

Direct Marketing Association, Inc.
1111 19th Street NW, Suite 1100
Washington, DC 20036-3603
Tel: 202.955.5030
Fax: 202.955.0085
<http://www.the-dma.org>



October 28, 2004

Via Electronic Filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: FACTA Prescreen Rule, Project No. R411010

Dear Secretary Clark:

The Direct Marketing Association appreciates the opportunity to submit comments on the Federal Trade Commission's notice of proposed rulemaking regarding "Prescreen Opt-Out Disclosure" required by section 213(a) of the Fair and Accurate Credit Transactions Act ("FACT Act"). 69 Fed. Reg. 58861, Oct. 1, 2004.

The DMA is the leading trade association for businesses interested in interactive and database marketing, with nearly 4,700 member companies from the United States and 53 other nations. Founded in 1917, its members include direct marketers from every business segment as well as the nonprofit and electronic marketing sectors. Included are catalogers, Internet retailers and service providers, financial services providers, book and magazine publishers, book and music clubs, retail stores, industrial manufacturers, and a host of other vertical segments, including the service industries that support them. According to a DMA-commissioned economic-impact study, direct and interactive marketing sales in the United States are projected to have surpassed \$1.7 trillion in 2003, including \$133 billion in catalog sales and \$41 billion in sales generated by the Internet. The DMA's Web site is www.the-dma.org, and its consumer Web site is www.shopthenet.org.

As the Commission promulgates its rule implementing the prescreening disclosure requirements of the FACT Act (Pub. L. No. 108-159), it should do so with the recognition that there are significant societal benefits to credit offers that result from prescreening. A primary benefit of prescreening is the competition in the consumer credit markets, which results in a reduction of price for credit and increased access for borrowers who might otherwise have been denied credit. The congressional mandate is to make the required disclosures more "simple and easy to understand." It is not to encourage opt-outs as does the NPRM. The new law is intended to ensure that the disclosures are simple and clear enough for consumers to understand. For example, it should be clear to consumers that offers for credit may not ultimately be extended if

they do not meet the criteria at the time of consideration by the credit grantor. Likewise, the disclosures should be presented in such a manner that consumers will understand that information from their credit reports was used in determining to send them the marketing materials.

The DMA believes that the Commission's current proposal will have the potentially negative effect of encouraging opt-outs for prescreening, instead of simplifying the disclosures in order to better inform consumers about prescreening offers and corresponding choices to limit such offers. This, we believe, is inconsistent with the statute. For these reasons, the DMA believes that the Commission should revise its proposed rules to align with the statutory requirement and to provide businesses with more flexibility in implementation.

The DMA would like to make the following specific points in response to the proposed rule.

- The disclosures should not be required to occur on the front side of the first page or on the first screen of the principal promotional document in the solicitation. For this reason, the use of layered notices should be an option and not a mandate for businesses.
- In the event of a short notice, the short notice should not single out a consumer's ability to opt out of prescreened offers; rather, it should reference that there is information describing why the consumer received the offer and choices regarding such offers described in the long notice.
- Any required notice should permit inclusion of information in addition to that required in the rule, and not potentially create liability for limiting the contents of the short notice.
- The effective date of the rule should be extended to nine months following the publication of the final rule in the *Federal Register*.

1. In Addition to the Layered Notice, the Commission Should Permit An Alternate Manner of Providing the Prescreening Disclosures

The Commission's proposal would require a "layered notice" consisting of an initial, prominent statement that provides opt-out information and a separate long notice that provides all of the required disclosures. Such an approach is not required by the statute and would have the result of confusing consumers as well as encouraging opt-outs from individuals prior to their full understanding of the prescreening offer. Rather, the amendment to section 615(d) of the FCRA requires that the notices be presented in a manner that is "simple and easy to understand." It is not necessary that a notice be on the first page or first screen of a promotional document in

order to satisfy this statutory requirement. The DMA believes that the Commission should allow for a layered notice as an option, but should not require such a notice if businesses elect to include one notice rather than follow a layered approach. Businesses should be provided with the flexibility to elect to use a single notice that sets forth the required disclosures and is “simple and easy to understand.”

Prior to enactment of the FACT Act, section 615(d) of the FCRA set forth prescreening disclosures to be included in written prescreened solicitations, including that:

- information contained in the consumer’s consumer report was used in connection with the transaction;
- The consumer received the offer of credit or insurance because the consumer satisfied the selection criteria for the offer;
- if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer, or any applicable criteria bearing on creditworthiness or insurability, or the consumer does not furnish any required collateral;
- the consumer has a right to prohibit information contained in the consumer’s file with any consumer reporting agency from being used in connection with any prescreened credit or insurance transaction; and
- the consumer may exercise the right to opt out of prescreening by calling a toll-free number or writing to the appropriate consumer reporting agency. 15 U.S.C. § 1681m(d)(1).

Section 213(a) of the FACT Act amended this section to require that the Commission issue rules so that these disclosures “be presented in such format and in such type size and manner as to be simple and easy to understand.” The Commission has determined that there are two components to make the disclosures “simple and easy to understand”: (1) language and syntax that effectively convey the intended messages to readers; and (2) presentation and format that call attention to the notice and enhance its readability. 69 Fed. Reg. at 58862.

To ensure that the notice is in a “presentation and format that calls attention to the notice and enhances its readability,” the proposed rule would require that the short notice be on the front side of the first page or, if provided electronically, on the first screen of the principal promotional document in the solicitation.” 69 Fed. Reg. at 58868.

The Commission has leaped from the requirement in the amendment to section 615(d) that requires making the above-listed disclosures “simple and easy to understand” to—(1) singling out and showcasing the consumer’s ability to opt out by means of the short notice, and (2) mandating its location on the first page or screen of the offer. The amendment does not require that disclosures “call attention” to an opt-out. Disclosures should be “simple and easy to understand” without being highlighted in the material. Limiting the short notice to an “opt-out”

will fall far short of informing and educating recipients about the prescreening process, as Congress intended.

Additionally, even if there is a reason to “call attention” to the right to opt out, there are other effective means of calling attention to such right than requiring placement on the first page or screen of the document. Businesses should be provided with flexibility as to the best means of calling attention to the disclosures. The long notice, standing alone as a separate document, with appropriate emphasis and improvements from the current language, will result in calling attention to the disclosures. This fact is supported by the Commission’s own study, which found the difference in effectiveness between the layered notice and improved disclosures to be “statistically insignificant.” 69 Fed. Reg. at 58864. Some businesses may prefer to provide consumers with one notice rather than using a layered approach to satisfy the required disclosures. For these reasons, the DMA believes that the Commission should indicate that a long notice alone also would satisfy the FACT Act’s requirements.

II. The Commission Should Not Single Out the Disclosure of the Ability to Opt Out in the Short Notice

As described above, the DMA believes that the Commission should provide businesses with flexibility as to the location of the notice and that a short notice on the first page should not be the only option to satisfy the statutory requirement. In the event of the use of a layered notice approach, the short notice, however, should include only a statement that refers the consumer to the longer notice. The short notice proposed by the Commission does not adequately describe the benefits of prescreening nor the effects of opting out of prescreening.

The Commission proposes that “any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer” must provide a consumer with a “short notice” that indicates the consumer’s ability to opt out of receiving prescreened solicitations. There is nothing in the amendment to section 615(d) of the FCRA that suggests that an opt-out provision be singled out from the other required disclosures for inclusion in a short notice. Likewise, there is no basis for treating the opt-out as more important to consumers than the other disclosures. Moreover, a simple notice of opt-out will not provide for an informed choice by the consumer. Prior to electing to opt out of future prescreening, consumers may be interested in understanding why they were selected to receive the solicitation and under what criteria it will be determined whether they will be granted credit. Additionally, consumers may incorrectly interpret the opt-out set forth by the Commission as an opt-out from all subsequent mail marketing offers, when the prescreening opt-out is limited to further prescreening offers.

For these reasons, rather than the Commission’s proposal, the short notice should be a more neutral statement to inform consumers of the disclosure in the long notice that describe

why and how the recipient was selected to receive the offer and a means of opting out of future uses of their consumer reports for such solicitations.

The DMA believes that the Commission should revise its proposed short-form notice to read as follows:

Please see the enclosed [Notice] for details describing why and how you were selected to receive this offer and your choices regarding receiving such offers.

III. Both the Short and Long Notices Should Permit Relevant Additional Information

The FACT Act does not mandate specific language for the short notice. Rather, it imposes a more general standard that the notice must be a “simple and easy to understand” statement that conveys consumers’ opt-out right and how they can exercise such right. The proposed rule, however, would prohibit text that is extraneous to the opt-out right. Unlike the short notice, the proposed rule does not prohibit marketers from including additional information in the long notice, “provided that the additional information does not interfere with, detract from, contradict, or otherwise undermine the purpose of the opt-out notices.” 69 Fed. Reg. at 58868.

The DMA believes that businesses should be permitted to include non-opt-out information in both the short and long notices. First, as noted above, Section 615(d), as amended, does not mandate that the opt-out disclosure be singled out from other required disclosures. Second, such information only will serve to benefit and provide clarity to consumers regarding the opt-out and other disclosures. For example, businesses may want to provide additional privacy information or other information related to opt-outs that extend more broadly than opting out of prescreened credit offerings and to include all such related information together. Requiring such information to be located separately will only have the result of confusing consumers with respect to their options.

Additionally, liability could attach to the disclosures that are contained in or omitted from the short notices. Companies face liability from diverse sources including the FTC, state Attorneys General, and state litigation under statutes such as S. 17-200 in California for what is included or not included in their privacy representations. What the Commission is suggesting is that a marketer cannot take protective actions to more fully disclose practices in order to limit the risk of injury. This is unfair, and not mandated by the statute. The Commission should stick with the statutory standard and not direct what cannot be said in a short notice.

IV. The Effective Date Should be Lengthened to Nine Months to Permit Sufficient Time for Compliance

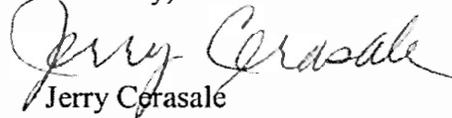
The Commission should provide a minimum of nine months for businesses to comply with the new notice rules. It will take companies time to create and implement new notices and

Mr. Donald S. Clark
October 28, 2004
Page 6

to arrange for printing and distribution of such notices. Additionally, many times, marketing campaigns are planned several months in advance. Businesses will need to time to integrate the new notices into business cycles of its marketing offers. For this reason, we recommend that businesses have a minimum of nine months to implement the rule.

Thank you for the opportunity to offer the views of The DMA on these issues. Please contact me with any questions.

Sincerely,



Jerry Cerasale
Senior Vice President
Government Affairs
The Direct Marketing Association

cc: Ronald L. Plessner
Stuart P. Ingis
Counsel to the DMA