



October 28, 2004

Experian  
475 Anton Boulevard  
Costa Mesa, CA 92626

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

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

Thank you for the opportunity to provide comments in response to the Federal Trade Commission's notice of proposed rulemaking for "Prescreen Opt-Out Disclosure" required by section 213(a) of the Fair and Accurate Credit Transactions Act (FACT Act).

Experian Information Solutions, Inc. (Experian) is a leader in providing information solutions to organizations and consumers. We help organizations find, develop and manage profitable customer relationships by providing information, decision-making solutions and processing services. We empower consumers to understand, manage and protect their personal information and assets. Experian works with clients across diverse industries. Its U.S. headquarters are in Costa Mesa, California.

Experian appreciates the Commission's efforts to simplify and clarify the notice to consumers about their right to opt out of receiving unwanted prescreened offers. However, we believe the Commission's proposed "layered notice" approach is seriously flawed and would be detrimental to both business and consumers. Additionally, we believe that the proposed rule, unless revised, fails to uphold Congressional intent.

We agree with the Commission and Congress that consumers should have the ability to make an informed choice regarding prescreened credit offers, and that the notice conveying the required information should be simple and easy to understand. However, Experian does not believe the "layered notice" approach, as proposed by the FTC, provides consumers with the opportunity to make a truly informed decision, and therefore, should not be the prescribed notice format in the Commission's final rule.

**Lost opportunity**

Distinguished economists have stated, and a number of studies have shown, that prescreened offers increase consumer choice and opportunity, drive market competition and reduce prices. The FTC's own Facts for Consumers brochure "Choosing and Using Credit Cards" recommends that consumers "shop around to get the best deal," and states that "it's wise to compare terms and fees before you agree to open a credit or charge card account." Prescreened offers make such shopping around and offer comparison possible on a national scale. This is particularly



significant in less populous areas of the country where prescreened offers vastly increase choices from a handful of local lenders to a national marketplace.

Information regarding these benefits should not be considered “ancillary,” as described in the Synovate study. Rather, information about the consequences of opting out is essential for consumers to make a reasoned decision about whether or not they should opt out of receiving prescreened offers.

Results of the Synovate study clearly indicate the “improved” version of the notice exceeds the “layered” notice’s effectiveness in providing this critical information. It was noted in the study’s conclusions that “there was some evidence that the improved notice may be more effective in communicating the benefits of continuing to receive offers (Information Point #4) than the layered notice.” In fact, the “improved” notice demonstrated better results or proved to have statistically insignificant differences as compared to the layered notice in every category with one exception. The layered notice proved to be statistically more effective in communicating that consumers could make a telephone call to opt out in the “natural exposure” phase of the study. However, that difference evaporated when the respondent was directed to read the notice more carefully.

Basing the FTC’s final rule on the singular fact that consumers know they can call a telephone number to opt out does a tremendous disservice. Regulators and industry have a responsibility not only to tell consumers they can opt out by calling a toll-free telephone number, but also to ensure consumers can make an informed decision when exercising that right. A final rule mandating the layered notice format, as proposed by the FTC, will prevent consumers from making such an informed decision. As a result, they will lose economic opportunity and be deprived of the ability to follow the FTC’s own advice to “shop around” and to compare the terms and fees of competing offers.

### A question of intent

Aside from the loss of economic opportunity the proposed layered notice will cause for consumers, there are also serious questions about the proposed format in truly achieving Congressional intent. In its notice of proposed rulemaking, the Commission states that one way to accomplish communicating complex or voluminous information “is through a layered approach – imparting the most important information in a prominent location, with reference to a second location that provides additional details.” The Commission has determined that the most important information to be included in the notice is a statement that a person can opt out and the telephone number to do so. Yet, section 615(d) of the Fair Credit Reporting Act does not support the contention that Congress’ intent was only, or even primarily, to tell consumers that they can opt out of receiving prescreened offers and the telephone number to do so. In fact, as stated in the Commission’s Notice of proposed rulemaking, FCRA Section 615(d) requires that a business:



“shall provide with each written solicitation a clear and conspicuous statement that:

(A) information contained in the consumer’s consumer report was used in connection with the transaction; (B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer; (C) 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 credit worthiness or insurability or does not furnish any required collateral; (D) 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 credit or insurance transaction that is not initiated by the consumer; and (E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 604(e) [of the FCRA].”

It is important to note that the law lists the ability to opt out and the telephone number to do so last in priority. If the intent of Congress were to notify consumers simply that they could opt out and to provide the telephone number to do so, the FACT Act would have addressed the order in which the information was provided. Yet, it did not. The FACT Act only specified that the content of the notice be “simple and easy to understand.”

“Understanding” an individual’s right exceeds the threshold being set by the Commission’s interpretation of just “knowing” about a right to opt-out and how to exercise it. Clearly, the intent of Congress, by requiring a notice containing specific information, provided in a simple and easy to understand format, is to ensure consumers not only know their right, but also understand it. The proposed layered notice format undermines this intent.

As proposed, as is shown by the Synovate study, the layered notice does not inform consumers **about** their right to opt out, but rather only tells them **of** their ability to make a telephone call to opt out. As such, the “short notice” portion of the “layered notice” virtually **instructs** consumers to opt out: it does not explain their right to opt out and the consequences of doing so. The list of content included by Congress in the FCRA, and unchanged by the FACT Act, strongly indicates the intent of the notice is to ensure consumers have adequate information about the implications of their choice before making a decision.

#### **Incorrectly defining “layered notice”**

The Commission also has wrongly defined the term layered notice. As constructed in the Commission’s proposed rule, there is not a “layered notice,” but rather two separate notices. The first is a notice that, *in effect*, says to consumers, “You can opt out and here is the telephone number to do so.” The second notice in a different location explains the solicitation process and implications of opting out.



A true layered notice first provides a summary of all the information in the full notice, with enough information to make a reasonably informed decision without reading a voluminous, dense, and often legalistic disclosure. The second level of a true layered notice is the full content of the required notice. In a true layered notice, one or two pieces of information from the full notice does not constitute a short notice.

Yet, that is precisely what the Commission's proposed notice does. It simply takes two elements of the five required by Congress and presents them as sufficient to constitute a short notice, although the short notice unquestionably fails to provide enough information for the consumer to make an informed choice.

This very issue has been a point of contention among regulators and businesses regarding notices required under the Gramm-Leach-Bliley Act. Since its inception, many businesses have argued that a layered approach to the privacy notices required by the GLB Act would be more effective in not only notifying consumers of their privacy policies, but also in helping them understand those policies and their rights associated with them. At this time, Experian does not endorse any of the layered notice proposals, but does agree that the proposals more accurately represent a true layered notice.

Ironically, such "short notices" have not yet been approved for use in GLB notices by regulatory agencies. Instead, those agencies are still considering an advanced notice of proposed rulemaking (ANPR) to gain further understanding of the benefits and impacts of layered notice. Further study has been deemed necessary because it remains unclear that even the sophisticated layered notices proposed for GLB purposes could adequately meet legal requirements and Congressional intent.

While no final decisions has been made, the Commission is recommending an approach that does not rise even to standards for layered notices now under consideration in this ANPR. It is important to note that the results of the Synovate study suggested consumers would act solely on the information provided in the Commission's so-called short notice.

Further, there appears to be no suggestion that Congress intended the Commission to recommend a layered notice approach. The FCRA requires a business to "provide with each written solicitation a clear and conspicuous statement. . ." The FACT Act goes further to require that "the statement be presented in such a format and in such type size and manner as to be simple and easy to understand." The clear indication is that Congress envisions a single notice inclusive of the statements required by existing law so that consumers can make an informed decision regarding their right to opt out. There is no suggestion that content of the notice be divided in any way. There is nothing within the law that leads to conclusion that Congress as a whole, certain Members' public comments notwithstanding, intended in any way for certain elements of the required notice to be highlighted or presented separately.

Experian encourages the Commission to reconsider its recommendation of the layered notice approach in preparing a final rule in favor of the improved notice format. The improved notice format ensures the notice is highly visible, simple, and easy to understand, meeting the



requirements set forth in the FACT Act. Equally important, it ensures all of the statements required by the law are provided in an easy to understand format and allows for additional information about the consequences of opting out to be included, enabling consumers to make an informed decision about their right to opt out.

Experian is a signatory to the comments submitted by the Center For Information Policy Leadership (CIPL) and concurs with the comments submitted by the Consumer Data Industry Association (CDIA) and the Direct Marketing Association (DMA). We would refer the FTC to those submissions, as well, for additional discussion of these issues and others related to the proposed rule. In particular, the comments provided by CIPL suggest a workable format, should the Commission ultimately decide that a layered notice is an appropriate alternative.

Thank you for the opportunity to submit comments regarding this important issue.

Sincerely,

A handwritten signature in dark ink that reads "Jason Engel". The signature is written in a cursive style with a large initial "J".

Jason Engel  
Vice President &  
Assistant General Counsel