Bank of America
Legal Department
NC1-002-29-01
101 South Tryon Street
Charlotte, NC 28255

Tel 704.386.9644
Fax 704.386.1032

BY ELECTRONIC MAIL

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

Dear Sir or Madam:

Bank of America Corporation ("Bank of America") welcomes the opportunity to comment on the proposed rule ("Proposed Rule") published by the Federal Trade Commission ("FTC"), to improve the required notice to consumers regarding their right to opt out of prescreened solicitations for credit or insurance as required under Section 213 of the Fair and Accurate Credit Transactions Act ("FACT Act"). Bank of America is one of the world's largest financial institutions, serving individual consumers, small businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving 33 million consumer relationships with 5,800 retail banking offices, more than 16,000 ATMs and award-winning online banking with more than eleven million active users.

The Proposed Rule implements Section 213(a) of the FACT Act, which requires companies making prescreened solicitations for credit or insurance to provide enhanced disclosures about the consumer's right to opt out of receiving such offers in the future. Section 213(a) directs the FTC to draft a rule establishing opt-out disclosures that are

simple and easy to understand.[1] The Proposed Rule would require institutions using prescreened solicitations to include a "layered notice" consisting of a short, prominent notice informing consumers of their right to opt out, and a longer notice informing consumers of additional rights.

Layered Notice

Bank of America does not believe that a layered notice approach is necessary or appropriate in this context. The layered notice would establish an enhanced level of prominence for this notice that goes well beyond that required by the FACT Act. The standard established in the Fair Credit Reporting Act ("FCRA"), which is amended by the FACT Act, is a notice that is "clear and conspicuous." This standard has not been changed. However, Section 213(a) of the FACT Act directs the FTC to establish a rule setting forth the format, type size and manner of presentation of the prescreening notice that is required by Section 615(d) of the FCRA to be "simple and easy to understand." This provision does not incorporate any requirement to make the notice, or a part of the notice related to the ability to opt out, more prominent than other disclosures that are also required to be "clear and conspicuous." However, we believe that the layered approach as described in the Proposed Rule is primarily directed to making the opt out portion of the notice more prominent and not necessarily more "simple and easy to understand."

Requiring a notice that is more prominent than the rest of the letter or other communication, specifically calling out the right to opt out and the phone number, disproportionately emphasizes the significance of this provision relative to other information and disclosures included in such communication. Moreover, the proposed layered notice encourages consumers to opt-out of prescreening without informing them of the consequences. Prescreened solicitations provide many and significant benefits to consumers, including making credit less expensive, informing consumers of better pricing, and targeted marketing to consumers who are most likely to qualify rather than blanket marketing. The purpose of making this notice "simple and easy to understand" should facilitate an informed decision by the consumer about whether to continue to receive such solicitations. A layered notice does not promote an informed decision.

In addition, the layered approach, as proposed, is likely to be confusing to consumers who may want to respond to the offer. Marketers typically highlight the means for a consumer to accept the offer or ask questions. It is likely that this level of prominence on the front of a marketing piece could result in consumers calling the consumer reporting agency opt out number to accept the offer. It is also likely that consumers will not understand in such a brief statement that the opt out number relates to all prescreened solicitations rather than a general opt out for marketing from the institution from which the solicitation was received.

[1] The FTC defines "simple and easy to understand" as plain language designed to be understood by ordinary consumers. Factors that are considered in this determination include clear and concise sentences and the active voice, avoiding legal and technical terminology as well as multiple negatives.

Further, there are a number of other disclosures that are required to be on the first page of a marketing offer. The more disclosures required to be on the front of an offer, the less significance each will have for the consumer. For insurance offers, there is a specific disclosure that must appear in larger type than the marketing offer itself. This new disclosure would "compete" with the required insurance disclosure. In addition, the Office of the Comptroller of the Currency ("OCC") has recently issued guidance to national banks regarding unfair and deceptive practices that will likely result in including many additional footnotes and other explanatory material on the front of an offer. These competing sets of disclosures are likely to result in confusion and less clarity for consumers.

Alternatives to Layered Notice

The FTC conducted a consumer study to compare the noticeability and comprehension of three different versions of an opt-out notice embedded in prescreened offers of credit. We recommend that the FTC adopt version #2 outlined in the FTC study. Version #2 uses simpler and clearer language than the language in the proposed layered notice approach. Version #2 is a single disclosure that allows consumers to make an informed choice about opting out of prescreened solicitations.

If the FTC believes that Congress' intent was to highlight for the consumer the fact that he or she has the right to opt out, Bank of America suggests that the FTC instead only require on the first page a reference to the right to opt out and where to find the detail in the marketing solicitation. This would avoid confusion as to whether the telephone number relates to the offer or some other activity. It would also result in less confusion and conflict with the other disclosures now required on the front page of many offers. As an alternative, we would propose that the FTC permit institutions to use only the long notice, but require institutions to make it simple and easy to understand and to draw attention to it through the use of font size larger than the surrounding type, a different type face, or otherwise to call attention to the notice.

Short Notice

As mentioned above, we do not believe that the FTC was directed to make this notice, or a portion of it (that is, the right to opt out and phone number to do so), more prominent. The FTC was directed to specify the manner, format and type size to make it "simple and easy to understand." However, the specific requirements for the short notice in the Proposed Rule include the requirement "***prominent***, clear, and conspicuous" [2](emphasis added). In addition, dictating the minimum font size, and that it must be on the first page, must be distinct from other text and in a different typeface from the rest of the page, are all directed to the level of prominence of the information, not to how to make the material simple and easy to understand.

[2] Proposed 16 C.F.R. § 642.3(a)(2) (i).

Long Notice

The Proposed Rule provides that the long notice must begin with the heading "OPT-OUT NOTICE." Bank of America does not specifically object to this heading, but believes it could be more specific to identify this as the right to opt out with the consumer reporting agencies from receiving all prescreened solicitations from all financial institutions, not just from the one sending the particular solicitation. Most institutions have a separate process for accepting requests to opt out of various types of marketing solicitations. Designating this notice solely as "OPT-OUT NOTICE" does not distinguish between these processes and different rights. Thus, we suggest a heading similar to "CREDIT BUREAU OPT OUT NOTICE" to properly reflect this opt out.

It is unclear in the Proposed Rule whether the FTC intends the entire long notice to be set out in type no smaller than that contained on that page (but in no event smaller than 8-point type), in a typeface distinct from other typeface on the page and set apart from other text on the page. If the entire long notice must meet these criteria, it is likely that it will be more prominent than other disclosures on that page which must also be "clear and conspicuous" and may be at least as important to the consumer as they relate to the actual offer (such as the Schumer Box or the material conditions for the offer). Again, we believe that this requirement imposes a governmental determination that the right to opt out (and the other required disclosures) related to this offer should be considered by the consumer to be more important than other information appearing within the letter.

Effective Date

The Proposed Rule provides for an effective date of 60 days after the rule becomes final. The process to develop and send prescreened solicitations is very detailed and there is quite a bit of lead time in developing and sending the offer. We develop the disclosure portion of the prescreened solicitations several months in advance, which may be coupled with differing versions of the cover letter. Often, the disclosure portions are pre-printed, while the cover letters are laser printed. The pre-printed versions require additional lead time. Therefore, in order to avoid significant additional cost, we recommend that the FTC provide that the final rule be effective 180 days after it is finalized.

Costs for the Proposal

The Proposed Rule indicates that about five hundred (500) to seven hundred fifty (750) firms offer prescreened solicitations. The FTC estimates that the cost to the entire industry of the proposed layered notice will be between $110,000 and $167,000. We believe the estimated costs are significantly too low. Eight (8) hours per firm is clearly not sufficient to handle the number of solicitations many firms produce and there are other costs and resources needed to make the changes and address customer confusion and other related issues. We estimate that the additional cost to Bank of America alone will exceed $200,000.

Bank of America appreciates the opportunity to comment on the Agency's proposal. If you have any questions regarding our comments, please contact Kathryn D. Kohler, Assistant General Counsel, at (704) 386-9644.

Very truly yours,

Kathryn D. Kohler

Kathryn D. Kohler
Assistant General Counsel