UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Financial Practices

August 16, 2005

Mr. Jim Tozzi
Member, Board of Advisors
Center for Regulatory Effectiveness
11 Dupont Circle, N.W., Suite 700
Washington, D.C. 20036-1231

Dear Mr. Tozzi:

This letter responds to a May 20, 2005 letter and petition submitted to the Federal Trade Commission by the Center for Regulatory Effectiveness ("CRE") under the Data Quality Act. CRE's petition requests that the FTC correct certain information published by the Commission in connection with its Pre-Screen Opt-Out Disclosure Rule ("the Prescreen Rule") under the Fair and Accurate Credit Transactions Act of 2003 ("the FACT Act").[1]

Section 213 of the FACT Act amends Section 615(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(d), which requires, *inter alia*, that persons who use a consumer report in connection with a credit or insurance transaction not initiated by a consumer (commonly referred to as a "prescreened offer") must provide with each written solicitation a clear and conspicuous statement containing certain information, including consumers' right to prohibit the use of their consumer credit files in making prescreened offers and the means by which they can exercise that right ("opt-out notice"). Section 213 of the FACT Act specifies that this statement must be presented in "such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule . . . ." The Commission promulgated the Prescreen Rule in final form on January 31, 2005, with an effective date of August 1, 2005.

The CRE petition challenges the accuracy of statements relating to a consumer research study that was conducted in connection with the Commission's rulemaking ("the Prescreen study"). These statements are found in the Statement of Basis and Purpose for the Prescreen Rule (the "SBP") and in two reports on the Prescreen study, one by the company that conducted the study and the other by Manoj Hastak, Ph.D., the Commission's marketing expert (the "Hastak report"). CRE also faults the Commission's description and interpretation in the SBP of the Board of Governors of the Federal Reserve System's Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit or Insurance (the "FRB Prescreen Report").

---

[1] Prescreen Opt-Out Disclosure Rule, 70 Fed. Reg. 5022 (2005) (to be codified at 16 C.F.R. Parts 642 and 698); Fair and Accurate Credit Transactions Act of 2003, Public Law 108–159, 117 Stat. 1952.

Finally, the petition challenges statements in two federal register notices relating to the Commission's request for Office of Management and Budget ("OMB") approval under the Paperwork Reduction Act for conducting consumer research.

I am the Associate Director of the Division of Financial Practices, the office that has primary responsibility for the Prescreen Rule. I have reviewed the CRE petition and the issues raised therein.[2] For the reasons set forth below, CRE's request for correction is denied.

The Prescreen study was undertaken by the Commission to gain a better understanding of consumer comprehension of opt-out notices in prescreened offers of credit. Prior to conducting the study, the Commission sought and obtained the necessary OMB approval. The Prescreen study compared the noticeability and understandability of three different versions of an opt-out notice embedded in prescreened offers of credit. One version was representative in content and placement of the opt-out notices used in many prescreened credit card offers at the time of the study. A second "improved" version used simpler language and a more prominent notice on the back of the offer. A third, "layered" version was split into two parts, and included the same language on the back as the second version, as well as a boxed "short portion" at the bottom of the front page.

The study was performed in accordance with standards used in the market testing field. It included a large and diverse sample of respondents recruited in shopping malls across the country. Respondents were instructed to view a prescreened credit card offer that included one of the three versions of the opt-out notice. After the offer was removed from view, respondents were asked questions to assess the noticeability and understandability of the notice. Then, each participant was shown the offer a second time, was directed to the notice, and answered another series of questions about their reactions to the notice.

The study found, among other things, that the layered notice was significantly more effective than the current notice in communicating the two messages of interest – the right to opt out and the means of doing so – after a single exposure to the offer. By contrast, the improved notice did not communicate significantly better than the current notice after a single exposure. Moreover, the layered notice was more effective than the improved notice in communicating, after a single exposure, how consumers can opt out of future offers. Finally, after the second, forced exposure, both the improved and layered notices were more effective in communicating

---

[2] The "burden of proof" rests on a petitioner to justify the need for a correction. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Federal Trade Commission, Section XI.E. In addition, a petitioner seeking correction must meet the definition of "affected person" established in Section V.J of the Guidelines. *See also* Section 515 Administrative Mechanism – Ensuring and Maximizing the Quality of Information Disseminated by the Federal Trade Commission (Oct. 1, 2002). In order to address the issues raised in the petition, I have assumed – without deciding – that Mr. Tozzi and the CRE are affected persons.

the intended messages than the current notice.

The results of the Prescreen study provide support for the Commission's conclusion that the layered format provides for a disclosure that is simple and easy to understand.[3] It is important to understand, however, that the study was only one of several bases for the Commission's adoption of a layered notice. First, the Commission exercised its own expertise in consumer disclosures in reaching the conclusion that a layered notice is simple and easy to understand.[4] As the Commission noted in the SBP, a layered approach "is particularly useful in cases such as this, where the information that must be disclosed consists of a relatively simple central proposition accompanied by a larger quantity of explanatory or ancillary information." Prescreen Rule, 70 Fed. Reg. at 5025. Second, the Commission's approach is supported by the academic literature on disclosures[5] and the public comments received. Therefore, irrespective of the merits of the Prescreen study methodology, there is ample support for the Rule as promulgated.

Objections to Statements about the Prescreen Study

With respect to the Prescreen study itself, most of CRE's requests for correction relate to the sampling methodology used and the projectability of the study. Specifically, CRE asserts that mall intercept studies do not utilize random samples and therefore are not statistically projectable to the population at large, that statistical significance testing related to the study was inappropriate, that the study failed to ensure a demographically representative sample, and that the sample is further biased by exclusion of those over seventy-four years of age. As explained below, the record does not support CRE's assertions that these factors negate the reliability and utility of the study. Instead, the Commission's statement in the SBP that the study provided "probative evidence" of the comparative effectiveness of the tested notices, is accurate.

It appears to be CRE's position that mall intercept studies, because they employ a non-random sampling methodology, are inherently unreliable. This position is not supported by the marketing literature or practice, nor by applicable legal precedent. The Commission staff recognizes that non-probability samples are not statistically projectable to the population at large. This fact, however, does not indicate that such studies therefore lack utility. Mall

---

[3] The FACT Act does not require the Commission to devise an opt-out notice that *most* effectively communicates the opt-out information; rather, it simply mandates that the Commission choose a method that is "simple and easy to understand."

[4] The Commission's expertise in assessing the impact of communications on consumers has long been recognized by the courts. *See e.g., Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992).

[5] *See e.g.*, G. Ray Funkhouser, *An Empirical Study of Consumers' Sensitivity to the Wording of Affirmative Disclosure Messages*, 3 J. Pub. Pol. & Mktg. 26 (1984).

intercept studies are used widely to measure the communication of advertisements or other consumer stimuli. This methodology is especially useful when the study requires in-person interviews with consumers shown a stimulus. The Federal Trade Commission routinely relies upon mall intercept studies as probative evidence of consumer interpretation in deceptive advertising cases. *See, e.g., Kraft, Inc.*, 114 F.T.C. 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). Such studies are also utilized in many other contexts, including:

- By other government agencies in their decision making. *See, e.g.*, Alan S. Levy *et al.*, *Performance Characteristics of Seven Nutrition Label Formats*, J. Pub. Pol. & Mktg. (Spring 1996).

- In Lanham Act false advertising or trademark infringement cases. *See, e.g., National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 515, 229 U.S.P.Q. 785, 790 (D.N.J. 1986) ("a non-probability survey ... is sufficiently reliable to be admitted into evidence and accorded substantial weight.").

- By broadcasting networks for evaluating advertising challenges filed with them. *See, e.g.*, NBC Broadcast Standards and Practices Dept., Advertising Standards, 53 (1993).

- By the National Advertising Division of the Council of Better Business Bureaus, an advertising industry self-regulatory body, for adjudicating advertising challenges. *See, e.g., James River Corp., Quilted Northern Ultra Toilet Tissue,* N.A.D. Case Report No. 3263 (January 1, 1996).

- By the Trademark Trial and Appeal Board in trademark disputes. *See, e.g., Warner-Lambert Co. v. Nabisco, Inc.*, T.T.A.B. Paper No. 38 at 14 (T.T.A.B. April 7, 1999) (non-precedential opinion on opposition nos. 92,062 and 92,162 to application serial nos. 74/307,317 and 74/348,595).

- By businesses to test the communication of advertisements for marketing purposes. *See, e.g.*, Jacob Jacoby & Amy H. Handlin, *Non-Probability Sampling Designs for Litigation Surveys*, 81 Trademark Rep. 169, 175 (1991) (concluding that in commercial advertising, marketing, and consumer research, non-probability designs are used in more than 97 percent of instances where consumers are shown a tangible item).

- By consumer behavior experts for research purposes. *See, e.g., id.* (concluding that in empirical literature in the social and behavioral sciences, non-probability designs are used in 94 percent of instances where consumers are shown a tangible item).

In sum, there is widespread agreement that well-conducted mall intercept studies provide useful and reliable evidence of how consumers interpret communications.

CRE also asserts that no statistical testing can be applied validly to the Prescreen Study results because the study did not utilize random sampling. It therefore argues that all references to statistical testing in the study report were inappropriate. CRE misapprehends the purpose of the statistical testing in this study, however. The tests were not used to project the results in a statistical fashion to the population at large. Rather, the study was designed as an experiment in which respondents were randomly assigned to one of three treatment conditions, and the question of interest was whether one or more treatment conditions was more effective than the others on certain parameters. In experiments, such randomization allows researchers to draw statistically valid conclusions about the differences between groups. *See, e.g.*, Thomas D. Cook & Donald T. Campbell, *Quasi-Experimentation: Design & Analysis Issues for Field Settings* (1979). Scientific and medical studies commonly use convenience samples that are randomly assigned to groups, and researchers routinely apply statistical analyses of the results to draw conclusions about the differences between the groups studied. *See, e.g.*, Karen E. A. Burns, *et al., Perioperative N-acetylcysteine to Prevent Renal Dysfunction in High-Risk Patients Undergoing CABG Surgery: A Randomized Controlled Trial*, JAMA. 294:342 (2005).

The CRE petition asserts that the Prescreen study did not "ensure" a demographically-representative sample and therefore was biased. This objection lacks merit. As is typically the case in studies of this sort, the Prescreen study employed age and gender quotas and was conducted in several malls specifically selected to provide demographic and geographic diversity. There is no reason to believe that the inclusion of additional sampling criteria for "education level, income level and ethnicity" would have changed the results of the study.

A further source of alleged bias that CRE identifies is the exclusion of respondents over seventy-four years of age. The Prescreen study was a test of the relative noticeability and understandability of several alternative opt-out notices, and the Commission's consumer research consultant concluded that it was appropriate to have a maximum age to minimize extraneous age-related factors such as vision problems. Again, the study was intended to provide a measure of the *comparative* efficacy of different opt-out notices. The petition provides no evidence or argument that the age limits in this study would have biased the results *vis a vis* the three different treatment groups.

In describing the initial exposure to prescreened solicitations in the study, the SBP states that the "exposure may have simulated the experience of consumers who glance at prescreen solicitations, but do not examine them closely." CRE contends that the exposure did not simulate the experience of consumers who glance at offers because, according to the Hastak report, study respondents were told to "look over the **entire** offer, front and back" (emphasis added). The study instructions did not, however, tell respondents to "look over the entire offer" or otherwise examine the offer closely. Rather, respondents were instructed to "[a]ssume that you have received this in the mail. . . . Please read this mailing and let me know when you are

finished. Be sure and look at both sides of the mailing."[6] Therefore, the SBP was accurate.

CRE also submits an analysis by Jerry L. Coffey, Ph.D., which concludes that, at best, the Prescreen study shows "that improvements to the offer notices would improve message penetration among consumers by" "slightly more than 1%."[7] Dr. Coffey subtracted the communication of the current opt-out notice from that of the layered notice (*e.g.*, 30.8% - 18.8% = 12.0% for the right to opt out) and then multiplied this by 10% because, based upon the FRB Report, only 10% of consumers "examine" solicitations (*e.g.*, 12% x 10% = 1.2%). Coffey's analysis makes some implausible assumptions and addresses a different question than that addressed by the FTC. He assumes that the 34% of consumers who "glance" at offers (as opposed to "examine" them) will not benefit from improved disclosures, when, to the contrary, the opt-out notice may be highly relevant to consumers who "glance" at offers, and the layered notice is more likely to attract their attention. Coffey also incorrectly assumes that the 56% of consumers who do not open credit card offers should be included in an analysis of the effectiveness of the notices. The Congress directed that the Commission improve the opt-out notice – that it "be presented in such format and in such type size and manner as to be simple and easy to understand." The obvious focus of Congressional concern was consumers who open prescreened offers of credit.

Objection to a Statement about the FRB Prescreen Report

CRE also takes exception to the following statement in the SBP:

> [t]he results reported in the FRB Prescreen Report indicate that a layered notice may be a very effective means to ensure that consumers who open prescreened solicitations will see the prescreen disclosure. . . . Thus, a layered notice seems more likely to be seen by the majority of consumers who open prescreened solicitations."

CRE argues that the FRB Prescreen Report does not actually address layered notices.

The SBP, however, does not state or imply that the FRB Report specifically addressed layered notices. Rather, data cited in that Report provide support for the position that the layered notice approach may be an effective one. The SBP explains the basis for that position as follows:

> Those consumers who immediately throw the solicitation away [56% in the FRB

---

[6] Dr. Hastak's statement was merely an attempt to encapsulate in one sentence a longer set of instructions.

[7] In fact, the "layered" disclosure was 64% more effective than the current disclosure in communicating the right to opt out (30.8% vs. 18.8%), and 152% more effective in communicating how to opt out (21.2% vs. 8.4%).

> study findings] are not likely to see the notice wherever it is located; those who examine the solicitation closely [10% in the FRB study] might see any disclosure, even one on the back of the page or in fine print; but those consumers who "glance" at the solicitation [34% in the FRB study] may be more likely to see a prescreen disclosure located on the first page of the principal promotional document that is printed in a noticeable type size and set apart from other text on the page.

Objections Relating to OMB Clearance Process

Before conducting the Prescreen study, the Commission sought OMB clearance for conducting consumer research related to the FACT Act. The clearance was not limited to the study for the Prescreen Opt-Out Disclosure rulemaking and, at the time clearance was sought, the Commission had not yet determined exactly what study or studies would be conducted. In describing the anticipated research in a June 18, 2004 Federal Register notice, the Commission stated the "consumer surveys will involve individual interviews by telephone or focus groups and mall intercepts." CRE's petition notes that this is inaccurate because the only study that was conducted "involve[d] only mall intercepts." The statement as it applied to all of the anticipated research was generally accurate, and, in any event, has no bearing on the merits of the Prescreen study or the Prescreen Rule.[8]

After the Prescreen study was completed, the Commission sought an extension of its clearance from OMB for conducting additional prescreen opt-out related consumer studies. CRE challenges a statement the Commission made in connection with this request. An initial notice seeking public comment on the extension of the clearance appeared in the June 18, 2004 Federal Register. No comments were received. On September 16, 2004, the Commission requested that OMB approve the request for extension. In connection with that request, on September 21, 2004, the Commission submitted to the Federal Register a second notice requesting comment for publication in the Federal Register, which was published on September 28, 2004. Meanwhile, on September 27, 2004, OMB granted the FTC's request for an extension of the clearance. Because OMB granted the Commission's request a day before the second notice was published in the Federal Register, CRE argues that there was "no opportunity for meaningful public comment" and "the request for comment was a sham." As provided in OMB's procedures, OMB routinely reviews an agency request for clearance at the same time that the agency is seeking public comment in a second notice published in the Federal Register. When the Commission submitted its notice for publication, it was seeking public comment. No comments were

---

[8] CRE also complains that the clearance under which the Prescreen study was conducted was "generic" and on an "emergency" basis. This complaint does not relate to a request under the Data Quality Act for correction of information disseminated by the Commission. In any event, the Commission fully complied with OMB's procedural requirements to obtain clearance under the Paperwork Reduction Act to conduct consumer research related to the FACT Act.

received and if any comments had been received, they would have been fully considered.

In sum, the FTC is committed to ensuring and maximizing information quality, objectivity, utility and integrity. Mall intercept copy tests such as the one used in this rulemaking offer government agencies valuable data to assist in decision-making regarding consumer notices and disclosures. The challenged study was conducted appropriately and the Commission is in compliance with the Data Quality Act with respect to the Prescreen Rule.[9]

Very truly yours,

Joel Winston
Associate Director

[9] If CRE disagrees with this response to its petition, it has thirty days, excluding weekends and Federal holidays, to appeal to the FTC for reconsideration. The appeal should be submitted to the Office of the General Counsel as indicated in the Section 515 Administrative Mechanism – Ensuring and Maximizing the Quality of Information Disseminated by the Federal Trade Commission.