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COALITION TO IMPLEMENT THE FACT ACT

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:

The Coalition to Implement the FACT Act ("Coalition") submits this comment letter in response to the Proposed Rule ("Proposed Rule") issued by the Federal Trade Commission ("FTC") regarding the type size, format, and manner in which entities must provide the disclosures required by Section 615(d) of the Fair Credit Reporting Act ("FCRA") ("Prescreening Disclosures"). The Coalition represents a full range of trade associations and companies that furnish and use consumer information, as well as those who collect and disclose such information. We appreciate the opportunity to comment on the Proposed Rule.

Benefits of Prescreening

A number of in-depth academic studies over the past several years concluded that the use of prescreening by credit grantors has been of significant direct and indirect benefit to consumers. Essentially, these studies found that prescreened firm offers are a major vehicle for promoting competition in credit markets; for reducing the cost and increasing the availability of credit (sometimes to consumers who might not otherwise be knowledgeable about their own creditworthiness); and, for providing creditors with what is by far the most cost-effective and fraud-resistant form of mass marketing currently available. The findings of these academic studies reflect the real world marketplace experiences not only of the Coalition's credit grantors but of its insurance members as well -- all of whom utilize prescreening to develop new customers and/or retain existing ones.

The members of the Coalition believe that prescreened offers may well be the single most effective and important marketing catalyst in our nation's economy for expanding credit and insurance opportunities for consumers; and, through the intense competition fostered by prescreening, for reducing the costs and increasing the benefits associated with grants of credit and insurance. Additionally, internal analyses performed by Coalition companies confirm that the incidence of fraud associated with prescreened offers is a statistically insignificant fraction of the already small number of fraud cases associated with other forms of mass marketing.

Prescreening Disclosures Prior to the FACT Act

Section 615(d) of the FCRA specifies the Prescreening Disclosures to be included in written prescreened solicitations. In particular, the FCRA requires the following disclosures to be included in written prescreened solicitations:

- Information contained in the consumer's consumer report was used in connection with the transaction;
- The consumer received the offer of credit or insurance because the consumer satisfied the selection criteria for the offer;
- 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 creditworthiness or insurability, or the consumer does not furnish any required collateral;
- 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 prescreened credit or insurance transaction; and
- The consumer may exercise the right to opt out of prescreening by calling a toll-free number or writing the appropriate consumer reporting agency.

Under the FCRA, the Prescreening Disclosures must be provided as "a clear and conspicuous statement" to the consumer as part of the written solicitation. There is no statutory definition of clear and conspicuous, and the federal banking agencies with the authority to issue broad regulations under the FCRA have not provided a regulatory definition for the term. However, we are not aware of any regulatory enforcement action, including action taken by the FTC, with respect to how the Prescreening Disclosures are generally provided, nor are we aware of any private rights of action challenging industry's general practices. In fact, the Prescreening Disclosures are usually provided with a variety of other disclosures that must also be provided in a clear and conspicuous manner. In short, we are not aware of significant regulatory or enforcement issues involving allegations that the Prescreening Disclosures are not provided in a clear and conspicuous manner.

Prescreening Disclosures After the FACT Act

The FACT Act amended Section 615(d) of the FCRA to require the Commission to specify the format, type size, and manner of the Prescreening Disclosures so "as to be simple and easy to understand." Indeed, the Coalition supports the notion of making the Prescreening Disclosures "simple and easy to understand." The statutory requirements, as listed above, can be relatively complex and difficult for a company to distill into everyday language without concerns that someone will allege that the company is not providing the "full" or "complete" disclosures required by the FCRA.

The Basis for the Proposed Rule

The FTC states that the Proposed Rule "carries out the [FTC's] mandate to improve prescreen notices so that they are simple and easy to understand." The FTC further states that there are two components to making a notice simple and easy to understand. First, the notice must use language and syntax that effectively convey the intended message to readers. Second, the FTC alleges that the "presentation and format must call attention to the notice and enhance its readability."

The Coalition concurs with the FTC that making the Prescreening Disclosures "simple and easy to understand" should focus on the language and syntax of the disclosures. As discussed below, we applaud the FTC for its efforts in this regard. However, the Coalition respectfully disagrees with the FTC's statement that a charge to make the Prescreen Disclosures "simple" and "easy to understand" necessarily leads to a focus on calling attention to the Prescreen Disclosures. In fact, it would appear that the FTC, in addition to the other federal banking regulators, have repeatedly stated that issues relating to calling attention to required notices is a function of making the notices "clear and conspicuous." Although the Coalition agrees that the Prescreening Disclosures should be clear and conspicuous, Congress did not amend the existing "clear and conspicuous" requirement for the Prescreening Disclosures, nor did it grant the FTC the authority to implement regulations pertaining to the clear and conspicuous nature of the Prescreening Disclosures.

To the extent the FTC believes that making the Prescreening Disclosures "easy to understand" involves calling attention to them, this would appear to conflict with the FTC's interpretation of its regulations implementing the Gramm-Leach-Bliley Act ("GLBA Rule"). In particular, the FTC states in the GLBA Rule that the definition of "clear and conspicuous" has two separate and distinct components—the notice must be "reasonably understandable" and it must be "designed to call attention to the nature and significance of the information in the notice." The GLBA Rule goes so far as to provide separate and distinct examples of how to comply with each of the components. Given that the Proposed Rule appears to state that calling attention to the Prescreening Disclosures is a fundamental part of whether they are understandable, when the GLBA Rule treats the two issues as fundamentally different, we believe the Proposed Rule injects confusion into understanding how the FTC interprets standards pertaining to conspicuousness and ease of understanding.

Even if we were to accept the FTC's assumption that a direction to make the Prescreening Disclosures "simple and easy to understand" included an implied direction to require them to be disclosed in a manner that "call[s] attention to the notice and enhance its readability," the Proposed Rule is drafted in a manner that extends beyond even the broad parameters the FTC has established for itself. In particular, we believe that the long notice ("Long Notice") standing by itself, without the short notice ("Short Notice"), would meet the FTC's broad objective of calling

attention to the Prescreening Disclosures and enhance their readability. In this Regard, the notice would be distinct from other clear and conspicuous disclosures, and would be presented in a format that enhances its readability. However, the layered notice ("Layered Notice") included in the Proposed Rule goes beyond the FTC's self-described mandate, and would single out two portions of the Prescreen Disclosures and make them more prominent than any other federal disclosures, and more prominent than the text of the solicitation itself. We do not believe this is what was intended or required by Congress.

The Layered Notice

The Proposed Rule would require a company that sends a written prescreened solicitation to a consumer to include the Short Notice and the Long Notice. The Short Notice must include a simple and easy to understand statement that the consumer has a right to opt out of prescreening and the toll-free number to exercise that right. The Short Notice must also direct the consumer to the existence and location of the Long Notice, and state the heading of the Long Notice (*i.e.*, "OPT-OUT NOTICE"). The Proposed Rule prohibits the inclusion of any additional information in the Short Notice.

The Proposed Rule also specifies how the Short Notice should be provided in the solicitation. The Short Notice must be prominent, clear, and conspicuous. It must also be 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, on the front page of the principal promotional document in the solicitation. If the solicitation is provided electronically, the Short Notice must appear on the first screen. The Short Notice must be located on the page and in a format so as to be 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, such as bolding, italicizing, underlining, and/or in a different color.

Like the Short Notice, the Long Notice must also be simple and easy to understand. It must contain each of the Prescreening Disclosures, and a company could not include additional information "that interferes with, detracts from, contradicts, or otherwise undermines the purpose of the opt-out notices." The Long Notice must be clear and conspicuous. It also must appear in the solicitation and be in a type size that is 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 be in a typeface that is distinct from the other typeface used on the same page and have the heading "OPT-OUT NOTICE".

The Determination that the Opt Out Disclosures Are Fundamentally More Important Than Any Other Legal Disclosures

The Coalition believes that the Layered Notice is not the necessary or appropriate approach to make the Prescreening Disclosures simple and easy to understand. We believe there are several problems inherent in using the Layered Notice included the Proposed Rule. As a primary matter, the FTC has apparently determined that informing the consumer of his or her right to opt out of prescreening and how to opt out of prescreening (collectively, the "Opt Out Disclosures") is the most important legally mandated information made available to consumers. We do not believe there is any support in the statute or its legislative history for this result, nor do we believe that such a result can be justified as a policy matter.

The Coalition respectfully notes that Congress, at no time, engaged in a discussion of whether the Opt Out Disclosures, or even the full Prescreening Disclosures, were more important than other legally required disclosures included in written prescreened solicitations. We believe that such a policy matter would have been worthy of congressional debate had any Member of Congress intended for such a result. However, there is not a single instance of legislative history that touches on this topic, even tangentially. The Coalition does not believe that Congress would have nonchalantly deemed the Prescreening Disclosures (even yet, a small subset of them) to be more important than those disclosures pertaining to the cost and terms of the solicitation itself. If such a result were the intention, we are certain that there would have been concrete evidence of this policy determination.

Indeed, had Congress intended to make the Prescreening Disclosures more prominent than the others, Congress would have given a more obvious signal of its intent to alter the fundamental premise that the disclosures should be just as clear and conspicuous as any other disclosure that is required to be provided in a clear and conspicuous manner. For example, we direct the FTC's attention to Section 122(c)(1)(B) of the Truth in Lending Act ("TILA"). Section 122(c)(1)(B) of TILA includes a *statutory* requirement that certain disclosures, commonly referred to as the "Schumer box," must be "placed in a conspicuous and prominent location on or with any written application, solicitation, or other document," such as a written prescreened offer of credit. The Federal Reserve Board ("Board") has implemented this requirement by stating in its Official Staff Commentary to Regulation Z: "Disclosures are deemed to be prominently located, for example, if the disclosures are on the same page as an application or solicitation reply form. If the disclosures appear elsewhere, they are deemed to be prominently located if the application or solicitation reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that they contain rate, fee, and other cost information, as applicable." Therefore, it has been the longstanding requirement that, even when Congress specifies *in the statute* that a disclosure must be *prominent* in addition to conspicuous, the substance of the required disclosure need not appear on the first

page of the solicitation, much less inside a border using special typeface and a larger type size than the solicitation itself. In fact, a clear and conspicuous reference to the location of the disclosure meets the standard to provide the disclosure in a prominent manner.

The reference to the Board's requirements under TILA with respect to the Schumer box is important to highlight the fact that the Layered Notice, and the Short Notice in particular, are not what Congress intended when it directed the FTC to make the Prescreening Disclosures "simple and easy to understand." Unlike in TILA, Congress did not require that the Prescreening Disclosures must be "prominent" in addition to being conspicuous. Even when Congress intends for something to be prominent, the law has not required the substance of relevant disclosures to be presented on the first page of the solicitation as the FTC envisions in the Short Notice. We simply do not believe that a direction to make a notice "simple and easy to understand" means that the notice should be made even more prominent than those required to be made prominent by Congress are made. Said differently, it is highly improbable that when Congress intended for two disclosures to be provided in the same solicitation, as is the case with the Schumer box and the Prescreening Disclosures, Congress intended for the "simple and easy to understand" disclosure to be more prominent than the "prominent" disclosure. Indeed, a "prominent" disclosure should, by logic, be more prominent than one that is only required to be "simple and easy to understand."

Legislative History

In the Supplementary Information to the Proposed Rule the FTC outlines its support for using the Layered Notice. For example, the FTC states that Congress intended to enhance the disclosure of the means to opt out of prescreened lists. The FTC's support for this assertion is the fact that Congress used a section heading with a similar title for the section that included the FTC's charge to make the Prescreening Disclosures simple and easy to understand. We believe the FTC's reliance on the section heading to justify the Layered Notice is misplaced. It is a well accepted canon of statutory construction that "the words of a heading being more general will not control the more specific words of the act." In this instance, the specific words of the statute direct the FTC to make the Prescreening Disclosures "simple and easy to understand." Making such disclosures simple and easy to understand is a more specific way to "enhance" a disclosure. Therefore, the section heading cannot be read to expand on the specificity of making the disclosure simple and easy to understand. Similarly, the heading title cannot be given a meaning that contradicts the plain language of the statute. In this regard, the plain language of Section 615(d), even as amended by the FACT Act, is plainly applicable to each of the Prescreening Disclosures, not just a subset of them such as the Opt Out Disclosures. Therefore, it would appear that, while the subject heading for Section 213 of the FACT Act may give guidance as to the congressional intent, it does not mandate the Layered Notice. In fact, the plain language of the statute gives equal treatment to each of the Pre-

screening Disclosures, rendering an interpretation of the section heading as providing for differential treatment (*e.g.*, through a Layered Notice) as a moot point.

The FTC also relies on the statements of two Senators to bolster its purported mandate for the Layered Notice. We do not believe the statements quoted by the FTC necessarily indicate that the two Senators, much less Congress, intended for the "simple and easy to understand" Prescreening Disclosures, much less just the Opt Out Disclosures, to gain prominence over every other disclosure in a written prescreened solicitation. The FTC quotes Senator Tim Johnson stating that the FACT Act "takes important new steps to empower consumers to reduce unwanted credit solicitations" as part of the record supporting a Layered Notice. We respectfully disagree with the FTC's characterization of Senator Johnson's statement. It is not clear, even in the context of Senator Johnson's full statement, that the Senator was discussing the FTC's rulemaking authority with respect to the Prescreening Disclosures. The statement could apply to a debate on the affiliate sharing provisions in Section 214 of the FACT Act. It could apply to the FTC's education campaign with respect to educating consumers about prescreening. It could also simply be a reference to improving the understandability of the Prescreening Disclosures in general. The statement simply cannot be read to imply an intention that the Prescreened Disclosures should be presented in a Layered Notice, or even that the Opt Out Disclosures should be improved in a manner not consistent with the remaining Prescreening Disclosures. The FTC also quotes Senator Paul Sarbanes in the Supplementary Information. We note that Senator Sarbanes' statements do not suggest a Layered Notice as the only approach, or even as a potential approach. To the extent they are construed as such, which would require a light more favorable than could possibly be granted, the legislative history provided by a single Senator as almost an aside cannot support a notion that is so heavily discounted for the reasons described above.

In sum, the FTC has determined that a section heading and two relatively vague statements by Senators suggest that the Layered Notice is the appropriate mechanism for the Prescreening Disclosures. This evidence stands in contrast to the language of Section 615(d), indicating that no single Prescreening Disclosure is different than another. This evidence also stands in contrast to the *plain statutory language* in TILA directing the Schumer box to be prominent, indicating that Congress knows how to indicate when it intends for a regulatory body to address the prominence of a disclosure. Therefore, we are unconvinced that there is any support to make the Prescreening Disclosures, much less the Opt Out Disclosures, more prominent than any other disclosure.

The Study

In further support of the Proposed Rule the FTC relies on the results of a study it conducted to measure consumers' awareness of specific portions of the Prescreening Disclosures based on three formats of presentation ("Study"). Before dis-

cussing the findings of the Study, it is appropriate to discuss the applicability of the Study to the congressional mandate. We note that the Study examined more than whether the Prescreening Disclosures, once read by the consumer, were simple and easy to understand. The Study also reviewed whether the Opt Out Disclosures, and to a lesser extent the Prescreening Disclosures as a whole, were conspicuous to the consumer, *i.e.*, whether the consumer noticed the disclosures without prompting. However, as noted above, Congress did not direct the FTC to regulate the conspicuousness or prominence of the Prescreen Disclosures. The Study's findings with respect to the conspicuousness or prominence of the Prescreen Disclosures would therefore appear to be academic.

Despite our disagreement with the FTC as to the relevance of the Study to the FTC's duties under Section 615(d) of the FCRA, there are a few points made in the Study that deserve more attention than was provided in the Supplementary Information. The FTC believes that the Layered Notice should be used because, in part, it raised consumers' awareness of the Opt Out Disclosures from 18.8% of consumers who saw only the "traditional" Prescreening Disclosures ("Traditional Notice") to 30.8% of consumers who saw the Layered Notice. However, the Coalition notes that the difference in awareness between the Layered Notice and an "improved" notice that did not involve a layered approach ("Improved Notice") was only about 2%. The FTC did not opine on whether there is a statistically significant difference between the Improved Notice and the Layered Notice with respect to the conspicuousness of the Opt Out Disclosures. Regardless, the Study demonstrates that a Layered Notice is not the only mechanism to increase the conspicuousness of the Opt Out Notices.

The FTC also notes that the Layered Notice was more effective in conveying the substance of the Opt Out Disclosures than the Traditional Notice. However, it is important to note that the Supplementary Information states that, *once consumers had read the Prescreen Disclosures*, there was little difference between the Layered and Improved Notices in conveying the right to opt out to the consumer and that the Layered Notice was not statistically significantly more effective than the Improved Notice with respect to communicating how to opt out. In other words, once the notice was read, the Layered Notice and the Improved Notice conveyed the Opt Out Disclosures in a manner of roughly equal simplicity and ease of understanding. Therefore, the Improved Notice would appear to satisfy the congressional mandate with respect to ensuring the Prescreening Disclosures are "simple and easy to understand." It would appear that the Study supports the conclusion that the Layered Notice is not the only manner in which to satisfy the congressional mandate.

Recommendation to Use the Improved Notice

In General

The Coalition commends the FTC for developing an alternative to the Layered Notice for purposes of the Study. In fact, we believe that, in large part, the Improved Notice developed by the FTC should be adopted instead of the Layered Notice for purposes of the final rule. We believe that the Study demonstrates the comparability between the Improved Notice and the Layered Notice for purposes of meeting the need to make the Prescreen Disclosures "simple and easy to understand." The Coalition also believes that the Improved Notice is more appropriate to the FTC's task than the Layered Notice. In this regard, the Improved Notice does not elevate the stature of the Prescreening Disclosures above those disclosures that, by statute, must be prominent. The Improved Notice also does not result in the Opt Out Disclosures gaining prominence over the other Prescreening Disclosures, a situation that does not appear to be supported by Section 615(d) of the FCRA.

We also applaud the FTC for seeking to "convey effectively the required information, while at the same time not unnecessarily increasing costs to those making prescreened offers." The Coalition strongly believes that the use of the Improved Notice will meet this praiseworthy goal, whereas the use of the Layered Notice is less likely to do so. In this regard, the Study demonstrated that the Improved Notice conveyed at least some of the required information as well as the Layered Notice conveyed the same information (the Study did not include measures for conveying the substance of each of the Prescreen Disclosures). However, the Layered Notice would be extremely costly to implement. For example, every entity that prescreens would need to completely redesign the templates used for each prescreened solicitation. We believe that there are literally thousands of templates that would have to be redesigned, and then reviewed for compliance with the Proposed Rule. Many of the major entities that prescreen may have significant numbers of templates to review. Of course, much of the existing stock would have to be discarded as well if companies must come into compliance within 60 days of a final rule being issued. On the other hand, if the Improved Notice were adopted, companies would be required to amend perhaps only a few templates, or perhaps only one, because the templates for disclosure pages provided with a variety of prescreened solicitations are relatively uniform across solicitations—at least more so than the solicitations themselves.

It is also worth noting that a single notice modeled on the Improved Notice is superior to the Layered Notice because not all prescreening solicitations are more than one page. While prescreened solicitations for credit are usually at least two pages, that is not necessarily the case with respect to prescreened solicitations for insurance. For example, many offers of insurance are a single page or a fold-out self-mailer that consumers return in order to accept the offer. The Layered Notice would not be appropriate for such offers, and there is no reason to include both on a single page offer.

Model Long/Improved Notice

We believe the FTC has developed a model notice for the Long Notice that should be adopted as the model notice for the Improved Notice, with some minor adjustments. The Coalition is extremely pleased that the FTC has provided text for the Prescreen Disclosures that is much more concise and understandable to the average consumer than what many companies use today. We believe that the FTC's language is a marked improvement over a recitation of the statutory language, and that the language provided should be retained in general. The Coalition, however, suggests that the model for the Improved Notice should have a heading that is a more accurate description of the Prescreening Disclosures. As drafted, the model Long Notice has a heading of "OPT OUT NOTICE" even though the Opt Out Disclosures make up only a fraction of the information deemed important enough by Congress to convey to consumers. Therefore, a more appropriate heading would be "PRESCREENING DISCLOSURES" or "PRESCREENING NOTICE".

We also urge the FTC to insert language that was tested as part of the Study into the model Improved Notice. In particular, we request the FTC to include the following sentences as part of the model: "Offers like these may be useful in comparing terms and benefits of various credit offers."; "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."; and "Please note: Even if you choose not to receive prescreened offers of credit [or insurance], you still may get other credit [or insurance] offers.". The FTC included these sentences in the Study, even as part of the Layered Notice, and states that the sentences would "likely comply" with the Proposed Rule, but provides no explanation as to why the sentences were not included in the model Long Notice provided in the Proposed Rule. The Coalition believes that these messages are important to convey to consumers, and the Study demonstrated that such messages were conveyed to a significant number of consumers who read the Prescreen Disclosures. Therefore, we ask the Coalition to make these sentences part of the model Improved Notice. Alternatively, we ask the FTC to indicate that use of those sentences would, in fact, comply with the Proposed Rule.

If the FTC adopts the Improved Notice instead of the Layered Notice in the final rule, the Coalition believes the other regulatory requirements established for the Long Notice in the Proposed Rule would generally be acceptable. However, although we agree that the Improved Notice should be "simple and easy to understand," we ask the FTC to revise the definition of "simple and easy to understand" that is provided in the Proposed Rule. We agree with the FTC that a reasonable definition is that the notice should be in "plain language designed to be understood by ordinary consumers." We also believe the FTC has developed a model notice that accurately represents how a company could meet this standard. Therefore, we ask the FTC to delete the list of eight factors to be considered when determining whether the Prescreening Disclosures are in "plain language designed to be under-

stood by ordinary consumers." While we appreciate the FTC's intention to assist companies, and the FTC's specific indication that the "determination of whether a notice meets the 'simple and easy to understand' standard is based on the totality of the disclosure and the manner in which it is presented, [and] not on any single factor," the Coalition is concerned about how the factors will be interpreted by others. For example, we note that FTC staff has stated in public forums that the language of Section 615(h)(8) precluding private rights of action under Section 615 of the FCRA could possibly be interpreted in a manner other than as the plain language indicates. Others believe the prohibition on private rights of action with respect to Section 615 was an "error" by Congress that should be "corrected" in future legislation. Therefore, we ask the FTC to retain the definition of "simple and easy to understand" but to delete the suggested factors in the definition itself.

Suggested Modifications to the Layered Notice

As we have stated, the Coalition strongly opposes the use of the Layered Notice, or any layered approach, to provide the Prescreening Disclosures. However, if the FTC retains the Layered Notice, the Coalition offers suggested modifications. The general intent of our suggestions is to remove the implied notion that prescreening harms consumers and that they should opt out of prescreening. By requiring that the company sending the prescreened solicitation to treat the Opt Out Disclosures in such an ominous manner does a distinct disservice to consumers. There is absolutely no reason to make the Short Notice resemble the warning labels on cigarette packages. A bold announcement, larger than the text of the solicitation, in a box imploring the consumer "[t]o stop receiving 'prescreened' offers" without providing consumers with a more complete understanding of the prescreening process is hardly an evenhanded approach to a process which ultimately benefits consumers. It is almost as if the FTC had made the policy determination that consumers *should* opt out of prescreening, and the Short Notice should be designed with that purpose in mind.

First, we believe the Short Notice should serve as a general notice to the consumer of the existence of the Prescreening Disclosures, not highlight one or two of the statutorily required disclosures. Second, the Short Notice should be clear and conspicuous, as required by the statute, but not include type size, typeface or similar requirements. Third, the Short Notice should not be placed inside a border or subject to similar requirements. We propose the following as language for the Short Notice: "Please see our <u>PRESCREENING NOTICE</u> [specify location] to receive important information about your rights and 'prescreened' offers of [credit/insurance]." With respect to the Long Notice, we refer the FTC to our comments on the Long/Improved Notice above.

The Coalition also requests the FTC to clarify or revise its requirements with respect to electronic solicitations. The Proposed Rule states that, if the Short Notice is provided electronically, that it must be "on the first screen." We are concerned that this requirement is vague in the context of providing electronic solicitations.

For example, an electronic solicitation could take many forms, such as a hyperlink to the full electronic solicitation. The hyperlink (or pop-up box, or multi-purpose e-mail) is nothing more than a gateway for the consumer to obtain the solicitation. It has the same function as an envelope for a written solicitation. We are concerned that a requirement to place the Short Notice "on the first screen" could be read to require that the Short Notice be included with a link or similar mechanism that is used to provide the full solicitation to the consumer. We do not think that this was the FTC's intent, as it would establish a higher disclosure standard with respect to electronic solicitations without corresponding policy support for such a distinction. However, we urge the FTC to clarify this issue to ensure that written and electronic solicitations are afforded the same treatment.

Use of Model Notices

The FTC includes in the Proposed Rule model notices "to demonstrate more clearly proper format, manner, and type size of prescreen opt-out notices." Furthermore, the FTC "considers the model notices compliant with the statutory requirements, as well as with the requirements of the [P]roposed Rule." The Coalition commends the FTC for giving companies model language that can be used to assist them in their efforts to comply with the FCRA and with the final rule. We also commend the FTC for indicating that the model notices "may" be used, but are not necessarily required. We urge the FTC to retain the use of model language in the final rule. Our comments on the language of the model notices can be found in our discussion above.

Effective Date

The Proposed Rule indicates that the final rule will be effective 60 days after it is issued. The FTC states that it "considers this amount of time adequate and appropriate to implement the limited requirements of the" final rule. The Coalition believes that companies will need at least nine months to review their prescreening programs and make the appropriate changes. It is important for the FTC to know that prescreened solicitations require significant lead time, such as two months, from the time they are printed to the time they reach consumers. Naturally, companies will also need several months to make the changes to those solicitations as will be required by the final rule. In light of the fact that the solicitations must already include "clear and conspicuous" Prescreening Disclosures, we do not believe there are significant consumer benefits that would outweigh the costs to implement the final rule with an undue urgency.

Sincerely,

Jeffrey A. Tassey
Executive Director