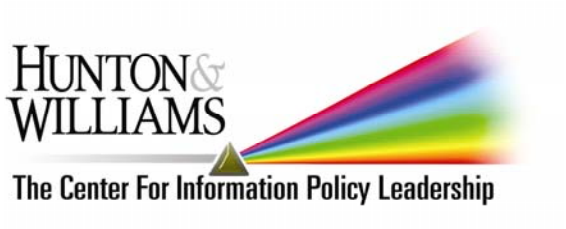

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October 28, 2004

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

Re: FACTA Prescreen Rule, Project No. R411010

Ladies and Gentlemen:

This letter is submitted by the Center for Information Policy Leadership at Hunton & Williams (CIPL)[1] in response to the request for public comments regarding the Commission's proposed rule (the "Proposed Rule") to improve the required notice to consumers regarding their right to opt out of prescreened solicitations for credit or insurance. This letter was prepared by Martin E. Abrams, Executive Director of CIPL; Margaret P. Eisenhauer, head of the Hunton & Williams Privacy and Information Management Practice; and Lisa J. Sotto, Hunton & Williams' Privacy Regulatory Practice Leader.[2] Please note that the views expressed herein

[1] The Center for Information Policy Leadership provides a unique combination of strategic consulting, legal, and policy development services for information industry and information-dependent companies. The Center brings together business leaders, government officials, consumer advocates, and academic experts to provide thought leadership on a variety of information policy topics, including global privacy law development, privacy notices, public-private data sharing, and the use of personal information for authentication. The Center's internationally-recognized privacy experts advise chief privacy officers and other senior executives on the implementation of global information management programs as well as the development of effective privacy laws.

[2] Mr. Abrams also serves as Senior Policy Advisor to Hunton & Williams LLP. He is not a lawyer. Ms. Eisenhauer is admitted to practice law in Georgia and Florida. Ms. Sotto is admitted to practice law in New York and Washington, D.C.

are those of CIPL, the authors and those companies named; they do not necessarily reflect the views of other CIPL member companies, Hunton & Williams LLP or its clients.
CIPL addresses information privacy and security concepts from a research-based, non-partisan perspective that seeks to take into account the needs of individuals, the realities of the business environment, and the practical costs and benefits of protecting (or failing to protect) privacy and security. Since our inception in 2000, we have tackled a wide variety of information policy issues. In addition to our work on privacy notices (discussed below), we have (i) drafted principles for sound global privacy legislation, (ii) informed government, consumer and industry efforts on identity theft, authentication and the use of analytics, and (iii) worked with multiple groups on the issues associated with the collection and use of personal information for marketing and customer relationship management.

Introduction

CIPL believes that effective privacy notices are an essential communications tool. In order for consumers to drive company privacy practices, consumers must understand those practices. We commend the Commission for its efforts to improve the disclosures mandated by the Fair Credit Reporting Act (the "FCRA") in connection with non-consumer initiated transactions.

For over three (3) years, CIPL has been working with leadership companies, consumer organizations, privacy scholars, and government regulators to develop effective, readable privacy notices. Our comments here reflect the lessons that we have learned from our work in this area.

The Relationship Between Notices and Consumer Choice

As a preliminary matter, it is helpful to consider the reasons that the prescreening notice is mandated. The prescreening notice is designed to <u>educate</u> individuals about the prescreening transaction and to <u>enable</u> consumers to exercise choice with regard to their information.

The Commission has long stated its position that consumers should not be asked to exercise choice unless appropriate notice is provided as to the consequences of that choice. For example, the Commission has encouraged companies to post privacy policies online and educate consumers about data collection, use and disclosure practices. These online notices then enable consumers to make informed choices about whether to provide personal information to the website operator. For consumers to make the "right" decisions, they must be given appropriately complete and comprehensible information about the consequences of exercising their choices.

Similarly, financial privacy notices mandated by the Gramm-Leach-Bliley Act ("GLBA") and the healthcare privacy notices mandated by the Health Insurance Portability and Accountability Act (HIPAA) are designed to provide consumers with important information and facilitate

choices about data-sharing. We commend the Commission, the Federal Banking Regulators and the Department of Health and Human Services for considering and encouraging the use of consumer-friendly layered notices both to help improve privacy education and to facilitate informed decision-making and privacy practice comparisons.

Prescreening Disclosures Must Follow the Same Rule

The prescreening disclosure is no different from other privacy notices -- it represents Congress's and the Commission's method for enabling consumers to choose between privacy and the benefits that they obtain from prescreening transactions.

In the Opinion of the Commission issued *In the Matter of Trans Union Corporation* on February 10, 2000, Commissioner Mozelle Thomson explained:

> Congressional interest in protecting consumers' privacy is further illustrated by the 1996 amendments to the FCRA, in which Congress added to the permissible purposes of consumer reports prescreening for certain defined firm offers of credit and insurance. The Committee Report to the amendments notes an effort 'to balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers who meet the criteria for the credit or insurance being offered.' *[footnote omitted]*. In striking this balance, however, Congress ensured significant privacy protections for consumers, requiring that they receive notice that their personal credit information as being used for such purposes, and that they have the right to 'opt-out' of such use.

The Commission's own study on prescreening disclosure acknowledges that it is important to consider consumer-understanding of the benefits and limits of prescreening. In the report submitted to the Commission by Manoj Hastak, Ph.D. regarding "The Effectiveness of 'Opt-Out' Disclosures and Pre-Screened Credit Card Offers," Dr. Hastak notes that the objective of the study was to test how well prescreening disclosures communicated:

> (1) that consumers have the right to opt-out of receiving pre-screened offers,
> (2) the ways in which consumers may exercise those rights,
> (3) the fact that consumers will continue to receive other types of solicitations even if they opt-out, and
> (4) that there may be benefits to receiving pre-screened offers (*e.g.*, to assist in comparison shopping).

The study methodology consisted of asking consumers to analyze three versions of prescreened privacy notices and respond to questions about these notices. The three versions were (v1) a standard "back page" tiny-type disclosure that contained only the first two

elements above, (v2) a back-page, tiny-type disclosure set off with different color ink, more space and information on all four points above, and (v3) a "layered" notice consisting of a large-type out-opt exhortation paired with the v2 notice just described.

We commend the Commission and Dr. Hastak for including consumer understanding of the benefits of prescreening and the limits of the opt-out (*i.e.,* that it won't prevent all other offers) in the test methodology. We note that the test indicated a very low level of consumer knowledge of either of these points. Unfortunately, the study did not then test ways to improve communication of either of these points. By testing the v3 disclosure, the study demonstrated that a layered notice could increase communication of the opt-opt right and method. We regret that the study did not test a different approach, using the top layer to alert consumers that more information was included without providing the opt-out details in the top box.

The problem with the methodology of the v3 notice design is that, because of the affirmative language, it suggests to consumers that they should make an opt-out choice based on the top layer of the notice, and it empowers them to do so by providing the toll-free number. It refers to "details" on the other side of the notice, but it does not require or even suggest that the consumer consider these details prior to making the opt-out choice. It does not state or even suggest that the "details" might include information on adverse consequences (loss of the benefits) associated with making the opt-out choice. Without being provided the information needed to make a choice intelligently , the v3 notice violates a basic Commission premise -- consumers should not be asked to make choices without being given the information they need to make informed decisions.

As discussed more fully below, the better approach would be to provide an alert box that informs consumers of the right to choice (via an opt-out) in the top layer, so that consumers are quickly made aware of this important right, but then refers consumers to the complete notice so that they can learn how to exercise the right as well as the consequences of doing so. In this approach, we believe that you can maximize consumer knowledge of all four key information points -- not just the first two.

We also recommend that the Commission consider the adequacy of the complete notice with regard to the one benefit listed in the complete notice layer in v2 and v3 --comparison shopping.[3] While the ability to compare terms of credit offers is certainly a benefit of prescreening, this sentence suggests that it is the only benefit. In fact, the Commission has recognized on many occasions the multitude of consumer benefits offered by prescreening

[3] The v2 and v3 full disclosures contain the following tiny-type sentence: "Offers like these may be useful in comparing terms and benefits of various credit offers."

transactions. In particular, the very ability of consumers to receive firm offers of credit or insurance cannot be overlooked as a key benefit of the prescreening transaction. As the Commission noted in its Prepared Statement of the Federal Trade Commission on the Fair Credit Reporting Act Before the Financial Institutions and Consumer Credit Subcommittee of the House Financial Services Committee (June 4, 2003, the "Prepared Statement"):

> The Commission's rationale for permitting prescreening [prior to the 1996 Amendments] was that the minimal invasion of consumer privacy involved in prescreening was offset by the fact that every consumer received an offer of credit.

Similarly, in the Brief of *Amicus Curiae*, Federal Trade Commission in Support of Plaintiff-Appellant Urging Reversal in the United States Court of Appeals for the 7th Circuit in Cole v. U.S. Capital Inc., *et. al*. (filed April 15, 2004)[4], the Commission wrote:

> A primary goal of the FCRA is to protect consumers' interest in the privacy of the information maintained by consumer reporting agencies *[citations omitted]*. The FCRA achieves this goal by prohibiting persons from obtaining consumer reports unless they have a permissible purpose. Each permissible purpose reflects a congressional determination that the benefits of that use of information are sufficient to justify the infringement of privacy that it entails….
>
> [T]he FCRA's 'firm offer of credit or insurance' permissible purpose is a narrowly circumscribed use that is fully consistent with Congress's underlying rationale that consumers should only be required to give up the privacy that the FCRA protects when they are getting something of value in return. Even though not all consumers will take advantage of a genuine firm offer of credit or insurance, the FCRA recognizes that such offers provide something of value to consumers, in return for which many consumers will be willing to yield a degree of privacy. The statute ensures the primacy of consumer choice, moreover, by requiring that a consumer who receives a firm offer must also receive a clear and conspicuous statement that explains how the offer was made and affords an opt-out opportunity for consumers who do *not* value the receipt of such offers enough to give up their privacy.

The ability of U.S. consumers to qualify for, and be offered, credit and insurance products drives the competitive marketplace for financial products. The Commission rightly notes that the FCRA is the foundation for this economic achievement. As the Prepared Statement says:

[4] Online at http://www.ftc.gov/os/caselist/colevuscapitalinc/colevuscapitalinc.htm

> The modernization of credit reporting has played a key role in providing American consumers rapid access to consumer credit. It was not that many years ago that applying for credit required a personal visit to a loan officer. The loan officer, if he did not know you personally, contacted your references, including other creditors, before making the decision on your application. If you were new to the community or applying for credit the first time, you might get turned down or be approved only for a small entry loan. The decision often would take days and would be based solely on the judgment of the loan officer. By contrast, consumers today can use the Internet from the comfort of their home to comparison shop from a wide variety of credit products and get a virtually instantaneous offer, including rates and other terms.

Credit on even more-favorable terms may, of course, also be offered via the prescreening transaction process.

We note that the Commission's view on the benefits of prescreening is completely consistent with academic research on the topic. In the seminal paper *Financial Privacy, Consumer Prosperity, and the Public Good: Maintaining the Balance*,[5] Professors and Scholars, Fred Cate, Robert Litan, Michael Staten and Peter Wallison, explore the vast array of benefits from the Fair Credit Reporting Act's enablement of credit reporting and lending, including prescreening. These scholars note that *"accessible credit information 'democratizes' financial opportunity"* (emphasis in the original) and enables U.S. consumers to enjoy a globally-unprecedented level of access to consumer credit. This accessible credit has resulted in enhanced competition, consumer empowerment and economic growth.

Accordingly, we urge the Commission not to understate the benefits of prescreening in the improved disclosures. Instead, as discussed in our recommendations below, we encourage the Commission to use this opportunity to improve the notice by including a real statement of the benefits of prescreening in the new disclosure.

"Layered Notice" Can Improve Education and Choice

We agree with the Commission that prescreening disclosures can be markedly improved. Specifically, improvements can be made in the areas of visibility and content

[5] *Financial Privacy, Consumer Prosperity, and the Public Good: Maintaining the Balance*, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES (Mar. 2003)

Improvements to the prescreening notice should be evaluated in the same way as improvements to the GLBA privacy notices. In our March 29, 2004 comments regarding Alternative Forms of Privacy Notices, Project No. P034815, we discussed the lessons learned from the CIPL Layered Notices Program. Our findings can be summarized as follows:

- Consumer comprehension and comparability should be the fundamental objectives for privacy notices. Consumers desire consistency and commonality of notice formats.

- Our focus group testing as well as testing conducted by others have demonstrated that consumers prefer a template-based short notice in a consistent format with text-based descriptions of information practices.

- "Highlights" notice forms must remain short, with no more than seven elements and a limited amount of text in each box.

Dr. Hastak's research confirms CIPL's own focus group testing as well as prior studies on readability: *layered* privacy notices can significantly improve consumer education by providing key elements of the privacy message in a highly-readable, highly-visible format.

Unlike existing layered notices efforts, which pair a highlights notice containing key elements with a complete notice of company privacy practices, the prescreening disclosures pair an "alert" type box with a relatively short notice of rights and benefits associated with prescreening. In the prescreening instance, the goal of the top layer must be to educate the individual that a privacy notice and statement of opt-out rights is included in the firm offer materials.

It is vital that the Commission's approach to the prescreening disclosures continue the Commission's existing commitment to neutral, informed privacy disclosures. The unfortunate testing of an opt-out exhortation as the top layer instead of a neutral statement designed to facilitate education must not become a barrier to developing the most effective, appropriate notices possible. In particular, in keeping with the Commission's long-standing mandate, the text in both the short and the full notice must be presented in such a way as to be accurate and consistent so that consumers can make truly informed choices.

The current proposed opt-out notice fails in this regard. The short form notice provides consumers with information on making a choice without noting any of the consequences of that choice. Additionally, because the language exhorts people to make the opt-out choice and provides the number, people will be encouraged to make a choice without understanding the facts. A government-sanctioned bias would thus be created that reverses a vital, shared public and personal goal – that of easy and timely access to credit. It is not necessary to include information on the cost or benefits in the short notice. For readability and to draw attention to

the notice, we agree that a short form layered notice can work in this circumstance. The top layer, however, should be neutral and should provide an indication that more information should be considered.

CIPL's Recommendations

To improve the prescreening disclosure process and achieve the Commission's objectives, we recommend that the Commission adopt a "layered" approach to the prescreening notices. The layers should consist of:

- A short "alert" disclosure on the offer cover page (or otherwise where the offer recipient is most likely to see it) that informs the individual that an important privacy notice is included in the materials. This alert should educate the consumer that the privacy notice contains information on the consumer's right to opt-out. For example:

> You have a choice about receiving firm offers of [credit or insurance]. Please see the important prescreening Privacy Notice [on the other side] for details.

The Commission should require the alert layer to be visible, although we recommend that companies be able to achieve visibility in whatever manner fits best with the offer document itself. The Commission can suggest ways to achieve visibility, such as with the use of graphics (such as a box or colored shading) or different text styles (such as fonts or colored text).

- The "complete" notice should appear elsewhere in the offer materials where indicated in the alert. At minimum, the complete notice should contain all of the FCRA-required disclosures. The complete notice should also contain appropriate language regarding the benefits of prescreening and the consequences of opting-out. The Commission should recommend, but not require, that these notices achieve maximum consumer-readability and comprehension through use of simple wording, short sentences, and bullets, boxes or other layout features that facilitate understanding.

The Commission might suggest sample language and layout that meets these standards as well. For example:

> **PRIVACY NOTICE:** (1) This "prescreened" offer of credit or insurance was sent to you because information in your credit report suggested that you qualify for this offer. This offer is not guaranteed if you do not actually qualify.
>
> (2) Offers like these may be useful in comparing terms and benefits of various credit and insurance products. Additionally, even if you are not interested in this offer today, these offers may be valuable to you in the future.
>
> (3) If you do not want to receive prescreened offers of credit or insurance, call toll-free 1-888-5-OPT-OUT; or write: [address]. If you call or write, you may be asked to provide your Social Security number and other personal information to verify your identity. This information will be used only to process your request. Please note that even if you choose not to receive prescreened offers of credit, you still may get other credit or insurance offers, although they may not reflect the best offers for which you would qualify.

This approach meets all of the Commission's goals: (1) it informs consumers that they have a choice, (2) it educates them so they can make the "right" informed choice, and (3) it effectively conveys all of the information that the Commission and Dr. Hastak identified as important in a consumer-friendly manner.

Conclusions

Thank you very much for your interest in this topic and for your consideration of our comments. If you have any additional questions, we would be pleased to respond.

Very truly yours,

THE CENTER FOR INFORMATION POLICY LEADERSHIP AT HUNTON & WILLIAMS

s\ *Martin E. Abrams*
s\ *Margaret P. Eisenhauer*
s\ *Lisa J. Sotto*

and

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