FACT ACT Prescreen Rule, Project No. R411010

COMMENTS OF THE NATIONAL INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION DIRECTED TO THE FEDERAL TRADE COMMISSION, WASHINGTON, D.C. 20580

SECTION A. BACKGROUND

Section 615(d) of the Fair Credit Reporting Act (FCRA) requires that any person who uses a consumer report in order to make an unsolicited firm offer of credit or insurance to the consumer, shall provide with each written solicitation a clear and conspicuous statement that: (A) information contained in the consumer's consumer report was used in connection with the transaction; (B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for creditworthiness or insurability under which the consumer was selected for the offer; (C) 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 credit worthiness or insurability or does not furnish any required collateral; (D) 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 credit or insurance transaction that is not initiated by the consumer; and (E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 604(e) [of the FCRA].[1]

On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act (FACT Act) in an attempt to reduce the risk of consumer fraud and related crimes, including identity theft, and to assist any victims. In general, the FACT Act amends the FCRA to enhance the accuracy of consumer reports and to allow consumers to exercise greater control regarding the type and amount of marketing solicitations they receive. Section 213(a) of the FACT Act amends FCRA Section 615(d) to require that the statement mandated by Section 615(d) "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, in consultation with the Federal banking agencies and the National Credit Union Administration."

Having consulted with the Federal banking agencies and the National Credit Union Association, the FTC published the Notice of Proposed Rulemaking for the Prescreen Opt-Out Disclosure Rule and requested public comment regarding the same. The objective of the Proposed Rule is to improve the required notice to consumers regarding their right to opt out of prescreened solicitations for credit or insurance by establishing a format, type size, and manner of the notice so that the notice will be simple and easy to understand. It sets forth the purpose and scope of the Rule; defines "simple and easy to understand"; requires a layered notice consisting of an initial, prominent statement that provides basic opt-out information, and a separate longer explanation that offers further details; sets an effective date for the Rule; and proposes model notices that may be used for compliance with the Rule and the FCRA.

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[1] Section 615(d)(1) of the FCRA [15 U.S.C. 1681m(d)(1)].

Entities covered by Section 615(d) of the FCRA and the Proposed Rule include insurance companies, retailers, department stores, and banking institutions.[2] The National Independent Automobile Dealers Association (NIADA) has represented independent motor vehicle dealers for over 50 years. The National Association and its State Affiliate Associations represent more than 19,000 independent motor vehicle dealers located across the United States. In 2003, a record 43.6 million used motor vehicles were retailed in the United States generating more than $366 billion in revenues. Because vehicles are lasting longer (the average vehicle on the road today is over 8.5 years old), projections of future used vehicle sale volumes suggest that the used vehicle market will maintain its 40-million-plus volume in the years to come.[3] Given the number of motor vehicle transactions that take place each year and the number of independent motor vehicle dealerships that utilize prescreened solicitations to solicit those transactions, the Prescreen Opt-Out Disclosure Rule could have a significant impact on the used retail motor vehicle industry and, therefore, NIADA hereby submits the following comments with respect to the Rule.

SECTION B. NIADA'S COMMENTS ON THE PROPOSED PRESCREEN OPT-OUT DISCLOSURE RULE

The FTC sought comment on all aspects of the Proposed Rule. Without limiting the scope of the issues on which it sought comment, the FTC indicated that it was particularly interested in receiving comments on the twenty questions enumerated in Section VII titled "Questions for Comment on the Proposed Rule." Many of the specific questions posed by the FTC address issues with respect to which NIADA agrees with the position taken by the FTC or issues that will not have a significant impact on its Members and, therefore, need not be addressed by NIADA. The proposed requirements for format and manner of disclosure, however, could have a substantial impact on the current advertising practices of motor vehicle dealers engaged in making prescreened offers.

1. The proposed requirements for format and manner of disclosure may fulfill the purpose of enabling consumers to understand their right to opt-out of receiving prescreened offers, but diminish the significance of other information disclosed pursuant to Section 615(d) of the FCRA.

Proposed Paragraph 642.2(a) defines the term "simple and easy to understand" to mean plain language designed to be understandable to ordinary consumers. The factors to be considered in determining whether a statement is simple and easy to understand are provided, but the FTC has permitted companies to retain flexibility in determining how best to meet the simple and easy to understand standard. The FTC further states, "These factors generally are consistent with those cited in other recent rulemaking proceedings requiring understandable consumer notices."[4] However, in this Proposed Rule the FTC has included specific formatting and language requirements, as well as type size requirements for the disclosures required by

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[2] 15 USC 1861b(c).

[3] The 2004 Used Car Market Report, Manheim Auctions, 1400 Lake Hearn Drive, NE, Atlanta, GA 30319-1464.

[4] See Proposed Rule for Prescreen Opt-Out Disclosure at 7 citing 16 CFR 313.3(b)(2)(financial privacy rule; examples of how a notice can be made to be "reasonably understandable") and 69 FR 33324, 33327(June 15, 2004) (notice of proposed affiliate marketing rule; examples of "reasonably understandable").

Section 615(d) of the FCRA, which is inconsistent with its approach in the Financial Privacy Rule and Proposed Affiliate Marketing Rule and the Truth in Lending and Leasing Acts. For example, the Privacy Rule does not mandate that specific form notices be utilized or require the use of any particular technique for making the notices clear and conspicuous, but rather provides guidance on how the mandated disclosures should be presented and the types of words that customers have found readily understandable.

Section 642.3 of the Proposed Rule specifically requires a "layered" notice consisting of both a short and long notice. The short notice would inform consumers about the right to opt-out of receiving prescreened solicitations and specify a toll-free number for consumers to call to opt-out and the long notice would provide consumers with all of the "additional information" required by Section 615(d) of the FCRA. This approach was taken based upon the purpose of Section 213(a) of the FACT Act and research relied upon by the FTC which shows that disclosures tend to be more effective if they are written in a clear and concise manner that is easily understandable by the average consumer and convey a limited amount of information.

NIADA recognizes that this "layered approach" may be effective when the information being conveyed is lengthy and complex, but NIADA does not believe that a layered approach is either necessary or the most effective means for conveying the required information to consumers in this case. Although the purpose of Section 213(a) of the FACT Act amendments is to highlight for consumers their right to opt-out of receiving prescreened solicitations and the available means of exercising that right, NIADA does not believe it was intended to treat the opt-out information as the "most important information" and the other items of information that must be conveyed by the FCRA Section 615(d) notice as "additional details".[5]

The Proposed Rule does not mandate any specific language for the short notice, rather, it imposes a more general standard that the notice be a "simple and easy to understand" statement that conveys consumers' opt-out rights and how they can exercise their opt-out rights. The Proposed Rule also prohibits the addition of extraneous information in the short notice because the FTC felt that the effectiveness of the communication could be diminished by adding additional language or concepts. The sample short notice provided by the FTC states:

To stop receiving "prescreened" offers of [credit or insurance] from this and other companies, call toll-free, [toll-free number].
See <u>OPT-OUT NOTICE</u> on other side [or other location] for details.

The long notice must contain all information required by Section 615(d) of the FCRA and must also be presented in a manner that is simple and easy to understand, is clear and conspicuous and begins with a heading identifying it as the "OPT-OUT NOTICE." The Proposed Rule does not prohibit marketers from including additional information in the long notice, provided that the additional information does not interfere with, detract from, contradict, or otherwise undermine

[5] <u>See</u> Proposed Rule for Prescreen Opt-Out Disclosure at 8-9.

the purpose of the opt-out notice. The language utilized by the FTC in the model notice was:

> **OPT-OUT NOTICE: This "prescreened" offer of [credit or insurance] 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. If you do not want to receive prescreened offers of [credit or insurance] from this and other companies, call toll-free, [toll-free number]; or write: [consumer reporting agency name and mailing address].**

The long notice does not contain any additional information regarding the consumer's opt-out right, except to the extent it provides an address to write to the consumer reporting agency. Moreover, the title "OPT-OUT NOTICE:" on the longer notice is misleading and detracts from the other material information that marketers are required to disclose to consumers pursuant to Section 615(d). For example, if a consumer reads the short notice and decides not to opt-out of receiving additional solicitations, he or she may not proceed to read the longer "OPT-OUT NOTICE" assuming that all of the information contained in that notice is related to his or her right to opt-out of receiving further solicitations. In reality, the long notice may contain other material terms and conditions and limitations and exclusions related to the offer of credit and the consumer's eligibility therefore. A short opt-out notice titled OPT-OUT NOTICE setting forth the toll-free number and address to contact to stop receiving prescreened offers such as the following would be more effective and accurate:

> **OPT-OUT NOTICE: To stop receiving "prescreened" offers of [credit or insurance] from this and other companies, call toll-free, [toll-free number] or write: [consumer reporting agency name and mailing address]**.

The additional language, "See OPT-OUT NOTICE on other side [or other location] for additional details," could also be permitted for use in those instances when marketers desire to include additional information about the consumer's opt-out rights, such as the right to contact all of the consumer reporting agencies and their respective toll-free numbers and mailing addresses. A longer opt-out notice properly titled as such would not necessary need to be in the same document as the short notice pertaining to opt-out rights as long as the marketer notifies the consumer about where to find the long notice and the additional information provided supplements and does not detract from or contradict the purpose of the opt-out notices. This notice is concise and simple and when prominently featured on the principal promotional document fulfills the purpose of enabling consumers to understand their right to opt-out of receiving prescreened offers.

The "other information" required by Section 615(d) of the FCRA could be presented in a separate notice altogether. Disclosing that information contained in a consumer report was used in connection with the transaction; that the consumer received the offer of credit or insurance because the consumer satisfied the criteria for creditworthiness or insurability under which the consumer was selected for the offer; and, if applicable, that 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 credit worthiness or insurability or does not furnish any required collateral, are material terms and conditions that should be brought to a consumer's attention. The FCRA already mandates that this information be presented in a manner that it is clear and conspicuous. Many state advertising and consumer protection laws further specify that any material exclusions or limitations with respect to an advertised offer, including an offer of credit, must be set forth in close proximity to the terms explaining the offer of credit. For purposes of disclosing this

information, NIADA proposes adopting the standards enumerated for the long notice.

If the FTC elects to retain the layered notice as presented in the Proposed Rule, NIADA respectfully requests that the FTC clarify in the Final Rule that marketers may include the long notice on the first page of the promotional document along with the short notice, provided that the other criteria for ensuring that the notices are prominent and clear and conspicuous and the type size requirements are met. Not all prescreened solicitations are as complex as the solicitations utilized by the FTC to demonstrate the model notices. For example, many motor vehicle dealers utilize one-page solicitations that consist of a short letter to the consumer regarding the offer for credit with an attached form and/or coupon at the bottom with the disclosures required in connection with the offer of credit offer, including the FCRA disclosures mandated by 615(d) and any other federal and/or state mandated disclosures. Therefore, while it may not be necessary to require both notices to appear in the same document, it would be beneficial for marketers to do so.

2. The FTC should consider reducing the mandatory type size proposed for the short notice.

Unlike in other recent Rulemakings wherein the FTC has permitted companies to retain broader flexibility in determining how to best meet the clear and conspicuous standard, while providing examples of the methods that may be utilized to make their notices clear and conspicuous, in this Proposed Rule the FTC has adopted more specific standards for compliance. For instance, the FTC has specified that the short notice must 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 side of the first page of the principal promotional document in the solicitation, or, if provided electronically, on the first screen; located on the page and in a format so that the statement is distinct from other text, such as inside a border; and in a typeface that is distinct from other typeface used on the same page, such as bolding, italicizing, underlining, and/or in a color that contrasts with the color of the principal text on the page, if the solicitation is in more than one color. The FTC has also specified that the long notice must 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; be in a typeface that is distinct from other typeface used on the same page, such as bolding, italicizing, underlining, and/or in a color that contrasts with the color of the principal text on the page, if the solicitation is in more than one color; and be set apart from other text on the page, such as by including a blank line above and below the statement, and by indenting both the left and right margins from other text on the page.

NIADA appreciates and supports the FTC's decision to maintain some flexibility for marketers to comply with the notice requirements. With the exception of the mandatory font size requirements, the proposed standards are consistent with the guidelines and examples of methods that may be utilized to make notices clear and conspicuous and to call attention to the nature and significance of the information provided that have been published by the FTC in prior Rulemakings. Furthermore, NIADA is not necessarily opposed to the adoption of a mandated type size requirement, provided that it is geared toward the end goal, which is to ensure that the consumers' attention is drawn to the notices. NIADA believes that the use of 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 as specified in the long form notice, when combined with the other requirements that the typeface be distinct from other typeface used on the same page and be set apart from other text on the page, accomplishes this goal and would be effective for both the short and long notices. Recognizing that the FTC may wish to distinguish one notice from the other, especially in those instances when the short and long notices appear on the same page, NIADA

alternatively proposes that the type size for the short notice 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 10-point type.

4. The model notices offer helpful guidance for complying with the Rule and there should be a safe harbor for utilizing the language and format suggested in the model notices, or substantially similar notices.

While NIADA believes that the use of the model notices provided in Appendix A should be discretionary, those marketers that elect to use them (or a substantially similar notice) should have the benefit of a safe harbor from administrative enforcement actions and consumer and regulatory challenges regarding the notice. Encouraging the use of the format and language of the model notices would benefit both consumers and marketers. The development of uniform notices would protect consumers by ensuring that they are aware of their opt-out rights as well as other pertinent information, including any limitations and exclusions, related to an advertised offer of credit. At the same time, covered entities would have appropriate direction as to the format and language that is most easily understood by their potential customers.

5. There are a significant number of small entities that may make prescreened offers of credit or insurance and that would benefit from having additional time to comply with the Final Rule.

The Proposed Rule applies to any entity, including small entities that make prescreened offers of credit or insurance. For these kinds of entities, the Small Business Administration defines small business to include, in general, insurance companies and retailers whose annual receipts do not exceed $6 million in total receipts and department stores whose annual receipts do not exceed $23 million in total receipts. For banking institutions, the Small Business Administration defines small businesses to include entities whose total assets do not exceed $150 million.

The FTC acknowledged that it has been unable to ascertain a precise estimate of the number of small entities that are creditors or insurers but, based on discussions with various trade associations, it was of the belief that many small businesses do not find prescreened solicitations to be cost-effective. While NIADA is unable to provide specific information regarding the actual number of small entities that utilize prescreened solicitations, NIADA does know firsthand that of its more than 19,000 independent motor vehicle dealers located across the United States, a significant number of them utilize prescreened solicitations as a means of marketing.

NIADA is not suggesting that the FTC adopt alternative provisions in the Final Rule. The anticipated benefits of having the sample notices provided in Appendix A, together with the guidance the FTC has provided regarding making “clear and conspicuous” disclosures and, if included in the Final Rule, a safe harbor provision, outweigh the costs and burdens imposed on NIADA members. NIADA does not believe, however, that making the Rule effective 60 days after the publication of the Final Rule is an adequate amount of time for covered entities to comply with the Final Rule. In many instances, independent motor vehicle dealers rely upon outside marketing companies to prepare and mail prescreened solicitations on their behalf. These solicitations must be prepared in advance of mailing and often run for periods of 30 to 60 days. In addition, regardless of whether a dealership prepares and sends its own solicitations or retains a marketing company to do so, it is ultimately responsible for ensuring that the solicitations comply with applicable federal and state laws. NIADA proposes that a mandatory effective date 120 days from the date on which a Final Rule is issued is adequate time for

covered entities to complete any marketing program involving prescreened solicitations that already underway, to consult with their attorneys or other professional advisers regarding their new obligations, and to take steps to ensure compliance with the new Rule.

SECTION C. CONCLUSION

NIADA would like to thank the FTC for the opportunity to comment with respect to the Proposed FACT Act Affiliate Marketing Rule. Any questions the FTC has regarding NIADA's comments and the position taken herein may be directed to NIADA's Legal Counsel, Keith E. Whann or Deanna L. Stockamp, of the Law Firm Whann & Associates located at 6300 Frantz Road, Dublin, Ohio 43017.