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September 26, 2005

Federal Trade Commission
Attn.: Section 515
Office of General Counsel
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Reconsideration of Initial FTC Response

Dear Federal Trade Commission:

This document is an appeal of the Federal Trade Commission's (FTC's) initial decision of August 16, 2005 on our Request for Correction (RFC) of certain information in and pertaining to the Commission's *Federal Register* notice of January 31, 2005, pages 5022-5037, "Prescreen Opt-Out Disclosure, Final Rule."

First, we would like to thank the Commission staff who prepared the response to our RFC for their diligent work. Clearly, the FTC took the issues we raised seriously and devoted considerable effort to developing the response.

Second, we would like to thank the FTC for their legal research regarding mall intercept studies¹ since the court cases cited, and others, explicitly support CRE's central contention. Specifically, the case law, as well as the FTC's Information Quality Guidelines, require:

1. That mall-intercept studies be properly conducted using sound statistical methods; and
2. The burden is on the proffering party to demonstrate that the study was conducted in accordance with accepted principles of survey research.

However, as we explained in our RFC and further detail in this appeal, the Synovate Study and associated analytic conclusions did not meet the basic requirements for mall intercept studies to prevent bias and otherwise adhere to sound statistical and research methods.

¹ For the purpose of this appeal, Jim Tozzi and CRE will assume that a correctly performed mall intercept study has the potential to possess objectivity and utility.

I. BIAS: Failure of the Synovate Study to Comply with Sound Statistical Methods

The Data Quality Act Requirements Against Bias and for Using Sound Statistical Methods

The FTC's information quality guidelines, under the definition of objectivity, require "a focus on ensuring accurate, reliable, and unbiased information. In a...statistical context, original and supporting data are normally generated, and the analytic results are normally developed using sound statistical and research methods."

Court Holding Requiring Use of Generally Accepted Statistical Procedures

"The proponent of a consumer survey has the burden of establishing that it was conducted in accordance with the principles of survey research, i.e., that (1) a proper universe was examined; (2) as representative sample was drawn from that universe; (3) the mode of questioning the interviewees was correct; (4) the persons conducting the survey were recognized experts; (5) the data gathered was accurately reported; and (6) the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of procedures and statistics in the field of such studies."²

What Constitutes Accepted Principles of Sound Statistics and Research?

It is clear from the FTC's Information Quality Guidelines and case law that FTC can only use and disseminate statistical information and analytic results that were developed using accepted, sound statistical and research methods. The question, therefore, is what constitutes such accepted principles and methods with respect to mall intercept studies?

The Advertising Research Foundation (ARF) is the leading authority on industry standards and guidelines for market research, including the procedures for the proper conduct of mall intercept studies. Founded in 1936, ARF "is the preeminent professional organization in the field of advertising, market and media research. Our combined membership represents more than 325 advertisers, advertising agencies, research firms, media companies, educational institutions and international organizations."³

ARF's "Guidelines for Market Research," cited in CRE's RFC, explain the proper conduct of mall intercept and other non-probability sampling techniques.

² Tyco Industries, Inc. v. Lego Systems, Inc., 1987 WL 44363 *9 (D.N.J. 1987). (Citations omitted).

³ <http://www.arfsite.org/about/index.html>.

“Quota samples are used in non-probability sample studies to assure that the sample matches known characteristics of the population under study such as distribution by age, education, sex, ethnicity, or product category usage. ... **Demographic quotas are of vital importance in mall intercept studies because of the demographic skew of most malls.**”⁴

Furthermore, the ARF Guidelines explicitly inform researchers that, “where non-probability samples are used, **external validation of the measures produced in the survey are required....**”⁵

ARF Guidelines provide a list of typical screening questions to guard against bias. These questions include “income” and “ethnic origin.”⁶

ARF further explains the importance of carefully selecting well-trained interviewers “to address potential bias issues” because “Language, social strata, age, gender, and other demographic characteristics can play a large role in influencing respondent cooperation and responses.”⁷

Thus, accepted standards for the use of mall intercept studies include:

1. Use of demographic quotas, including ethnicity and socio-economic status, because malls are demographically skewed, i.e., mall shoppers do not accurately reflect the demographics of the surrounding community. Sampling in malls in diverse locations does not overcome this demographic skew; and
2. Validation of the mall intercept survey results.

The ARF Guidelines reflect a broad consensus among government and industry regarding the appropriate methods of using mall intercept studies while preventing bias. For example, the Federal Judicial Center’s “Reference Manual on Scientific Evidence,” another eminent reference source cited in CRE’s RFC, explains that mall intercept studies and other convenience sample “may suffer from serious bias.”⁸

⁴ Advertising Research Foundation, “Guidelines for Market Research,” August 2003, p. 28. [Emphasis added.]

⁵ Ibid., p. 25. [Emphasis added.]

⁶ Ibid., 38.

⁷ Ibid., p. 48.

⁸ Federal Judicial Center, “Reference Manual on Scientific Evidence, Second Edition,” 2000, p. 162.

In addition to explaining the potential sources of bias, including the interviewer⁹, the Reference Manual discusses how to cope with bias. For example, “In quota sampling, the interviewer is instructed to interview so many women, so many older men, so many ethnic minorities, or the like.”¹⁰

The Reference Manual helpfully provides at least one validation test for determining if the results of a mall intercept survey are biased.

“By administering the survey at several different malls, **the expert can test for and report on any differences observed across sites**. To the extent that similar results are obtained in different locations using different on-site interview operations, it is less likely that idiosyncrasies of sample selection or administration can account for the results.”¹¹

The same standards for sound statistical research practices with respect to mall intercept studies are echoed by other authorities. For example, a study by the RAND Corporation’s National Research Defense Institute, citing a survey conducted by *The Los Angeles Times* of military personnel, highlighted the importance for screening on ethnic as well as other demographic factors when it explained that “Quota methods were used to ensure selection of appropriate numbers of males and females; blacks, whites, and Latinos; and age groups.”¹²

Similarly, the Business Research Lab, a market research firm, warns that mall intercept samples are “Not necessarily even representative of the areas they’re in.” and that they are “Demographically skewed samples. (Young, female, suburban, middle-income, frequent shoppers).”¹³

Thus, since malls intercept samples are inherently prone to several types of bias, researchers need to:

1. Screen for various relevant demographic factors, and
2. Validate their results.

⁹ Ibid., p. 100.

¹⁰ Ibid.

¹¹ Ibid., p. 246. [Emphasis added.]

¹² RAND Corporation, National Research Defense Institute, “Sexual Orientation and U.S. Military Personnel Policy Options and Assessment,” MR-323-OSD, 1993, p. 210.

¹³ <http://www.busreslab.com/articles/article4.htm>.

A. Ethnic and Socio-Economic Bias

CRE Assertion

CRE's RFC explained that "even in the limited world of quota surveys, the research does not pass muster..." and that because "the Synovate study did not record crucial demographic factors about survey respondents, there is no way to even attempt to estimate the level of socio-economic, ethnic, and other biases in the survey data."¹⁴

CRE also demonstrated that the "failure of the FTC to have ensure a demographically-representative sample of consumers was interviewed means that the information quality requirement regarding the development of quality information and data was not met."¹⁵

FTC Initial Response

The FTC's Initial Response dismissed CRE's concern regarding the Commission's failure to ensure a demographically representative sample was taken as lacking merit.¹⁶ The FTC claimed that "There is no reason to believe that the inclusion of additional sampling criteria for 'education level, income level and ethnicity' would have changed the results of the study."¹⁷

There are two substantive problems with the FTC's Initial Response:

1. The FTC Initial Response is factually incorrect. The FTC had strong reason to believe that issues such as ethnicity were relevant to consumer understanding of prescreen opt-out notices because the Federal Reserve Board's Prescreen Report discussed the impact of such factors on the rate at which consumers exercise their opt-out rights. As CRE's RFC explained, "the FRB Prescreen Report found that **'individuals residing in areas with a relatively low concentration of racial and ethnic minorities...are more than twice as likely to opt out as individuals living in predominantly minority areas...'**"¹⁸

¹⁴ RFC, p. 10.

¹⁵ Ibid., p. 11.

¹⁶ FTC Initial Response, August 16, 2005, p. 5.

¹⁷ Ibid.

¹⁸ Board of Governors of the Federal Reserve System, "Report to Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance," December 2004, p. 52. [Emphasis added.]

Thus it is inexplicable how the FTC can claim in their Initial Response that they had no reason to believe that ensuring the use of an ethnically representative sample was important in a study on how to improve consumer awareness of opt-out rights, when the FRB study demonstrated that the concentration of minorities in a sample significantly relates to the extent to which consumers are exercising such rights.

2. The FTC Initial Response is addressing a “strawman” issue. The issue is not whether the Commission believes that controlling for education, income level and ethnicity of respondents would change the results of a study. Instead, the crux of the Data Quality petition and this appeal is whether the FTC adhered to their own information quality guidelines.

The Synovate Study and associated analytic findings were not “developed using sound statistical and research methods” and thus violated OMB and FTC information quality guidelines and cannot be disseminated by the Commission or provide probative evidence for a rule.

The Synovate Study, the FTC Prescreen Opt-Out Disclosure rule,¹⁹ and the FTC’s Initial Response all ignore the accepted research principles for mall intercept studies. Multiple authorities explained that malls are “demographically skewed,” may not be demographically “representative of the areas they’re in,” that selection bias can result because “recruiters naturally prefer to approach friendly-looking potential respondents...,”²⁰ that respondent bias is also a potential problem, and that demographic quotas are of “vital importance.”

Validation. In addition to the bias issue, the Synovate Study and the FTC violate another fundamental precept of sound statistical methodology that was discussed in both the Federal Judicial Center’s “Reference Manual on Scientific Evidence” and the Advertising Research Foundation’s “Guidelines for Market Research.” Specifically, Synovate and, more importantly the FTC, failed to validate the results of the mall samples even though the study generated data that would permit at least some attempt at validation.

As was discussed above, the Federal Judicial Center’s Reference Manual provides a simple validation methodology; testing for differences in results across malls. The Synovate Study did not test for such differences nor did it provide mall-specific data. Neither the Hastak Report nor the FTC provided mall-specific

¹⁹ 70 FR 5022-5037.

²⁰ Reference Manual, pp. 246-247.

data and, far more importantly, did not perform a perfunctory test that could help determine if the Synovate samples were biased. Thus, in yet another essential way, the study and its use by the FTC failed to comply with sound statistical and research methods as required by the Commission's Information Quality Guidelines.

In addition to not adhering to the required "sound statistical and research methods," the FTC also failed in its "burden of establishing that [the consumer survey] was conducted in accordance with the principles of survey research..." Although the preceding quote is from case law, the root of the FTC's non-discretionary duty to pro-actively ensure that the study was appropriately conducted is rooted in the pre-dissemination review process mandated by the OMB and FTC information quality guidelines.

Although the FTC correctly states with respect to RFCs that the "proof of burden' rests on the petitioner," it is also true that the FTC has the pre-existing duty "to substantiate the quality of the information it has disseminated through documentation..."²¹ as discussed in Section VI of the FTC Information Quality Guidelines. Thus, CRE urges the Commission to consult their pre-dissemination review record with respect to not only the Synovate Study and Hastak Report but of all their information and analyses to determine whether the materials comply with OMB and FTC information quality requirements.

B. Age Bias

CRE Assertion

CRE's RFC explained "It is very important to note that the screening questionnaire also directed screeners that if a consumer is **"OVER 74 YEARS OLD, TERMINATE..."**²² even though older consumers receive prescreened credit offers. By excluding older consumers, the survey deliberately created a demographic bias."²³

FTC Response

The FTC's Initial Response dismissed the age-bias issue by stating, "the Commission's research consultant concluded that it was appropriate to have a maximum age to minimize extraneous age-related factors such as vision problems."²⁴

²¹ 67 FR 8459, col. 1.

²² Synovate Study, p. 64. [Emphasis in original].

²³ CRE, Request for Correction, May 20, 2005, p. 9. [Emphasis in original].

²⁴ FTC Initial Response, p. 5.

The FTC's response seems to be, at best, an after-the-fact rationalization since:

1. The screening questionnaire included two explicitly vision-related questions, F and G.²⁵ Thus, it is difficult to believe that an age-limit was set for vision reasons, particularly since: 1) persons of any age may have vision-related difficulties; and 2) if vision was the FTC's actual concern and thought that it was insufficiently addressed by the two screening questions, a simple, non-burdensome vision test could have been administered.

If the what the FTC means by "age-related factors" is concern that older Americans may lack the mental acuity to take part in the survey, then the Commission should state so forthrightly. There are many older Americans active in all three branches of government, the private sector, and private life who would be fascinated to learn the FTC's views on this important issue.

The FTC Initial Response also stated that the our "petition provides no evidence or argument that the age limits in the study would have biased the results..."²⁶ There may well be many older Americans who would doubtless be interested to learn that the FTC believes that deliberately excluding Americans over 74 years of age from an information gathering exercise does not result in bias or, in the alternative, that they should expect to be pro-actively excluded from at least some federal information gathering projects which may affect them unless they can prove discrimination. The FTC's view on this issue is rather peculiar given the Commission's pre-dissemination information quality review requirements, i.e., the duty to prevent bias before it occurs not simply correct it after it has been proven.

2. The FTC states that the need for an age-limit restriction on survey participation was the conclusion of the Commission's consultant. It does not matter whether the notion for the age limit came from a Commission consultant or a Commission employee. The survey is "sponsored" information as defined by the OMB's information quality guidelines²⁷ since the FTC had "the authority to review and approve the information before release." Thus, the decision to use an age-limit was effectively the FTC's and the responsibility for that decision likewise rests solely with the agency.

²⁵ Synovate Study, p. 64.

²⁶ FTC Initial Response, p. 5.

²⁷ 67 FR 8454

II. Issues

- ▶ The sole purpose of this appeal is to ensure that information not meeting OMB and FTC information quality standards is withdrawn and corrected prior to re-dissemination.
- ▶ However, there is also an additional, larger issue at stake; whether the FTC will set a precedent under the Data Quality Act demonstrating that bias and discrimination in any phase of an information collection and regulatory development process is acceptable. As the RFC and this appeal have detailed, the FTC: 1) actively discriminated against older Americans; and 2) refused to ensure that the views of ethnic minorities and other demographic segments were proportionately represented during an important part of the information development process.

Prior to my career as a federal civil servant I worked, albeit without great success, as a jazz musician in New Orleans. At that time I learned that discrimination was often viewed as “benign” and could be cloaked in the guise of convention and even civility. That’s just the way it was. I did not find passive or active discrimination acceptable then, I do not find them acceptable now.

If the Federal Trade Commission holds that age discrimination and not ensuring that minorities are fully represented in every stage of the rulemaking process is acceptable, then that is an issue that would need to be fully ventilated in a more open and prominent venue than a Data Quality petition process.

III. Conclusions

- ▶ A cynic would conclude that this appeal has no chance of success since it:
 - Focuses on a study that provided probative evidence for a rule that is already in effect; and
 - Is being filed by parties that may appear to lack Article III standing.
- ▶ We disagree with such a cynical conclusion. CRE is long aware of the FTC’s deep dedication and commitment to fairness, adherence to law, and to fulfilling its important mission. Thus, we conclude that after Commission staff scrupulously examine the requirements of the Data Quality Act and implementing guidelines, the standards and procedures for sound statistical research, the FTC-disseminated information in question, and this appeal, that they will reverse the Initial Response and decide in our favor.

IV. Relief Requested

- ▶ CRE respectfully requests that the FTC withdraw and correct:

- The study in question that fails to meet Commission's information quality standards; and
- Other documents, or portions of documents, that cite or otherwise utilize the study and/or analytic conclusions drawn from the study.

Sincerely,

/s/

Jim Tozzi

Member, Board of Advisors

Center for Regulatory Effectiveness