October 28, 2004

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

To Whom It May Concern:

This comment letter is submitted by the Consumer Bankers Association ("CBA") in response to the proposed rule ("Proposed Rule") issued by the Federal Trade Commission ("FTC") to ensure that the disclosures required under Section 615(d) of the Fair Credit Reporting Act ("FCRA") ("Prescreening Disclosures") are "presented in such format and in such type size and manner as to be simple and easy to understand." CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. CBA thanks the FTC for the opportunity to comment on the Proposed Rule.

Summary

The CBA appreciates the efforts to make the Prescreening Disclosures "simple and easy to understand." However, we do not believe that the Proposed Rule embodies the approach envisioned by Congress in enacting the Fair and Accurate Credit Transactions Act ("FACT Act"). In particular, we believe that the FTC can accomplish its statutory objective in a manner that does not result in differential treatment among the Prescreening Disclosures or holding the Prescreening Disclosures to a higher "clear and conspicuous" standard than other federally required disclosures. Instead of the approach embodied in the Proposed Rule, the CBA urges the FTC to consider adopting the approach it tested as an "improved" notice as part of the consumer survey it conducted in connection with the Proposed Rule ("Survey"). We provide more detailed comments below.

Consumers Benefit from Prescreening

There can be no doubt that consumers receive a large net benefit as a result of prescreening. The increased competition in the credit marketplace has produced almost countless offers to consumers of improved credit products at lower prices. The Information Policy Institute ("IPI"), with the support of the National Chamber Foundation, recently published a report, "The Fair Credit Reporting Act: Access, Efficiency & Opportunity," that devoted significant discussion to the benefits of prescreening. In sum,

the IPI found that "[a]s recently as 12 years ago, access to credit cards was primarily for the affluent, and most borrowers paid dearly for credit." However, the IPI found that: (i) prescreening has helped to lower the interest rate on credit card balances dramatically; (ii) prescreening is the most important method for credit card issuers to acquire new customers; (iii) the cost of acquiring new credit card customers would increase and access would decrease if prescreening were restricted; and (iv) prescreened offers of credit are not driving the rise in identity theft.

The Federal Reserve Board ("Board") is also in the finishing stages of completing its congressionally mandated study on the costs and benefits of prescreening to consumers. The results of the Board's study have not yet been released. We request that the FTC allow the CBA, and others, to be permitted to provide additional comments for the record on the Proposed Rule once the Board's study is released.[1] We believe that findings from the Board's study would be directly related to the subject matter regulated by the Proposed Rule. In particular, we believe that it would be important to consider any proposal that essentially encourages a consumer to opt out of receiving prescreened solicitations, which is undeniably the case with respect to the Proposed Rule, with more complete knowledge of how the consumer's decision may help or hurt the consumer.

The Layered Notice

The Proposed Rule establishes a regulatory requirement to provide the Prescreening Disclosures in a layered notice ("Layered Notice") made up of a short notice ("Short Notice") and a long notice ("Long Notice"). The Short Notice must be a simple and easy to understand statement that the consumer has the right to opt out of receiving prescreened solicitations, and the toll-free number the consumer can call to opt out ("Opt Out Notice"). Furthermore, the Short Notice must direct the consumer to the existence and location of the Long Notice, using the heading "OPT-OUT NOTICE." The Short Notice may not contain any other information. The Short Notice must be prominent, clear, and conspicuous on the front side of the first page of the principal promotional document in the solicitation (or, if provided electronically, on the first screen). A company must print the Short Notice in a type size that is larger than the type size of the principal text on the same page, but in no event smaller than 12-point type. The Short Notice must be located on the page and in a format so that the statement is distinct from other text, such as inside a border. Finally, the Short Notice must be in a typeface that is distinct from other typeface used on the same page.

The Long Notice must be a simple and easy to understand statement that includes the Prescreening Disclosures. The Long Notice may not include any other information that interferes with, detracts from, contradicts, or otherwise undermines the purpose of the opt-out notices. It must be clear and conspicuous and in a type size no smaller than the type size of the principal text on the same page, but in no event smaller than 8-point type. The Long Notice must begin with the heading "OPT-OUT NOTICE" and be in a typeface that is distinct from other typeface used on the same page. The Long Notice must also be set apart from other text on the page.

[1] Pursuant to Section 213(e)(2) of the FACT Act, the Board must present its study to Congress by December 4, 2004. It is our understanding that the Board intends to meet this deadline.

The CBA does not believe that the Layered Notice is a necessary, or appropriate, approach in order to make the Prescreening Disclosures "simple and easy to understand." We believe the FTC has gone well beyond what is necessary to make the Prescreening Disclosures "simple and easy to understand," and instead has embarked on a project to make the Prescreening Disclosures more prominent, clear, and conspicuous. Furthermore, the Proposed Rule has the effect of establishing the Opt Out Notice as more important than any other federally required disclosure, and more important than any of the other Prescreening Disclosures. We do not believe this is appropriate from a policy perspective, nor do we believe there is support for such a result in the statute or the FACT Act's legislative history.

We do not believe that Congress intended for the FTC to regulate how to make the Prescreening Disclosures clear and conspicuous. Although Congress addressed the issue of prescreening in several areas in Section 213 of the FACT Act, none of the provisions in the FACT Act amended the existing statutory requirement that the Prescreening Disclosures be "clear and conspicuous." Furthermore, Congress did not grant the FTC limited rulemaking authority to interpret the "clear and conspicuous" requirement. Had Congress intended the FTC to address issues related to the clear and conspicuous nature of the Prescreening Disclosures, we believe Congress would have amended Section 615(d) of the FCRA to state such an intention. However, Congress apparently believed that "simple and easy to understand" meant something different, and therefore added a new Section 615(d)(2)(B) to the FCRA to achieve its goal.

It is also unlikely that Congress would have intended the FTC to engage in a process whereby the FTC is in a position to determine, unilaterally, the relative importance of disclosures required to be included in written prescreened solicitations. Not only was such an intention not evident in the statute or the FACT Act's legislative history, but the language of the relevant statutes suggests an outcome opposite of that provided in the Proposed Rule. As a general matter, all of the Prescreening Disclosures must be conspicuous. So, too, must the solicitation disclosures required under the Truth in Lending Act ("TILA"). Even if that were the only point of comparison, it would appear that Congress intended for these two sets of disclosures that are to be in the same solicitation to be equally conspicuous. However, there is a distinction between the Prescreening Disclosures and the solicitation disclosures under TILA. Specifically, Congress included in the statutory language of TILA that the solicitation disclosures (also called the "Schumer box") must also be "prominent." This requirement is absent from Section 615(d), suggesting that the Schumer box has at least a slightly increased importance in terms of prominence than the Prescreening Disclosures. Therefore, we do not understand how the FCRA and TILA could support a result whereby the Opt Out Notice, which must be "clear and conspicuous" and "simple and easy to understand" should be given drastically increased prominence over another disclosure that must be in a "conspicuous and prominent location."

Aside from an analysis of the statutory construction, we do not believe that public policy dictates, or even supports, a result whereby the Opt Out Notice should be situated in a manner that clearly suggests to the consumer that the consumer should opt out. There can be no debate as to whether the Opt Out Notice, as provided in the Proposed Rule, would encourage consumers to opt out of prescreening. By using a format that resembles warnings on cigarette labels, and placing the word "prescreening" in scare quotes, the Opt Out Notice suggests that prescreening is somehow nefarious. After all, why else would the government require such a foreboding disclosure on the first page of

the solicitation? We do not believe that this is the appropriate message to convey from a policy perspective. Given the benefits of prescreening to consumers, we also do not believe that public policy indicates that the Opt Out Notice is more important than the Schumer box. Regardless of whether others agree or disagree with our value judgment pertaining to the Opt Out Notices and the Schumer box, we believe that the public policy determination is of a level of gravity that Congress would have discussed the matter.

The Proposed Rule also does not provide any indication as to how the plain language of the FCRA, which requires *each* of the Prescreening Disclosures to be "simple and easy to understand," provides support for an approach that calls one or two Prescreening Disclosures out for special treatment. The Supplementary Information to the Proposed Rule indicates that the FTC considered the section heading for Section 213 of the FACT Act ("Enhanced Disclosure of the Means Available to Opt Out of Prescreened Lists") in determining to make the Opt Out Notices more conspicuous than the other Prescreening Disclosures. We note that, although a section heading may assist in interpreting the meaning of Section 213 of the FACT Act, it cannot override the plain language of the statute—and the statute applies equal treatment to each of the Prescreening Disclosures. That does not mean that the section heading is not without meaning. On the contrary, there are several other provisions to Section 213 of the FACT Act to which the section heading may provide for some guidance. But in no way does the section heading direct the FTC to adopt, or nor does it provide support for, a Layered Notice.

The FTC also indicates that statements made by Senators Johnson and Sarbanes are indicative of the congressional intent to provide for a Layered Notice. Again, the statements of two Senators, even if they supported the FTC's claim,[2] cannot control the plain language of the statute. We also note that the FTC omitted legislative history from its discussion that could be a counterweight to the history it cited. In particular, the original sponsor of the FACT Act, Congressman Bachus, engaged in a colloquy with Congressman Kanjorski on the House floor as part of the debate on the conference report to H.R. 2622. In particular, Congressman Bachus stated that "not only should consumers know they can opt out of getting these [prescreened] offers, [but] they should also know that opting out…affects their chances of getting additional credit offers with competitive terms." 149 Cong. Rec. H12218-19 (daily ed. Nov. 21, 2003). The CBA concedes that this colloquy was held in the context of the FTC's obligation to engage in an education campaign. However, the substance of the discussion is instructive: the sponsor of the FACT Act intended for the FTC to take a balanced approach to prescreening. We respectfully submit that requiring an ominous Opt Out Notice on the first page of the written solicitation, printed more prominently than the solicitation itself, is not a balanced approach to prescreening.

Finally, the FTC relies on the Survey to demonstrate the need for the Layered Notice. We believe the Survey falls short of indicating a need for the Layered Notice. In fact, the Survey indicates that the Layered Notice is not the only mechanism available to enhance the simplicity and ease of understanding of the Prescreening Disclosures. The Survey found that roughly equal numbers of consumers noticed the Opt Out Notice as

[2] Senator Johnson's statement is sufficiently vague that it is not even certain that he was describing Section 213(a) of the FACT Act. Senator Sarbanes' statements do not necessarily suggest a Layered Notice.

between the Layered Notice and the "improved" notice tested ("Improved Notice").[3] Therefore, it would not appear that there is a statistically significant difference between the Layered Notice and the Improved Notice with respect to how conspicuously each provided the Opt Out Notice. The FTC bases some of its decision to use the Layered Notice, however, on the fact that consumers who casually reviewed the Layered Notice were more likely to understand how to opt out than those who casually reviewed the Improved Notice.[4] The CBA suggests the FTC is relying on the wrong findings with respect to whether the Layered Notice or the Improved Notice is better at conveying how to opt out of prescreening. In fact, a consumer who has no interest in opting out is unlikely to focus on how to opt out. The Survey did not include a cross tab allowing us to review the results of consumers who would be inclined to opt out. Therefore, we must use another proxy, such as requiring each consumer specifically to read the Prescreening Disclosures.[5] Once consumers were told to read the Layered Notice or the Improved Notice, it appears that each notice conveyed the substance of the Opt Out Notices equally well. In other words, the Layered Notice and the Improved Notice were comparable in terms of whether they were "simple and easy to understand." At the very least, the Survey illustrates that the Layered Notice is not the only approach available to the FTC if it seeks to make the Prescreening Disclosures "simple and easy to understand."

Adopt the Improved Notice

We strongly urge the Commission to adopt the approach taken in the Improved Notice as the method by which companies can make their Prescreening Disclosures "simple and easy to understand." By adopting the Improved Notice, the FTC would meet its statutory directive to make the Prescreening Disclosures simple and easy to understand. Furthermore, the FTC would achieve its objectives in a manner that does not involve a judgment that the Opt Out Notice should be more clear and conspicuous than the other Prescreening Disclosures, or any other federally required disclosures.

In adopting the Improved Notice for the final rule, we believe the FTC should retain much of the Proposed Rule in the final rule. For example, we commend the FTC for defining "simple and easy to understand" to mean "plain language designed to be understood by ordinary consumers."[6] This definition should be retained in the final rule.

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[3] Had the FTC been charged with improving the conspicuousness of the Prescreening Disclosures, the Survey's results on the conspicuousness of the various notices would be more relevant to the discussion.

[4] We respectfully suggest that the Survey may be inherently flawed in this regard. The Survey asked consumers about an item of information that they would attempt to remember only if they were interested in opting out. While they may or may not be likely to recall that they had the option to opt out of prescreening, it is less likely that they would focus on how to do so since they were in a setting in which they could not possibly have done so.

[5] This is a proxy because it is reasonable to assume that a consumer who is uninterested in opting out will not read further. By forcing the consumer to read the Prescreen Disclosures, we can get a proxy of what information a consumer would absorb if the consumer reads the full disclosures (*i.e.*, if the consumer is interested in opting out).

[6] Although the CBA is grateful for the guidance, we ask the FTC to delete the list of components that may be considered as part of a determination as to whether the Prescreening Disclosures are

Although the adoption of the Improved Notice as the approach in the final rule would result in the elimination of the requirements pertaining to the Short Notice, we believe the requirements pertaining to the Long Notice would generally be acceptable with respect to the Improved Notice. For example, the Improved Notice should: (i) be simple and easy to understand; (ii) be clear and conspicuous; and (iii) appear in the solicitation. We also concur that the FTC should establish a minimum threshold for format and type size such that the Prescreening Disclosures can be read by the consumer. We agree with the FTC that the context of the Prescreening Disclosures may be a factor in determining whether they are simple and easy to understand. For example, providing the Prescreening Disclosures as part of a long, run-on paragraph in 5-point type as part of a plethora of other disclosures would probably not result in a disclosure that is easy for the consumer to understand.[7] Although the Proposed Rule probably goes beyond what is necessary to achieve its goal, the CBA does not necessarily object to a requirement to set the Prescreening Disclosures apart from other disclosures on the same page.

However, we request that, if the FTC retains a requirement to include a heading for the Prescreening Disclosures, the FTC provide a heading that is more descriptive of the Prescreening Disclosures. A heading such as "PRESCREENING DISCLOSURES" would be more appropriate than a heading that suggests the disclosures pertain only to opting out of prescreening. Finally, if the FTC retains the requirement to use a distinct typeface, we ask that the FTC clarify the final rule to require that the typeface be distinct from the principal typeface on the document. The use of bold, italics, or underlining elsewhere in the document should not prohibit the use of the same typeface for the Prescreening Disclosures.

We also ask the FTC to delete the prohibition on including "any other information that interferes with, detracts from, contradicts, or otherwise undermines the purpose of the opt-out notices." The CBA agrees that the solicitation should not include information that is unfair or deceptive—and such behavior is already prohibited. However, the standard proposed by the FTC is vague and may prove counterproductive. For example, the FTC should concur with the assertion that consumers are better served if they are provided a more thorough description of the prescreening process, and the costs and benefits associated with the process. Companies that prescreen should not be discouraged from providing such information to consumers, which is what the Proposed Rule would appear to do.

With respect to the model notice provided for the Long Notice, we believe the model notice does an excellent job of summarizing the Prescreening Disclosures. In fact, the summary of the Prescreening Disclosures is the single most important item in the Proposed Rule with respect to making them simple and easy to understand. Therefore, we ask the FTC to retain this language. However, we also ask the FTC to re-

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simple and easy to understand. Although the FTC apparently does not intend to use the list as a "checklist," we cannot be certain that others may not try to do so, now or in the future.

[7] We note that establishing certain *minimum* thresholds to provide for a basic understanding of a disclosure is not necessarily the same as addressing whether the disclosure is prominent or conspicuous. The distinction lies in the goal of ensuring that the disclosure is in a format such that it can be understood at a fundamental level, compared to ensuring that the disclosure is conspicuous in a broader context.

insert the language the FTC tested as part of the Survey. This language pertained to the general benefit associated with prescreening, the need to provide a social security number as part of opting out, and the fact that opting out of prescreening is not an opt out with respect to all solicitations for credit or insurance. We believe each of these statements conveys important information to consumers. We appreciate that the FTC believes that use of these statements would "likely comply" with the Proposed Rule. However, we ask the FTC to provide more concrete guidance. Indeed, as there is no evidence that the language detracts from the Prescreening Disclosures, it is not clear to us why the FTC removed the language from the model notice once the Survey was completed.

Improvements to the Layered Notice

As discussed at length above, the CBA strongly opposes the Layered Notice in the Proposed Rule. However, we feel it is necessary to provide comments on the Short Notice in the event that the FTC retains the Layered Notice. In no way should our comments on how to improve the Short Notice be interpreted as the CBA condoning the Layered Notice, or that CBA would support the Layered Notice if the improvements were made.

If the Short Notice is retained, the FTC has an obligation to develop a Short Notice that does not appear to suggest opting out of prescreening. By placing the Short Notice in a box, in a larger type size than the solicitation itself, and in bold or other typeface, the FTC has created a disclosure that suggests immediate action should be taken by the consumer. Several changes to the Short Notice must be made to avoid this result. For example, if a notice must appear on the first page of the solicitation, the only requirement should be that it be clear and conspicuous. The FTC should delete a minimum type size requirement, especially one that requires the Short Notice to be larger than the text of the solicitation itself. The FTC should also delete the requirement that the Short Notice be placed in a box or similar device, and that the Short Notice should be in a more distinctive typeface than the solicitation itself.

The CBA also believes the model notice for the Short Notice should be content neutral. In other words, the Short Notice should do no more than indicate to the consumer that the Prescreening Disclosures can be found elsewhere in the solicitation. This approach is also consistent with the approach outlined by the Board with respect to the Schumer box. Therefore, the model notice should be amended to read: "Please see our prescreening disclosures [specify location here] to receive important information about your rights and prescreened offers of [credit/insurance as applicable]."

Effective Date

The FTC has proposed that the final rule be effective 60 days after it is published. The CBA strongly encourages the FTC to revise this timeframe to reflect the practical realities of the prescreening process. If the Proposed Rule is adopted, it will take companies significant amounts of time to assemble their prescreening templates, review them for compliance, revise the templates to achieve compliance with the final rule, review and proof them for compliance, and print the new solicitations. In order to provide the FTC with a point of reference as to the need for significant lead time when printing new solicitations, we understand that some companies have sent solicitations to the printer for use two to three months from now.

We note that the FTC may believe that 60 days is an appropriate amount of time because the FTC has significantly underestimated the number of man-hours that would be necessary to bring a company into compliance with the Proposed Rule. The FTC estimates that each company would need dedicate only a single employee for a single business day to collect the necessary templates, redraft them, review them for compliance, and discuss the revisions with the printer. We do not believe the FTC's estimate to be necessarily accurate even for smaller companies, much less for large banks that send dozens, if not hundreds, of different prescreened solicitations to consumers. To suggest that a bank with such extensive prescreening programs would need only one employee for one business day to make the necessary changes to comply with the Proposed Rule is simply not credible. In fact, we believe that many companies would need 9 months to comply with the final rule. Anything less than 6 months would create significant and unnecessary burdens, and could disrupt many prescreening programs.

Use of Model Language

The CBA applauds the FTC for providing model language to assist companies in their efforts to comply with the final rule. Although we have provided comments on the model language above, we urge the FTC to retain the use of model language in the final rule. We appreciate that the FTC has indicated in the Supplementary Information that it "considers the model notices compliant with the statutory requirements, as well as with the requirements of the Proposed Rule." However, we ask that the FTC provide for a specific safe harbor if a company uses the model language. Such a safe harbor would be consistent with other regulations issued by the FTC. Furthermore, we cannot think of a circumstance under which a company that uses the model language appropriately should be considered in violation of the final rule.

We would be happy to answer questions or to provide additional material. Please contact me at msullivan@cbanet.org or 703 276 3873.

Very truly yours,

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