is referred by the study's author as a "decoy" question, presumably because the author feels that notices do not state or suggest anything about the impact of prescreening on credit scores. (Respondents were instructed to base answers "only on the mailing you just read and not on your prior knowledge or beliefs, OK?")

In reality, of course, consumers who elect to receive prescreened offers can and do use the new credit they obtain to improve their credit ratings. For example, accepting a prescreened offer for a low rate credit card, or a card that offers a 0% APR on transferred balances, allows the customer to reduce outstanding loan balances, pay off other accounts, lower credit "utilization" levels, and avoid delinquencies, actions that can improve credit ratings. Rather than addressing this understanding in a "decoy" question, the study might have tested notices that actually tried to convey this information to consumers.

The FCRA Does Not Require Prescreening Opt-Out Notices for Electronic Solicitations

The Commission's proposed rules would require that prescreening opt-out notices be included in electronic solicitations. Such a requirement exceeds the Commission's statutory authority.

The FCRA requires a prescreening opt-out notice with each "written solicitation." However, the FCRA clearly does not treat "electronic" communications as being "written." In section 610, for example, the FCRA generally requires that consumer reporting agencies provide certain disclosures "in writing." However, if the agency wishes to provide those disclosures "by electronic means," the agency must first obtain the consumer's authorization. 15 U.S.C. 1681h(b)(2). The legislative history of this section confirms that "electronic" disclosures were considered by the drafters to be "non-written." S. Rep. No. 185, 104th Cong., 1st Sess. at 42 (Dec. 14, 1995) ("[N]on-written disclosures may be made to the consumer in person, by telephone, [or] by electronic means…."). Similarly, section 15 requires that users of consumer reports provide adverse action notices "orally, in writing, or electronically," another clear demonstration that "electronic" communications are not deemed "written" under the FCRA. In the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., Congress likewise distinguished between communications that are "in writing" and those that are "electronic." The Act provides that laws requiring records be "in writing" may be satisfied by an "electronic record" provided that certain enumerated requirements are met. 15 U.S.C. 7001(c). If electronic records were deemed writings, these provisions of the Act would be meaningless. For the above reasons, we respectfully urge the Commission to strike from the proposed rules any reference to electronic solicitations.

The Proposed Effective Date Provides Inadequate Compliance Time

The proposed 60-day effective date will impose difficult and costly compliance burdens, particularly for large users of prescreened solicitations. If adopted as currently proposed, the rule would require a recall of marketing materials currently in the "pipeline" (e.g., materials and inserts that have already been printed or are currently in preparation) and the development of new materials that comply with the new rules.

Compliance with the new requirements means far more than slipping a revised notice into solicitation envelopes. The proposed placement and format mandates fundamentally change the current "clear and conspicuous" notice requirement and render all current marketing materials obsolete. All materials used in connection with future prescreened credit offers, from the cover letter to the informational inserts, must be redesigned, retested,[10] reviewed for legal compliance (perhaps in consultation with bank regulators), and then readied for printing and mailing.

The short compliance period, like the Commission's estimation of compliance costs under the new rule, may be based on the misunderstanding that each lender uses a single solicitation format that can be changed with little effort in six hours' time.[11] In fact,

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[10] It is no secret that creditworthy consumers receive multiple prescreened offers. In order to motivate consumers to respond to an offer, lenders strive to make their solicitation materials attractive and readily understandable, a process that requires information about consumers' perception and receptivity to a particular solicitation piece. This is obtained through consultation with marketing experts, test marketing of revised materials, focus groups and other techniques. Because even small changes in the message or format of a solicitation can affect response rates, it is often necessary to separately test multiple versions of each solicitation piece.

[11] The Commission has greatly underestimated the costs of complying with the layered notice procedure. Using an analysis that assumes, incorrectly, that "the primary cost incurred by the rule will be incurred by the reformatting of solicitations" (ANPR, note 12), the Commission estimates this cost at $221.74 per business or no more than $166,305 industry-wide. In fact, the "primary cost" of the proposal to lenders would not result from the clerical tasks involved in reformatting solicitations, but rather from the massive

Discover and other large users of prescreening each use multiple solicitation letters and formats that would all have to be revised to comply with the new rule.

The task of conforming marketing materials to the new rule cannot be accomplished in 60 days, and lenders cannot begin revising solicitation materials in anticipation of the new rule until the requirements have been finalized. A 60-day effective date would effectively prevent the mailing of all prescreened offers until a considerable time after the 60-day period begins, because lenders will need additional time to develop and produce solicitation materials that are in compliance. Consumers, of course, would be denied the benefits of prescreened offers during this interval. We therefore urge the Commission to adopt a 180-day effective date for the rule.

Conclusion

A recent FTC staff study of another proposed mandatory financial disclosure (on mortgage broker compensation) found that misguided requirements can "confuse consumers" and "distort consumer decisions," (or "lead to worse decisions") and "harm competition." Without a careful analysis of what information consumers really need, how they will interpret and use the information, and the benefits and costs of a proposed disclosure, the study said, substantial costs can result. [12]

We believe that a careful analysis of the proposed layered notice on consumers and competition would demonstrate that the notice would lead to decisions that are bad for consumers and competitors alike. The Commission can avoid this result by abandoning the effort to devise a layered notice (with a prominent opt-out number on the first page of all solicitations), model form and notice placement mandate. At the very least, the Commission should defer action on this aspect of the rule until their impact can be better evaluated.

The Congressional directive to the Commission was simply to write a rule that insures that prescreening notices are "simple and easy to understand." This can be achieved by defining that term in a manner that prevents complicated or confusing notices that

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costs of acquiring new credit card accounts through other means if large numbers of consumers opt out of prescreening because they believed that opting out to be beneficial. If the notices have this impact on the effectiveness of prescreening, that technique would be replaced over time by less efficient and more costly advertising and solicitations programs, and consumers would pay more for credit. A cost estimation that fails to consider these indirect, but no less real, costs is misleading.

[12] "The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment…Or Why Disclosures Are Tricky", James M. Lacko and Janis K. Pappalardo (Bureau of Economics, Federal Trade Commission, October 5, 2004.) The study found that the broker compensation disclosures would do more harm than good, actually reducing consumers' ability to identify the best loan products and choose less expensive loans, while "lead[ing] to a significant anti-broker bias that may have anti-competitive effects on the mortgage loan market." We believe that, put to this same test, the proposed layered prescreening notice would fare no better. It, too, creates a bias (against prescreening) that would influence consumers to make the wrong opt out decision.

consumers cannot readily find or comprehend. The proposed definition of “simple and easy to understand” achieves this objective.

Respectfully submitted,

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