



CUNA & Affiliates
A Member of the Credit Union System

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August 15, 2004

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



RE: FACT Act Affiliate Marketing Rule, Matter No.
R411006

Dear Sir or Madam:

The Credit Union National Association (CUNA) is pleased to respond to the Federal Trade Commission's (FTC's) proposed rule implementing provisions of the Fair and Accurate Credit Transactions (FACT) Act that will provide consumers with the opportunity to "opt-out" before a business uses certain information provided by an affiliate to market its products or services to the consumer. By way of background, CUNA is the largest credit union trade association, representing more than 90% of our nation's nearly 9,800 state and federal credit unions. The following comments were developed by CUNA with input from credit unions, credit union leagues, and CUNA's Consumer Protection Subcommittee.

These FACT Act restrictions will apply to "eligibility information," which generally means information bearing on the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is expected to be collected or used to at least some extent as a factor in establishing credit or insurance eligibility. The FTC proposed rule will apply to state-chartered and privately insured credit unions, while the National Credit Union Administration's recent, similar proposal will apply to federal credit unions.

Summary of CUNA's Position

- CUNA does not believe the FTC should determine which party should be responsible for providing the notice. That decision should be made by the affiliated parties in a manner that will ensure compliance with the final rule, while minimizing the burden on the relationship between these parties.



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- Inquiries from consumers may be considered an exception to the requirement to provide a notice and opportunity to opt-out of certain marketing information. The FTC should remove the restrictions to this exception, such as the requirement that the inquiry be an affirmative request for information and that the consumer provide contact information.
- Another exception to the requirement to provide consumers with a notice and opportunity to opt-out is when the information is used in response to a communication initiated by the consumer. CUNA does not believe the FTC should impose the requirement that there be a request for information related to the product or service that is being solicited.
- CUNA believes oral opt-out notices should be permitted.
- It should be the decision of the credit union as to whether it wants to disclose in their opt-out notices the amount of time the member has to respond to the notice, as well as whether the credit union wants to disclose the period of time that the consumer's decision to opt-out will be honored.
- Credit unions should not be required to provide members with an electronic means to opt-out if they received the notice electronically, and credit unions should not be required to provide an envelope if they provide a written method for opting out.
- If the consumer terminates his or her relationship with an affiliated entity, the FTC has proposed that the opt-out in force at that time will continue to apply indefinitely, unless revoked by the consumer. This will be burdensome for credit unions to track without any corresponding benefits for members, as they will not likely receive solicitations after they terminate their member relationship.
- After the opt-out period expires, an extension notice and a new opportunity to opt-out must be provided to consumers before such solicitations may be made. The FTC has outlined a format for these extension notices that is different than the initial notice. CUNA believes credit unions should have the option to use the same format for the extension notice that they used for the initial notice, as this should be sufficient for providing consumers with a reasonable opportunity to extend their opt-out decision.
- CUNA urges the FTC to delay the mandatory compliance date for a reasonable period of time beyond the effective date, which will be only six months after the final version of this rule is issued. Because credit unions may elect to include these opt-out notices with the Gramm-Leach-Bliley Act (GLBA) privacy notices, we believe the mandatory compliance date could be tailored to take this into account. Specifically, financial institutions should be permitted to include the initial opt-out notice with the annual privacy notice that will be distributed in the one-year period after the effective date.

Discussion

Delivery of the opt-out notice

The FTC has proposed that the entity communicating the information about a consumer to its affiliate that plans to send the solicitation should be the one responsible for providing the notice to the consumer. This may be provided by the entity, the entity's agent, or through a joint notice with one or more affiliates. If sent by an agent, the opt-out notice must be in the name of the entity or common corporate name, and the entity, not the agent, assumes responsibility for failure to comply with the notice requirements.

We do not believe the FTC should determine which party should be responsible for providing the notice. That decision should be made by the affiliated parties in a manner that provides the required notice, while minimizing the burden on the relationship between these parties. The FACT Act does not mandate which party should provide the notice, and we believe the intent was to leave this decision to the affiliated parties.

Although the proposed rule permits notices to be issued by an "agent" of the entity responsible for providing the notice, which presumably may include the affiliate receiving the information, it appears that under the rule the entity communicating the information would be liable for complying with these requirements, an example being if the recipient used the information to make a solicitation before the consumer received the notice. We believe the liability should be imposed on the party providing the notice, whether it is the one communicating or receiving the information and, again, the parties themselves should make that decision.

If the receiving affiliate provides the notice, we believe the notice should not be separate from the solicitation. Credit union members receiving such information may be uncertain as to what information the opt-out would apply. Sending the notice with the solicitation will help members decide whether to opt-out, as they will have an example of the types of information that would be covered under the opt-out.

Exceptions for providing the opt-out notice

The FACT Act and the proposed rule provide a number of exceptions to the requirement to provide consumers with a notice and opportunity to opt-out. One exception is when the affiliated party receiving the information has a pre-existing business relationship with the consumer. Such a relationship can be established in a number of ways, one of which is when an inquiry or application by the consumer regarding a product or service has been made during the three-month period before the marketing solicitation was sent to the consumer. Under the proposed rule, an inquiry includes any affirmative request by a consumer for

information, such that the consumer would reasonably expect to receive the information from the affiliate about its products or services, and would also require the consumer to provide contact information.

We believe the FACT Act does not require such an affirmative request or require the consumer to provide contact information. Although we understand the objective of providing consumers with the opportunity to limit marketing solicitations, we do not believe restricting the term “inquiry” in this manner is necessary. It is our understanding that the intent of these provisions of the FACT Act was to limit solicitations initiated by businesses, not solicitations that may arise based on communications initiated by the consumer, which occurs when the consumer makes the original inquiry.

It is also not practical to require the consumer to provide contact information. The problem here is that there may be times when a consumer would be receptive to receiving marketing information for certain products or services when he or she calls the affiliated party, and the consumer may not know that he or she would have to provide contact information in order to receive such information. Also, the rule requires that contact information be provided during each inquiry. This is not practical as the consumer may assume that the affiliated party already has the contact information and that it would be unnecessary to provide it again, especially if the consumer has made multiple inquiries over a period of time.

Another exception to the requirement to provide consumers with a notice and opportunity to opt-out will be when the information is used in response to a communication initiated by the consumer. The FTC has determined that this must include a request for information related to the product or service that is being solicited.

The FACT Act does not include the requirement that there be a relationship to the product or service being solicited, and the FTC should not include such a requirement in the proposed rule. Again, for the reasons described above regarding pre-existing business relationships, we believe it should be permissible to solicit consumers when they initiate contact with the affiliated party, regardless of the reason for the contact. We believe this will not place significant burdens on credit union members. As not-for-profit financial institutions, credit unions are primarily interested in providing products and services that the members may want or need. It is important that members are aware of their financial options, and credit unions respect their members’ wishes regarding their decisions on these options.

Form and format of the opt-out notice

Credit unions have a number of concerns regarding the form and format of the opt-out notices. As proposed, oral opt-out notices would not be permitted, and

the FTC has requested comment on this issue. We believe oral opt-out notices should be permitted. The Fair Credit Reporting Act currently permits notices to be delivered orally, and this should apply to the opt-out notices on affiliate marketing, especially if careful records are compiled to indicate those that have elected to opt-out of receiving the information. We also note that the FACT Act does not prohibit oral notices. It may very well be that credit unions will prefer that such notices be provided in writing, but the choice should be made by the credit union, not the FTC.

Credit unions also believe that it should be their decision as to whether they want to disclose in their opt-out notices the amount of time that the member has to respond and indicate that they want to opt-out of receiving the marketing information. The FACT Act does not require that such a time period be stated in the notice, and it is also not required for the privacy notices under the GLBA. We believe these provisions of the FACT Act and the GLBA should be consistent to the extent possible, since credit unions may elect to include these opt-out notices as part of their annual privacy notices, as the FTC has envisioned.

It is also possible that members may be led to believe that they will not be permitted to opt-out after the deadline indicated in the notice, which would not be true as members will always have the right to opt-out, regardless of when they choose to exercise this right. We also see little harm if affiliated parties were to send solicitations if the consumer has not opted out after a certain period of time, since he or she always retains the right to opt-out of receiving this type of marketing information.

Under the proposed rule, a consumer's decision to opt-out must be honored for at least five years. We do not believe it is necessary to indicate in the notice how long this decision will be honored as such information will provide little value for consumers since they will receive another notice and opportunity to extend their opt-out decision.

Such a requirement may actually create unnecessary problems. As the FTC has indicated, it may be easier for an affiliated entity to not place an expiration date on the decision to opt-out, as this will alleviate the need to provide notices at a later time to extend the opt-out period and will also make this process more consistent with the opt-out provisions of the GLBA privacy notices. However, if a credit union were to initially impose a five-year time period and was required to disclose this, then it may send an additional notice if it decided to remove the expiration period to avoid the possibility that such a change would subject the credit union to claims that the initial notice was misleading. This unnecessary burden of providing these additional notices can be avoided if there is not a requirement to disclose when the opt-out decision will expire.

We are also concerned about the requirement to provide consumers with an electronic means to opt-out if they received the notices electronically after

agreeing to receive them in this manner. This will prevent credit unions from requesting that a member opt-out through other means, such as in writing or by calling a toll-free telephone number, if the member received the notice electronically. Again, such a requirement is not required for the GLBA privacy notices, which will create another unnecessary difficulty in combining these FACT Act notices with the annual privacy notices. The FTC has also proposed that affiliated entities be responsible for providing an envelope for those electing to opt-out in writing, which is also not required for the GLBA privacy notices.

Duration and extension of the opt-out period

If a consumer terminates his or her relationship with an affiliated entity, the FTC has proposed that the opt-out in force at that time will continue to apply indefinitely, unless revoked by the consumer. For those credit unions that may impose time periods regarding the duration of the opt-out period, we are concerned that it may be burdensome for them to track such terminations and to make the necessary adjustments. We see no corresponding benefits for members, as they will not likely receive solicitations after they terminate their member relationship.

If an affiliated entity chooses to impose a time period regarding the duration of the opt-out period, which must be at least five years, the entity must provide the consumer with another notice and opportunity to extend the opt-out period before sending marketing information after the opt-out period lapses. The proposed rule outlines the format for these notices. Although similar to the initial notice, the extension notice must include language indicating that the consumer's opt-out period has or is about to expire. This difference between the initial and extension notice is not required under the FACT Act. We believe it would be burdensome to require different formats, and there would not be any additional benefits for consumers. Providing another copy of the initial notice may be less burdensome and should be sufficient for providing consumers with a reasonable opportunity to extend their opt-out decision.

Delay of the mandatory compliance date

The FTC has requested comment as to whether the mandatory compliance date for this rule should be different than the effective date, which will be six months after the rule is issued in final form. We strongly urge that the mandatory compliance date be delayed by a reasonable amount of time. Because credit unions may elect to include these opt-out notices with the GLBA privacy notices, we believe the mandatory compliance date should be tailored to take this into account. Specifically, financial institutions should be permitted to include the initial opt out notices with the annual privacy notices that will be distributed in the one-year period after the effective date. This will give all financial institutions at least six months to comply with the final rule, while also ensuring that they will

not have to issue opt-out notices separately from their privacy notices if they choose to combine these two notices.

Thank you for the opportunity to comment on the proposed rule implementing the FACT Act provisions that will provide consumers with the opportunity to “opt-out” before a business uses certain information provided by an affiliate to market its products or services to the consumer. If you have questions about our comments, please contact Associate General Counsel Mary Dunn or me at (202) 638-5777.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey Bloch", written in a cursive style.

Jeffrey Bloch
Assistant General Counsel