WILMER CUTLER PICKERING
HALE AND DORR LLP

David Medine

2445 M STREET NW
WASHINGTON, DC 20037
+1 202 663 6220
+1 202 663 6363 fax
david.medine@wilmerhale.com

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Federal Trade Commission
Office of the Secretary
Room H-159 (Annex S)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20850

Re: FACTA Prescreen Rule, Project No. R411010

The Commentors

These comments are submitted by David Medine, of Wilmer Cutler Pickering Hale and Dorr LLP, on behalf of American Express, Capital One Financial Corporation, and Providian Financial Corporation. We all appreciate the opportunity to comment on this important matter.

The Proposed Rule

Since 1996, the Fair Credit Reporting Act ("FCRA") has required that consumers who receive prescreened solicitations be provided, in those solicitations, a clear and conspicuous notice of their right to opt out of future prescreened solicitations. In 2003, Congress, in the Fair and Accurate Credit Transactions Act ("FACT Act"), directed the Federal Trade Commission ("Commission" or "FTC") to promulgate regulations that would require such notices be "simple and easy to understand." The FTC has proposed that companies engaged in prescreening must provide a "layered" prescreen opt-out notice. The first part of the layer, the "short notice," must be "simple and easy to understand," "prominent," "clear and conspicuous," and on the front side of the first page of the principal promotional document in the solicitation.

The rule would require that the short notice inform the consumer of the right to opt out of future "prescreened" offers, provide a toll-free number to call to exercise that right, and direct the consumer to the long notice. Companies could not provide any additional information in this notice. The long notice would also be required to be "simple and easy to understand," using typeface and placement that set it apart from other text on the page, but companies would have flexibility in determining where to place it. The long notice must include the information required by section 615(d) of the FCRA, and not include any information that "interferes with,

detracts from, contradicts, or otherwise undermines the purpose of the opt-out notices." The proposed rule includes model short and long notices. The rule would become effective 60 days after it becomes final.

Summary

The Commission's proposed rule is flawed both as a practical and legal matter. The proposed "layered" notice is neither necessary nor desirable. It would give the prescreen opt-out notice more importance than other information that is more important to the consumer's understanding of the offer – including information that is also required by law to be "clear and conspicuous," and even some information that is also required to be "prominent." The layered notice would also encourage consumers to opt out of prescreening before they understand what prescreening is, how it can benefit them, or the effect of their opt-out on access to credit. As a result, many consumers are likely to unwittingly lose out on the benefits of prescreening. Moreover, the proposed rule will *increase* consumer confusion, rejection rates for credit applications, and the volume of mail sent by the industry. Indeed, not even the Commission's own study supports the use of a layered approach. The requirement for a "prominent" short notice on the front page of a solicitation also exceeds the Commission's statutory mandate to make prescreen notices "clear and conspicuous" and "simple and easy to understand."

By contrast, a single improved "long" notice similar to that proposed by the Commission would overcome all of the failings of the proposed short notice. It would make the opt-out notice easier to understand as required by the FACT Act. At the same time, it would not displace other important information or give the opt-out notice more importance than the terms of the credit offer. It would also inform consumers of what prescreening is and the benefits of prescreening so they can make an informed choice. An improved "long" notice could convey all this information without making the notice burdensome or difficult to understand. Indeed, it likely would be not more than a few lines. And if the Commission determines that it needs to do more to make the long notice noticeable, it could require that it be in a box.

Finally, the Paperwork Reduction Act and Regulatory Flexibility notices in the proposal are inadequate. They vastly underestimate the burdens the rule would impose, through the legal, professional and technical effort that will be required to bring the industry in compliance with the rule. The proposal also mistakenly concludes that each company will only need to reformat one solicitation, when in reality major issuers will need to reformat 75-100 such offers. Our suggested alternative "long" notice would avoid many of these burdens.

I. The Mandatory First-Page Short Notice Would Displace Other More Important Information and Required Disclosures

The Commission's proposal would require that the prescreening opt-out notice appear on the first page, while other crucial terms, including the Schumer box, would continue to appear in less prominent locations. This approach necessarily diminishes the importance of terms and notices that do not appear on the front page – information that is unquestionably far more

important to the consumer. For example, the proposal would give the prescreening opt-out notice more prominence than the terms of the deal and required TILA disclosures. Among the information given less prominence than the opt-out notice is other information required by law and crucial to the consumer's ability to make an informed decision – such as the applicable annual percentage rate, whether the rate is variable, applicable fees, minimum finance charges, the grace period, and the balance computation method.[1] The proposal would make consumers more familiar with how to opt out of future prescreened offers than with the terms of the credit offer before them.

There is no reason to think that Congress intended the prescreen notice to be more important or prominent than these other disclosures. Indeed, many of the terms of the offer that would become *less* prominent than the prescreen opt-out notice under the proposed rule are already required by law to be *prominent*.[2] The proposal thus effectively would make a notice that is required only to be "clear and conspicuous" more important than notices that are required to be "prominent."

Many other disclosures are also required by federal and state law to be "clear and conspicuous." By interpreting the "clear and conspicuous" standard to require that the notice be "prominent," "layered," and on the first page of the application, the Commission would create a new *de facto* "clear and conspicuous" standard. But this makes no sense, given that many of the other disclosures required by federal and state law *also* must be "clear and conspicuous."[3] The proposed rule thus would lead to one of two equally untenable results – either all notices that must be "clear and conspicuous" are required to appear in a prominent location on the first page of an offer (likely leaving no room for any other information), or the prescreening opt-out notice is somehow more important than all other notices that must, by law, also be "clear and conspicuous." Indeed, those interested in litigation are likely to seize on this proposal's interpretation of "clear and conspicuous" to attack as unlawful any disclosures that are required to be clear and conspicuous, but do not appear on the front page of an offer.

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[1] 12 C.F.R § 226.5a(b).

[2] *See, e.g.* 12 C.F.R. § 226.5a(a)(2)(i) ("The disclosures in paragraphs (b)(1) through (7) of this section shall be provided in a *prominent* location on or with an application or a solicitation, or other applicable document . . .") (emphasis added).

[3] *See, e.g.* 12 C.F.R. § 226.5a(a)(2)(ii) ("The disclosures in paragraphs (b)(8) through (11) of this section shall be provided either in the table containing the disclosures in paragraphs (b)(1) through (7), or *clearly and conspicuously* elsewhere on or with the application or solicitation.); *see also* 15 U.S.C. § 1638(b) (mandating that disclosure required by the Act "be *conspicuously* segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization") (emphasis added).

II. The Proposed Layered Approach Would Encourage Consumers to Make an Uninformed Decision to Opt Out

The proposed short notice, which would inform consumers of only two of the five pieces of information required by section 615(s) of the FCRA,[4] is an ineffective and potentially misleading method of informing consumers of their right to opt out of receiving prescreened offers. The "layered" approach proposed by the Commission is not *necessary* because the information that must be conveyed to the consumer is not long or complex. To the contrary, as the Commission's own proposed model long notice demonstrates, a "long" notice alone can convey all the information required by the FCRA in a clear and conspicuous statement that is presented in a format, type size, and manner that is simple and easy to understand. Likewise, a layered approach will not be *effective* because the short notice does not accurately and clearly summarize the information that must be conveyed.

A. The Proposed Short Notice Will Encourage Consumers to Opt Out Without Understanding Crucial Information

The proposed rule would effectively encourage and enable consumers to opt out without understanding what they were opting out of or the benefits of *not* opting out. The short notice would not even explain what a "prescreened" offer is. While the term "prescreened" may be well-understood by the Commission and industry, the average consumer is not likely to understand it.[5] Nor would the short notice contain information crucial to making an educated decision whether to opt out, including that opting out would not stop all credit card offers, or why a consumer may benefit from prescreened offers.

By providing only notice of the right to opt out and how to do so, the proposed short notice would encourage consumers to avoid reading this crucial information in the long notice. The proposed rule virtually guarantees that most consumers will make an uninformed choice. This result is confirmed by the Commission's own study. Respondents who were given the "layered" notice were less likely to realize the benefits of prescreened offers than those who received an "improved" long notice alone, demonstrating the risk that consumers will "tune out" all other information once they read the short notice. The short notice, like a cigarette warning, suggests a prejudgment for opting out rather than enabling consumers to make an informed choice.

The proposed rule is thus likely to *increase* consumer confusion by encouraging consumers to opt out without understanding what they are opting out from or the effect that opt-out has on their future credit needs. For example, because the short notice would not explain

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[4] 69 Fed. Reg. 58,861, 58,868 (Oct. 1, 2004) (Proposed Rule § 642.3).

[5] By putting "prescreened" in quotes in the short notice, the Commission acknowledges it is an undefined term.

what a prescreened offer is, it can be safely assumed that many, if not most, consumers will think they are opting out of *all* credit card or insurance offers, not merely some subset of those offers.

B. By Encouraging An Uninformed Decision, the Proposed Rule Will Deprive Consumers of the Benefits of Prescreening

The proposed rule ignores entirely the benefits of prescreening, and puts a premium on consumers' awareness of their right to opt out of prescreened offers to the detriment of all other information. This approach is inconsistent with Congressional intent that the Commission strike a balance between informing consumers of their opt-out rights and educating them about the benefits of prescreening. The legislative history makes clear that Congress intended that the Commission would ensure that consumers have the information they need to make an informed choice.[6] The proposed rule ignores these benefits, and suggests instead that prescreening is something that consumers should avoid. The Commission cannot effectively inform consumers of the benefits of prescreening if the notice itself virtually guarantees that they will opt out without further information.

1. Prescreening Benefits Consumers by Making Them Aware of the Best Credit Offers and by Increasing Competition

Prescreening benefits consumers by giving them the best credit terms for which they qualify and ensuring that they are aware of their ability to obtain those terms. First, prescreening makes consumers aware of their eligibility for improved credit terms as their credit scores improve – a tool that is especially important for those with low credit scores. Many consumers with low credit scores have difficulty obtaining favorable credit offers. Yet those consumers will

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[6] *See* 149 Cong. Rec. H12,218-19 (daily ed. Nov. 21, 2003) (colloquy between Rep. Kanjorski and Rep. Bachus):

Mr. KANJORSKI. Section 213 of the bill directs the Federal Trade Commission to increase public awareness regarding the availability of consumer rights to opt out of receiving prescreened credit offer solicitations. Is that his understanding as well?

Mr. BACHUS. Mr. Speaker, it is, yes.

Mr. KANJORSKI. Mr. Speaker, does the gentleman share with me the understanding that the FTC's public awareness campaign is to be designed to increase public awareness, not only of the right to opt out of receiving prescreened solicitations, but also of the benefits and consequences of opting out?

Mr. BACHUS. Mr. Speaker, yes, I share that understanding. Not only should consumers know they can opt out of getting these offers, they should also know that opting out or not affects their chances of getting additional credit offers with competitive terms.

Mr. KANJORSKI. Mr. Speaker, and if the FTC's public awareness campaign increases their understanding of the opt-out, consumers will make more informed better decisions. Does the gentleman agree?

Mr. BACHUS. Mr. Speaker, yes, I agree.

improve their credit standing over time. For example, after one year on file, the credit scores for most "young" consumers increase from between 5 to 32 points, assuming they pay their bills on time. After an additional five years, those scores can increase anywhere from 26 to 64 points.[7] If such consumers opt out of prescreening, they will not become so easily aware of their ability to receive improved credit offers, including lower introductory and "go to" interest rates and higher credit limits, as their credit scores improve. This consequence is magnified by the fact that opt-out periods are longer than they have been in the past,[8] increasing the time during which the consumer is unaware of better credit terms that may be available.

Second, consumers who have not been prescreened may obtain less favorable credit terms. Prescreening provides for greater consistency in criteria used to make underwriting decisions, as opposed to a discrete, one-time review of credit eligibility in the non-prescreen channel. As a result, the minimum requirements to qualify for favorable credit terms may be lower in the prescreen channel. For example, one credit card issuer currently offers non-prescreened consumers with below average credit scores variable APRs of 5-10% more than similarly situated prescreened consumers.

Finally, prescreening has increased competition dramatically.[9] As companies compete with prescreened offers that vary in rates, "rewards," and other terms, the consumer necessarily benefits. Consumers have consistently taken advantage of the better offers generated through the prescreen process. Last year, 50% (2.4 billion) of credit card offers were generated from prescreening.[10] If consumers opt out of prescreening en masse without understanding these benefits, competition will decrease, and consumers will suffer.

2. Prescreening Reduces Mail and Costs

If consumers opt out of prescreening in large numbers, the industry will still need a way to promote their credit cards to consumers. Instead of sending prescreened, targeted offers to only those who qualify, the industry will be forced to send blanket mailings to all potential

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7 The same is true for consumers who begin to pay on time after a major derogatory event, such as a bankruptcy, collections action, or foreclosure. Assuming they begin making timely payments, consumers' credit scores will increase from between 9 to 64 points in one year and from 29 to 95 points after 5 years.

8 *See* Fair and Accurate Credit Transactions (FACT) Act of 2003, Pub. L. No. 108-159, § 213(c), 117 Stat. 1952, 1978-80 (2003) (amending section 604(e) of the FCRA to change two-year opt out period to five-year opt out period) ("the FACT Act").

9 For example, in recent years prescreening-driven competition has eliminated most annual card fees and dramatically reduced certain interest rates for consumers. According to research conducted by Synovate, approximately 41% of bankcard offers featured an annual fee in the year 2000. However, in 2001 this number fell to 19% and in 2002 only 16% of bankcard offers required an annual fee. Credit card introductory interest rates have also decreased, from 1.82% in 2000, to 1.48% in 2001 and to .90% in 2002. The mean "go to" interest rate, which was 16.87% in 2000, dropped to 14.71% in 2001 and fell further in 2002 to 11.64%.

10 Data from VISA U.S.A. Inc.

customers. Such general mailings will necessarily go to many more consumers who will not ultimately qualify than those who receive targeted prescreened offers today. This process will increase costs to industry – both in terms of preparing additional mailings and of processing applications. It will also increase costs of customer service; companies will invariably expend substantial resources answering consumer complaints regarding why they are still receiving credit card offers and why they were not approved for credit offers they received. Finally, as discussed further below, the industry will incur higher fraud-related costs if prescreening declines. These costs will, of course, ultimately be borne by the consumer.

3. Prescreening Reduces Consumer Rejection Rates

In addition to the nuisance of receiving more mail, consumers who opt out of prescreening are more likely to be rejected for offers they do receive because those offers will not be tailored to their eligibility. Some consumers may not be offered the best terms for which they qualify, while others will not understand why they don't qualify for an offer that was sent to them. Of course, as discussed above, consumer confusion will only increase if the Commission adopts its short form notice and the consumer believes that he or she has opted out from receiving all credit card offers. The net result, if the current proposal is adopted, is that consumers will receive more credit offers and will be rejected at a higher rate. This will result in an increased number of inquiries on consumers' credit reports and their credit standing may actually decline as a result. By contrast, even with *post*screening, the vast majority of consumers who respond to prescreened offers receive credit.

4. Prescreening Reduces Identity Theft

While there was once a belief that prescreening increased identity theft rates, that notion has now been soundly rejected. The legislative history of the FACT Act is replete with testimonials of the power of prescreening to *reduce* identity theft. Indeed, former Director of Consumer Protection Howard Beales testified that available data suggests that overall losses are lower on prescreened applications than on general applications for credit.[11] There was also testimony that industry losses from prescreened applications amounted to only four one-thousandths of a percent of total sales volume,[12] and that the fraud rate for prescreened offers is about five to fifteen times lower than for general offers.[13] These lower fraud rates result from the fact that companies that send prescreened applications already know more about the consumers

[11] *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions, Before the Senate Comm. on Banking, Housing and Urban Affairs*, 108th Cong. 89-90 (2003) (statement of Howard Beales, Director of Consumer Protection, Federal Trade Commission).

[12] *Fighting Identity Theft-The Role of FCRA, Before the Subcomm. on Financial Institutions and Consumer Credit of the House Financial Services Comm.*, 108th Cong. 44-45 (2003) (statement of Jim Kallstrom, Senior Executive Vice President, MBNA America Bank).

[13] *The Role of FCRA in the Credit Granting Process, Before the Subcomm. on Financial Institutions and Consumer Credit of the House Financial Services Comm.*, 108th Cong. 58-59 (2003) (statement of Scott Hildebrand, Vice President, Direct Marketing Services, Capital One Corporation).

to whom they send those applications as a result of the prescreening process, and thus can more easily detect fraud. Prescreened offers also result in lower fraud rates because they reflect only names and addresses, and none of the other information necessary to apply for credit.[14] By contrast, general postscreened credit applications often contain detailed information. Such applications thus put more sensitive customer information that could potentially be compromised into circulation. This evidence suggests that, if many consumers opt out of prescreening and the industry is forced to rely on general, non-tailored credit offers, identity theft will increase.

C. An Improved "Long" Notice, Unlike the Short Notice, Would Appropriately Balance the Need to Inform Consumers of their Opt-Out Rights with the Need to Disclose Other Crucial Information

We appreciate the Commission's recognition of the need to improve the current opt-out notices to make them simpler and easy to understand, taking into account the format, type size, and manner of the notice. The proposed short notice, however, fails to achieve these goals. A single easy-to-understand "long" form notice, placed in a conspicuous location, by contrast, would appropriately balance the need to inform consumers of their opt-out rights with the need to disclose other crucial information in a clear and conspicuous manner, ensure that consumers understand what they are opting out of, and provide consumers with the myriad benefits of prescreening.

As demonstrated above and by the proposed model notice, an improved "long" notice could effectively and clearly convey the information required by the FCRA in no more than a few lines. At the same time, such a notice would appropriately give consumers the opportunity to understand what prescreening is and its benefits *before* they opt out of receiving prescreened offers. If the Commission wishes to make the improved "long" notice more conspicuous, it could add the type of box it has proposed for the short notice. To assist the Commission in this regard, we have provided the following sample long notice, which would be placed in a clear and conspicuous location and in a font size similar to other text on the same page, but would not need to appear on the first page of the solicitation.

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[14] *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions, Before the Senate Comm. on Banking, Housing and Urban Affairs*, 108th Cong. 100 (2003) (statement of Michael Cunningham, Senior Vice President, JP Morgan Chase Card Member Services).

OPT-OUT NOTICE: This prescreened offer of credit is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria. Prescreening enables creditors to offer you credit with rates and benefits for which you are likely to qualify. If your credit standing improves, the prescreened offers you receive may offer credit on improved terms. By contrast, non-prescreened offers may feature a range of potential terms, but the chance of qualifying for an account (and especially for the best advertised terms) is generally lower.

You have the right to stop receiving prescreened offers of credit. Please note: even if you choose not to receive prescreened offers of credit, you may still get non-prescreened credit offers. To opt out of prescreened offers from [Issuer] and all other companies, call toll-free [1-888-5OPTOUT], or write [Marketing List Opt Out Address, P.O. Box XXXX. City, ST XXXXX].

A single improved long notice is the best and most sensible way for the Commission to implement its statutory mandate. If, however, the Commission nonetheless continues to believe that a layered approach is necessary, it should, at a minimum, make more minor adjustments to its proposal. First, the Commission should not prohibit industry from adding information to the short form notice explaining what prescreening is or its benefits. Second, the Commission should remove the telephone number from the short notice. Moving the phone number to the long notice will require consumers to at least look at the long notice – and thereby better understand what they are opting out of – before they opt out. Finally, given the delicate balance that must be struck and the many competing considerations involved, the Commission should seriously consider waiting until the Board of Governors of the Federal Reserve completes its study of prescreening before making major changes to the prescreening notice rules.[15]

III. The Commission's Own Study Does Not Support the Layered Approach

In justifying its proposed rules, the Commission relies on the consumer study that it commissioned to "better understand consumer comprehension of prescreen opt-out notices in solicitations."[16] But that study does not support the conclusion that a layered approach is necessary, or even desirable, to ensure that consumers understand their opt-out rights with regard to prescreened notices. First, there are serious methodological flaws in the study that undermine its usefulness as a basis for understanding consumer comprehension of prescreen opt-out rights. Second, even putting those flaws aside, the study does not demonstrate that layered notices are any more effective than improved "long" notices in conveying crucial information.

15 *See* section 213(e) of the FACT Act.

16 69 Fed. Reg. at 58,864.

A. The Commission's Study Is Flawed

The Commission's study was designed much like a study designed to test viewers' reactions to a television advertisement, in which consumers are briefly exposed to material, the material is removed, and the consumer are tested on what they viewed. This method ignores the fact that, in reality, consumers receive written offers that can be read and reviewed as often as the consumer desires. The study accordingly did not properly capture the way most consumers will read and digest written credit offers.

The study is also flawed because of its repeated references to whether the mailing said or suggested anything about the consumers' ability to ask that they not receive "similar" offers in the mail or what consumers should do if they do not wish to receive such "similar" offers.[17] Nothing in the study indicates that consumers understood that, in answering this question, they were speaking to whether the offer explained their ability to ask that they not receive *prescreened* offers – i.e., that they understood the word "similar" to mean "prescreened." Because "prescreened" is not a familiar term, it is likely that, when they answered "yes" to this question, many respondents actually thought that they could request that they not receive other offers of credit generally, not merely prescreened offers of credit.

B. Even if the Study Were Accurate, It Still Does Not Support the Conclusion that a "Layered" Approach Is Necessary or Desirable

There was almost no difference in effectiveness between the "layered" and "improved" versions of the notice in informing consumers of prescreening and their right to opt out of prescreened notices. Indeed, the layered approach scored statistically significantly better than the improved version only on *one* information point – whether the mailing conveyed whether there was anything the consumer could do if he or she did not wish to receive similar offers from "this and other credit card companies."[18] But, as noted above, the word "similar" in this question is ambiguous. As a result, the study's conclusion that consumers who read the layered notice understood how to opt out of other prescreened offers is questionable. Even if it were not, however, the fact that the layered approach scored better on one of four information points is not a mandate to choose it over the improved long notice, particularly because the layered version scored *worse* than the improved long version in conveying one of the key information points – whether there are benefits to receiving prescreened offers.[19] Even if the Commission believes that it is more important that the notice convey how to opt out than to convey the merits of doing so – Congressional intent to the contrary – the failings of the short notice outlined above outweigh any slight "memory test" advantage that might be perceived for the layered approach.

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[17] *See, e.g.* Manoj Hastak, "Effectiveness of 'Opt-Out' Disclosures in Pre-Screened Credit Card Offers," Report to the Federal Trade Commission, at 4 -5 (September 2004) ("Study").

[18] *Id.* at 12.

[19] *Id.* at 11.

IV. The Proposed Rule Exceeds the Commission's Statutory Mandate

A. Nothing in the FACT Act Requires that the Prescreening Notice Be "Prominent" or Authorizes the Commission to Adopt Such a Requirement

As the Commission notes, the FCRA requires that the prescreening notice be "clear and conspicuous."[20] The FACT Act added the requirement that the notice "be presented in such format and in such type size and manner as to be simple and easy to understand."[21] But the proposed rule goes beyond these requirements and would mandate short notices that are, in addition to "simple and easy to understand" and "clear and conspicuous," also "prominent."[22] The proposal elaborates on this "prominence" requirement by requiring a "layered" approach in which the short notice appears in a prominent location on the front page of the offer. But nothing in the FACT Act requires that notices be placed in any particular location, much less that they be "prominent" or "layered."

The "prominence" and layered approach thus go far beyond the Commission's Congressional mandate to make the notice simple and easy to understand. If Congress had wanted to require the notice to be prominent, it would have adopted that requirement itself, as it has for many other similar required notices.[23] Instead, it left the clear and conspicuous standard in place, requiring only that the Commission enhance the readability of the notice by making it "simple and easy to understand."[24] Although the FACT Act refers to the "format" and "manner" of the notice, this language does not give the Commission carte blanche to mandate the placement of the notice anywhere it wishes. To the contrary, the Commission is consigned to make the notice "simple and easy to understand" only within the context of the "clear and conspicuous" requirement. It is not instead permitted to impose an entirely new standard. Indeed, the

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[20] 15 U.S.C. § 1681m(d)(1).

[21] Section 213(a) of the FACT Act.

[22] 69 Fed. Reg. at 58,868.

[23] *See, e.g.* 15 U.S.C. § 1641(d)(4) ("Any person who sells or otherwise assigns a mortgage referred to in section 1602(aa) of this title shall include a *prominent notice* of the potential liability under this subsection as determined by the Board.") (emphasis added); 15 U.S.C.A. § 1693b(3)(B)(i) ("The notice required under clause (i) of subparagraph (A) with respect to any fee described in such subparagraph shall be posted in a *prominent and* conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.") (emphasis added); 12 U.S.C.A. § 3708(d)(3) ("A copy of the notice of default and foreclosure sale shall be posted in a *prominent* place at or on the real property to be sold . . .") (emphasis added).

[24] The legislative history of the FACT Act further demonstrates Congress's goal to make the notice less *confusing*, not to make it more *prominent*. During one hearing, Senator Bunning demonstrated his understanding of the existence of the prescreening opt out, but believed the opt-out right was regulated state-by-state rather than nationwide. *See The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions, Before the Senate Comm. on Banking, Housing and Urban Affairs*, 108th Cong. 16-17 (2003) (statement of Sen. Bunning).

Commission's proposed definition of "simple and easy to understand" alone fulfills its mandate to ensure that the notice is "presented in such format and in such type size and manner as to be simple and easy to understand." The requirement that the notice also be "prominent" goes well beyond the statutory requirements.

B. The Proposed Rule is Inconsistent with the Commission's Requirements for Similar Notices

The Commission cited its implementation of "reasonable understandability" and "clear and conspicuous" requirements in other recent rulemakings in support of its "simple and easy to understand" definition.[25] But those rulemakings only underscore that the Commission went far beyond clarifying the "clear and conspicuous" requirement of the FCRA and the "simple and easy to understand" requirement of the FACT Act. In those rulemakings, the Financial Privacy Rule and the proposed Affiliate Marketing Rule, the Commission defined "clear and conspicuous" with factors similar to the "simple and easy to understand" factors of the proposed rule, *but did not* also require that the notice be prominent. Rather, the Commission required only plain language headings, easy-to-read typeface and size, wide margins and ample line spacing, boldface type or italics for key words, and distinctive size, style, and graphic devices. Such factors make a notice "clear and conspicuous" and "simple and easy to understand" without requiring it to be prominent – an entirely different standard. Indeed, the Commission has never interpreted a "clear and conspicuous" or "simple and easy to understand" requirement to mean that the notice must appear in a prominent location on the front page of an offer. The Commission's previous interpretations reflect the simple truth that the "simple and easy to understand" requirement should relate to the substantive discussion of the merits of opting out, which is good for some and not for others, rather than to whether an inadequate notice is prominent enough.

V. The Commission Severely Underestimates the Burdens From the Proposed Rule

A. The Commission's Paperwork Reduction Act Analysis is Fundamentally Flawed

The Commission severely underestimates the burden the proposed rule would impose on firms with prescreening programs. In fact, the proposal's estimate of the total cost imposed on *all* affected firms may be less than the cost that would be incurred by even a *single* large firm. The Commission's cost estimates so significantly underestimate the actual costs the rule would impose on industry that the proposal must be withdrawn, reevaluated, and resubmitted to the OMB for analysis under the Paperwork Reduction Act. Otherwise, readers will erroneously assume that the rule would impose inconsequential costs.

First, the proposal wrongly estimates that the "legal, professional, and training costs" of implementing the rule are "likely to be inconsequential."[26] This conclusion is based on the

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[25] 69 Fed. Reg. at 58,862.

[26] 69 Fed. Reg. at 58,865 n.12.

notion that the only work would be to implement the changes to the notice itself, which the proposal reasons is not required because it has provided model notices.[27] But the proposal allows companies to add additional information to their long notices. Legal and professional costs will surely be incurred in developing those "long" notices. More importantly, however, if a short notice is required on the first page, legal and professional costs will be incurred in determining, on a case-by-case basis, how to reformat the *rest* of the promotional material to eliminate information that no longer fits on that page, taking into account other required disclosures and deceptive trade practices concerns. Under the Paperwork Reduction Act, all these burdens on affected firms must be considered and minimized.[28] Our suggested alternative, an improved long form notice, would avoid many of these burdens.

Nor will the legal and professional costs or the costs of reformatting be limited to one notice, as the proposal presumes.[29] In fact, one card issuer has estimated that 75-100 solicitations would have to be revised. Another estimates 160-400 solicitations would have to be revised. Thus, in addition to the enormous legal and professional costs that will be incurred to reformat some 75-400 notices that the Commission disregards as "inconsequential," the Commission's cost estimate of 6 hours of skilled technical labor per firm to actually reformat the notices must be multiplied by a factor of 75 to 400 to approach a reasonable estimate of the cost to industry. In addition, issuers will incur ongoing customer service costs responding to consumers who do not understand what "prescreening" is based on the short notice.

B. The Proposal Radically Understated the Impact on Small Businesses

The proposal's Regulatory Flexibility Act analysis is also flawed. First, the proposal's presumption that very few small entities make prescreened offers is erroneous.[30] An increasing number of small businesses are using prescreening as a means of offering deferred payment to their customers Moreover, the proposal substantially understates the costs those businesses will incur by assuming that they will only need to reformat one solicitation. As explained above, companies often use many different solicitations, each of which will need to be reformatted, requiring legal, professional, and technical effort. While small businesses may not have 75 – 100 separate prescreened solicitations, they are likely to have substantially more than the one

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27 *Id.*

28 *See* 44 U.S.C. §§ 3506(c)(3)(C), (E) (requiring a certification that the information collection, among other things, "reduces to the extent practicable and appropriate the burden on persons who shall provide [the] information" and "is to be implemented in ways consistent and compatible, to the maximum extent practicable, with existing reporting and recordkeeping practices of those who are required to respond"); 5 C.F.R. § 1320(d)(1) ("To obtain OMB approval . . . , an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection of information . . . [i]s the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives.").

29 69 Fed. Reg. at 58,865.

30 *See* 69 Fed. Reg. at 58,865-66.

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VI. The Effective Date Proposed by the Commission Would Not Give Industry Sufficient Transition Time

The Commission's proposal that the rule become effective sixty days after it becomes final, like the Commission's cost analysis, fails to account for the manner in which credit card providers structure their prescreening programs. Each prescreening promotion goes through months of development, in which the offering is designed, approved, matched with a list from a credit house, and then finally printed and mailed to consumers. Printers require that production of millions of pieces of mail be scheduled well in advance because it is a lengthy process. A sixty day effective date would require companies to halt these programs mid-stream, disrupting their businesses and forcing them to throw away offers that were no longer permitted under the new rule. The Commission should instead adopt at minimum a nine-month effective date.

We appreciate the opportunity to comment on this important matter. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact **David Medine** at **(202) 663-6220.**

Yours truly,

David Medine

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30 *See* 69 Fed. Reg. at 58,865-66.