October 28, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FACTA Prescreen Rule, Project No. R411010

Dear Sirs and Madams:

The Mortgage Bankers Association ("MBA") appreciates the opportunity to comment on the Federal Trade Commission's ("FTC") Proposed Rule and Request for Comment[1] under Section 213(a) of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"),[2] which amends Section 615(d) of the Fair Credit Reporting Act ("FCRA"). The MBA is a trade association representing approximately 2,900 members involved in all aspects of real estate finance. Our members include national and regional lenders, mortgage brokers, mortgage conduits, and service providers. MBA encompasses residential mortgage lenders, both single-family and multifamily, and commercial mortgage lenders.

Many of MBA's members provide prescreened offers to our nation's consumers for credit products to which the FCRA requirement applies, particularly offers for home equity lines of credit ("HELOCs") and second-mortgage loans. These forms of credit offer important advantages for consumers, often allowing them to obtain credit with both rates and monthly payments that are significantly lower than the alternatives available. Credit-bureau prescreening is an important tool that benefits both consumers and lenders, because it allows mortgage lenders to tailor their offerings to products for which the consumer is likely to qualify. These offers provide convenience to consumers (because there may be less information requested from a consumer), provide valuable information to consumers, and encourage competition among lenders. From the lender's perspective, credit bureau information can increase the yield of positive responses from a mailed solicitation, which is critical to the lender's decision of how many consumers to solicit and even whether to conduct the solicitation at all.

1 69 Fed. Reg. 58861 (Oct. 1, 2004).
2 P.L. 108-159 (Dec. 4, 2003).

The Proposed Rule would implement the FACTA provision by requiring an opt-out notice on "the front side of the first page of the principal promotional document in the solicitation, or, if provided electronically, on the first screen," that is "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."[3] The Proposed Rule would also require a more detailed notice elsewhere in the solicitation.

The MBA supports the concept of model language for the disclosure under Section 615(d) of FCRA. Specifically, MBA generally supports the proposed long notice but lenders should also be able to include a reference that the offer of credit would be conditioned on meeting collateral requirements to meet the conditions for a firm offer of credit. MBA believes that the short notice goes beyond the requirements of FACTA and could detract from the main content of the solicitation including important Truth in Lending Act ("TILA") disclosures. The MBA is concerned that the proposed language and format, while perhaps effective in conveying the message that the consumer has the right to "opt-out" would crowd out other important disclosures and discourage lenders from providing consumers with useful information about the terms of the offer. Therefore, MBA respectfully requests that the "short notice" requirement be withdrawn. Finally, section 615(d) of FCRA requires detailed disclosures that are difficult to express in simple English. Therefore, the MBA recommends that the FTC explicitly state that the use of the model language constitutes compliance with Section 615(d).

MBA members do not want to make offers to consumers who are not interested in receiving them, and, therefore, support efforts to make consumers aware of their right to "opt-out" from prescreened solicitations. But the opt-out disclosure should not send the message to consumers that it is more important to opt out of receiving future prescreened offers than it is to read the contents of the current offer.

General Comments

Background

Section 615(d) of FCRA requires any person who uses a consumer report in connection with a written solicitation for credit or insurance based on a consumer report ("prescreened offer") to provide a clear and conspicuous disclosure.[4] The disclosure must provide information about the offer, including a notice of the consumer's right to "opt-out" of permitting access to his or her consumer reports in connection with future transactions not initiated by the consumer.[5] Section 213(a) of FACTA amends FCRA to require this disclosure to "be presented in such format and in such type size and

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3 69 Fed. Reg. at 58863.
4 15 U.S.C. § 1681m(d)(1).
5 *Id.*

manner as to be simple and easy to understand," and directs the FTC to establish a rule to implement this new standard.[6]

Long Notice

The MBA generally supports the proposed "long notice," with two suggested modifications. First, lenders who make secured loans should be allowed to rewrite the second sentence to read: "This offer is not guaranteed if you do not meet our criteria, including acceptable property as collateral." This would allow mortgage lenders and other secured lenders to meet the condition for a solicitation to qualify as a "firm offer" under Section 603(*l*) of FCRA. Second, the rule should explicitly state that use of the model language constitutes compliance with Section 615(d), as well as with the firm-offer requirement if the optional language is used.

Short Notice

On the other hand, the MBA respectfully submits that requiring both the "short notice" in large type on the first page of the solicitation and a longer notice elsewhere in the materials goes beyond the FACTA requirement in ways that will be detrimental to both consumers and lenders. It is important to distinguish the mandate in FACTA to make the opt-out notice "simple and easy to understand" from a requirement to make the opt-out notice the most emphasized and most important part of the prescreened offer. FACTA did not amend FCRA to require that the opt-out notice be made more visible to consumers on a prescreened offer. FACTA only requires the FTC to make the notice simple and easy to understand, not more prominent or pronounced.

The proposed new disclosure could inadvertently detract from disclosures required by other federal law, most significantly those required by TILA. TILA, as implemented in the Federal Reserve Board's Regulation Z, 12 C.F.R. Part 226, requires that certain information be disclosed when certain other information is stated in an advertisement, including a credit solicitation.[7] The purpose of these requirements is to promote

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[6] P.L. 108-159 (Dec. 4, 2003).

[7] An advertisement for any type of open-end plan that contains information about credit charges must also include the following information: (i) any minimum, fixed, transaction, activity, or similar charge that could be imposed; (ii) any periodic rate that may be applied expressed as an APR, and if there is a variable rate, that fact; and (iii) any membership or participation fee that could be imposed. *See* 12 C.F.R. § 226.16(b). Advertisements for HELOCs that contain information on the finance charge or other charges or the terms of the plan must also provide information on the following: (i) any loan fee that is a percentage of the credit limit under the plan and estimate of any other fees imposed for opening the plan (including government charges and closing costs), stated as a single dollar amount or a reasonable charge; (ii) any periodic rate used to compute the finance charge, expressed as an APR, and (iii) the maximum APR that may be imposed in a variable-rate plan. *See id.* § 226.16(d).

Regulation Z requires an advertisement for closed-end credit that includes information on the amount or percentage of any downpayment, the number or period of payments, or the amount of any payment to contain the following information: (i) the amount or percentage of the downpayment; (ii) the terms of repayment; and (iii) the annual percentage rate, using that term, and if the rate may be increased after consummation, that fact. *See id*. § 226.24(c).

informed shopping for credit by ensuring that an advertisement that promotes certain attractive credit terms does not omit other important terms of a credit offer. In addition, solicitations by state-regulated nationwide lenders must include licensing and other disclosures required by a number of states. Even under current law, it has been a challenge to present all this information in a way that is understandable to the consumer. If the FTC adopted the Rule as proposed, it would become even more difficult to present information about the details of a credit offer in a meaningful way.

It would be unfortunate if the TILA disclosures were outweighed in the consumer's mind by the opt-out disclosure, which, while important, does not pertain to the current offer. The "crowding-out effect" of the short notice would also detract from the underlying message of a solicitation for mortgage credit – that the consumer may be able to refinance on advantageous terms or replace high-cost credit with a lower-cost, often tax-deductible loan or line of credit.

The detailed requirements of the proposed rule seem to be based on the incorrect assumptions that consumers who opt out of prescreened solicitations will still receive offers and that the main benefit of receiving an offer is the ability to comparison-shop.[8] In fact, a consumer who opts out of receiving prescreened solicitations dramatically reduces his or her chances of receiving further credit offers. Because of the substantial cost of each solicitation, lenders attempt only to solicit consumers who (1) appear to be qualified for the credit being offered, and (2) are likely to respond positively to the solicitation. Lenders that use credit bureau prescreening are unlikely to conduct separate, non-prescreened solicitations in order to reach consumers who have opted-out, because those solicitations will achieve a smaller yield of responses from consumers. Along the same lines, the benefit of a prescreened solicitation is not only the opportunity to comparison-shop, but more fundamentally, the opportunity to learn of opportunities of which the consumer may not have been aware and to obtain credit on better terms with much less effort.

Therefore, the MBA respectfully requests that the FTC withdraw the "short-notice" requirement when it issues its final rule under Section 615(d) of FCRA.

Specific Comments

The MBA would also like to respond to some of the questions posed by the FTC regarding the specific model disclosures contained in the notice of the proposed rulemaking and request for comment:

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[8] The study of the effectiveness of disclosures assumed that two of the four "information points" to be conveyed by the disclosure were that consumers might still receive other credit offers and that an offer would mainly be helpful in comparison-shopping. M. Hastak, *The Effectiveness of "Opt out" Disclosures In Pre-Screened Credit Card Offers: A Report Submitted to the Commission* at 1, *available at* http://www.ftc.gov/reports/prescreen/040927optoutdiscprecreenrpt.pdf.

1. Are the proposed requirements for format and manner of disclosure appropriate and adequate to fulfill the purpose of enabling consumers to understand their right to opt-out of receiving prescreened offers?

The MBA believes that the format and manner of the disclosure go beyond what is appropriate to meet the goals of the statute. The short and long notices repeat the same information. As noted, the short notice would detract from other important information in the solicitation. If the short notice is included, it could accomplish the same task of notifying the consumer of the opt-out right without including the telephone number. In fact, the short notice could simply contain one sentence, which directs consumer to the longer notice to learn about the right to opt-out.

Furthermore, we believe that any benefits of providing the opt-out notice on the front page of the advertisement would not outweigh the fact that the additional notice would distract consumers from important terms and information in the offer, and possibly make prescreened offers so expensive for some lenders that they would cease to employ this valuable marketing technique. Thus, consumers would no longer get the benefits of prescreened offers that are tailored to their individual credit needs.

2. Does the layered notice requirement provide a simple and easy format for disclosing the required information? Are the type sizes proposed for the short notice and the long notice appropriate? Should they be larger? Should they be smaller?

As noted, the MBA believes that the requirements are excessive and go beyond the mandate of FACTA. If the short notice is required, the type size required for that notice should not be as large as proposed, particularly if the text of the letter is much smaller. The short notice, being in a larger type size than and set apart from the solicitation, would distract consumers from other information contained in the offer. The short notice could be just as effective if the type size were the same or smaller than the principal text, because it would still be set apart from the text. As discussed below in response to Question No. 14, the type-size requirement would be particularly burdensome for electronic disclosures.

3. Should "principal promotional document" be a defined term? Should there be a safe harbor for placing the short notice on the first page of the document that is designed to be seen first by the consumer? What other factors should be considered in determining whether a document is the "principal promotional document"?

The regulation should define "principal promotional document." Although the definition may seem clear for certain offers, the term could prove vague for solicitations with multiple pages. Factors that should be considered in deciding whether a document is the "principal promotional document" include whether the document is the first page of a letter to the consumer or contains the credit terms being offered. In addition, there should be a safe harbor for placing the short notice on the first page of the document

that is designed to be seen first by the consumer, because this would create a clear test with which lenders could easily comply.

4. Is there additional information that should be required in the short notice to enhance its simplicity and understandability? If additional information is needed, identify the information and state why it is needed.

There is no additional information needed in the short notice. In fact, the MBA believes the short notice, if it is required at all, contains too much required information, and should merely be required to notify consumers of the opt-out right and direct consumers to the long notice on the back page. That notice informs consumers of the process for opting out.

5. Should the Rule allow additional information in the short notice? If so, what, if any, restrictions or conditions should apply to the inclusion of additional information?

The MBA does not support permitting additional information in the short notice. We prefer a simple, uniform disclosure that all lenders can make with confidence that they are in compliance with the Rule.

6. Is there additional information that should be required in the long notice to enhance its simplicity and understandability? If additional information is needed, identify the information and state why it is needed.

The long notice should inform consumers that the toll-free telephone number is the number of the consumer reporting agencies, and not the lender. In addition, as noted above, the notice should be amended to allow secured lenders to place the notice of collateral requirements required by the definition of a “firm offer” in the notice.

7. Should the Rule prohibit information beyond that required by the statute from being included in the long notice?

As with the short notice, the MBA does not support permitting additional information in the long notice, other than the optional disclosure of collateral requirements suggested above.

8. Should the Rule require the long notice to appear in the same document as the short notice?

No, the Rule should not require the long notice to appear in the same document as the short notice. The short notice would direct the consumer to the long notice, which would be included in the same solicitation, or accessible through an Internet link. This requirement would be an unnecessary restriction on the presentation of communications between lenders and consumers.

9. Is the effective date adequate and appropriate? If not, please specify what an appropriate effective date would be and provide specific information regarding why an effective date other than the date in this proposed Rule is necessary and appropriate. For example, is the effective date adequate for marketers to exhaust their existing inventories of solicitation forms, re-design the opt-out notice in order to incorporate the layered approach, and print solicitations with the new layered notices? Is there any small business that has a particular need for a longer period for compliance?
The effective date is not adequate to exhaust the current supply of solicitation forms, as well as prepare new forms to be mailed to potential customers. Lenders have many different types of solicitations for different products, especially larger companies, and redesigning each type of solicitation would be an exhaustive process. Redesigning and ensuring that the new forms retain their understandability and effectiveness would necessitate the implementation of many processes. Therefore, the effective date should be at least six months after the rule becomes final. On the other hand, users of consumer reports should be able to rely on the rule as a safe harbor for compliance as soon as it is issued in final.

10. Are the model notices simple and easy to understand? Are there terms used in the model notice that are not likely to be understood by ordinary consumers? If so, what are those terms, and what other terms would be understandable? For example, is the term "criteria" understandable to ordinary consumers? Are ordinary consumers more likely to understand a term such as "credit standards" or "requirements"?

The model notices are simple and easy to understand. However, the short notice could be made simpler by not requiring the telephone number to be included. The short notice could simply direct the consumer to the long notice, which would contain the information on the procedure to opt out. A consumer may become confused as to why he is directed to the long notice, when the short notice already contains the procedure to opt out. The specific terms used in the model notices are understandable.

11. Do the model notices adequately provide consumers with the information necessary to exercise their right to opt-out? If additional information is needed, identify such information and state why it is needed.

The model notices adequately provide consumers with the information necessary to exercise their right to opt-out. As noted, we believe that the combination of two notices is excessive and detracts from other important information.

12. Do the model notices offer helpful guidance for complying with the Rule?

Yes, the model notices provide helpful guidance for complying with the Rule.

13. The model long notice includes the name of the consumer reporting agency to whom the consumer can write to exercise the opt-out right. Is this helpful to consumers? Should the notice include the names of all nationwide consumer reporting agencies?

Since Section 615(d) requires inclusion of the address, it should be included in this notice. Otherwise, use of the model notice would arguably not constitute compliance with Section 615(d). The names of all nationwide consumer reporting agencies should not be required unless the solicitation used all of those agencies.

14. To what extent do credit and insurance providers make prescreened solicitations electronically? Describe the circumstances under which a prescreened solicitation would be made electronically. Are electronic prescreened offers likely to become more prevalent? Does the proposed rule adequately address prescreened offers that are made electronically?

MBA believes that prescreened electronic solicitations will increase as consumers do more of their shopping online. Under the Proposed Rule, a prescreened prescreen email solicitation would have to include both a short and a long notice in the email message. It would also have to include an unsubscribe mechanism and other disclosures required by the CAN-SPAM Act of 2003, P.L. 108-187 (2003). Consumers would likely be confused, rather than helped, by receiving these two different types of "opt-out" notices. To prevent this type of confusion, MBA recommends that prescreen messages that are sent electronically be exempt from the opt-out mechanism of CAN-SPAM. A consumer who opts out of electronic prescreened offers will not receive future prescreen offers electronically or otherwise, but will still be able to opt-out of receiving other types of commercial email messages.

[15. intentionally omitted.]

16. Please provide comment on any or all of the provisions in the proposed Rule with regard to (a) the impact of the provision(s) (including any benefits and costs), if any, and (b) what alternatives, if any, the Commission should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the proposed Rule on small entities in light of the above analysis. Costs to "implement and comply" with the proposed Rule should include expenditures of time and money for any employee training, attorney, computer programmer, or other professional time, as well as notice reformatting, mailing, or other implementation costs.

See answers to specific questions above.

17. Please describe ways in which the proposed Rule could be modified, consistent with the FACT Act's mandated requirements, to reduce any costs or burdens for small entities.

See answers to specific questions above.

[18. and 19. intentionally omitted.]

20. Please identify any relevant federal, state, or local rules that may duplicate, overlap, or conflict with the proposed Rule.

See discussion of Regulation Z and of state requirements under “General Comments” above.

The MBA thanks the FTC for the opportunity to provide comments on the Proposed Rule. Should you have any questions, please do not hesitate to contact Mary Jo Sullivan at (202) 557-2859.

Most sincerely,

Jonathan L. Kempner
President and Chief Executive Officer