



October 27, 2004

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

Project No: R411010 (FACTA Prescreen Rule)

Re: Prescreen Opt-Out Disclosure
69 FR 58861 (October 1, 2004)

Dear FTC Representative:

America's Community Bankers ("ACB")¹ welcomes the opportunity to comment on the proposal² issued by the Federal Trade Commission (the "Commission") to establish enhanced disclosures for informing consumers of the means available to elect not to receive prescreened offers of credit. The proposed regulations would establish a new standard for prescreened opt-out notices as required as required by the Fair and Accurate Credit Transactions Act of 2003³ ("FACTA") that require entities subject to the rule to present required prescreen notices in a "simple and easy to understand" manner.

ACB Position

As a general matter, ACB supports the efforts of lawmakers and the Commission to establish disclosure standards that are as simple and easy to understand as possible for consumers. However, we strongly oppose the proposed "layered notice" provision that would require all entities subject to the rule to provide both a short and long form version of the required prescreen notice.

Moreover, the proposed minimum characteristics for prescreen notices are overly prescriptive and would result in giving consumers the impression that the prescreen

¹America's Community Bankers is the member driven national trade association representing community banks that pursue progressive, entrepreneurial and service-oriented strategies to benefit their customers and communities. To learn more about ACB, visit www.AmericasCommunityBankers.com.

² 69 Fed. Reg. 58861 (October 1, 2004).

³ Pub. L. 108-159, 117 Stat. 1952 (Dec. 4, 2003).

disclosures were the most important disclosure provided. These requirements could potentially overshadow important consumer credit information provided in the statements required by the Truth in Lending Act (“TILA”) and its implementing regulation, Regulation Z.⁴ and other required disclosures.

ACB believes the Commission has far exceeded the clear intent of the statute and dramatically underestimated the burden associated with complying with the proposed regulations. ACB strongly urges the Commission to withdraw the layered notice approach mandated in this proposal and provide a basic framework for improved prescreening notices as required by the FACTA.

Proposal

The Fair Credit Reporting Act (“FCRA”)⁵ allows financial institutions and other entities subject to the FCRA to use a consumer report in connection with a credit or insurance transaction not initiated by the consumer. Such an offer is known as a “prescreened” credit or insurance offer. All prescreened offers must include a statement that describes: (1) that information from a credit report was used in connection with this offer; (2) the consumer received the offer because he/she met certain criteria; (3) the offer may be rescinded if it is determined the consumer does not meet the aforementioned criteria; and (4) the consumer has the right to prohibit consumer reporting agencies from making his/her information available for future prescreen offers.

The existing FCRA prescreen disclosures must be “clear and conspicuous” and provide the address and toll-free number a consumer may call to prohibit consumer reporting agencies from including his/her name in future prescreen credit or insurance lists. Pursuant to FACTA, the Commission is required, in consultation with the federal banking agencies, to develop a standard for prescreen notices that are to be provided in a “type size and manner as to be simple and easy to understand.”

The Commission has proposed that all prescreen notices must include both a short and long form version of the prescreen disclosure notice. The short form notice must (1) inform consumers of their right to opt-out of having their names included in prescreened lists; (2) provide the toll-free number the consumer can call to exercise that right, and (3) direct consumers to the existence of the long form notice. The short form notice is required to be prominent, shown in a type size that is larger than the type size of the principal text on the same page, and must appear on the front side of the principal promotional document. The long notice must include all the information found in the short form, along with the required statement that the consumer received this offer based on selected criteria identified in their credit report and that the offer is subject to confirmation of the selection criteria.

⁴ 15 USC 1601 et seq. and 12 C.F.R. § 226 (Regulation Z).

⁵ Pub. L. 91-508, 15 U.S.C. § 1681-1681t.

Layered Notice Overshadows Important Consumer Notices

The mandated layered notice approach proposed by the Commission goes well beyond what was required pursuant to FACTA in terms of details and specificity. FACTA does not require or suggest that the Commission issue a regulation that makes the prescreen notice the most prominent notice in such a credit solicitation. The proposal would minimize the importance of other mandated disclosures that provide consumers with essential information about the terms and conditions of the credit offer being presented.

Regulations implementing the TILA disclosure framework require that financial institutions place important information relating to the terms and conditions of an offer “in a prominent location” on or with the solicitation. The Commission has proposed that the short-form prescreen disclosure be not only “prominent,” but also placed on the “front side of the first page of the principle promotional document of the solicitation.” The specificity of this requirement would provide that the prescreen notice be the most prominent disclosure found on a consumer credit solicitation, a result that was clearly not intended by lawmakers. Financial institutions would be forced into the untenable situation of attempting to design forms and solicitations that make two separate federally required credit disclosures compete for prominence.

The Commission conducted a study⁶ to assess consumer understanding of opt-out notices in prescreened credit card solicitations. In the study, consumers were presented with three versions of the prescreen disclosure notices and asked questions to assess their understanding of the material presented. The disclosures included a form that was compliant with the existing statutory requirements, a layered notice similar to what is provided in the Commission’s proposal, and an “improved” notice that included simpler language and was designed to increase the prominence of the notice.

An evaluation of the study reveals that consumers could be equally well served by establishing disclosure requirements that more closely represent the “improved version” of the prescreen notice described in the FTC’s study without mandating a layered notice approach. When respondents were asked whether the disclosure notice allowed them the right to opt out of receiving prescreened offers of credit, 27.5 percent responded affirmatively when presented with the improved notice and 30.8 percent responded affirmatively when presented with the layered (two-part) notice. While both of these assessments are a significant improvement over the 18.8 percent of respondents who were presented with the existing disclosure, the difference between the improved notice and the layered notice was within the margin of error of the study and does not provide any basis for a conclusion that consumers would be better served with a two-part notice.

⁶ Manoj Hastak, *The Effectiveness of “Opt-Out” Disclosures in Pre-Screened Credit Card Offers*,” Federal Trade Commission, at www.ftc.gov/reports/prescreen/040927optoutdiscprecreenrpt.pdf (last visited 10/20/04).

ACB believes that mandating a layered two-part notice would minimize the importance of other disclosures and only serve to frustrate consumers by providing additional pieces of paper. ACB suggests the Commission use the experience gathered from the study to develop a more flexible proposal that allows financial institutions to provide the prescreen disclosure in a single statement that satisfies the FCRA disclosure requirements.

“Simple and Easy to Understand” Overly Prescriptive

The Commission has established specific criteria that outline what is expected of notices that are “simple and easy to understand.” This includes minimum type sizes (12-point for short notices, 8-point for long notices), border requirements, use of color, and placement of notices. The specificity of the criteria would require financial institutions that choose to use prescreening marketing techniques to develop notices that would place a greater emphasis on a consumer’s ability to express his/her marketing preferences over disclosures that describe the terms and conditions of credit offering.

ACB believes that the Commission should modify the proposal to remove the requirements for specific type size, placement of notice, and use of color/borders. ACB suggests that the Commission provide several model notices similar to the “improved” notice described in the aforementioned FTC study and provide institutions with the flexibility to determine placement of the notice that best fits within the context of the material presented. Additionally, the Commission should refrain from establishing minimum type-size requirements that may serve to minimize the prominence of other important disclosures and be out of context to the information presented to a consumer.

Additional Time Needed for Compliance

The Commission has indicated the effective date of the proposal would be 60 days from issuance of a final rule. Presumably this is based on the Commission’s estimate that entities making prescreened solicitations would be subject to two hours of managerial/professional time and six hours of skilled labor time to comply with the new requirement. While the time needed to comply will vary widely from organization, ACB believes the Commission has grossly underestimated the amount of time and costs for entities to come into compliance. At a minimum any financial institution will need to reformat existing marketing programs, obtain review/approval from legal and compliance personnel, and modify systems to include the disclosure. Moreover, many marketing programs are planned months in advance and such a short compliance timeframe would adversely affect these programs.

FACTA requires that the Commission establish final rules within one-year of passage (December 4, 2004), however, FACTA provides the Commission with the discretion to establish an effective date it determines is most appropriate. ACB believes that the Commission should provide financial institutions a minimum of nine months to one year to come into compliance with any final rule.

Conclusion

ACB appreciates the opportunity to comment on this very important matter. We strongly urge the Commission to not issue the two-part layered notice requirement in final form and to establish a more workable framework for prescreen disclosures. We stand ready to work with the Commission to develop disclosures that are understandable to consumers. Should you have any questions, please contact the undersigned at 202-857-3121 or via email at cbahin@acbankers.org or Rob Drozdowski at 202-857-3148 or via email at rdrozdowski@acbankers.org.

Sincerely,



Charlotte M. Bahin
Senior Vice President, Regulatory Affairs