October 28, 2004

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

RE: FACTA Prescreen Rule, No. R411010

Dear Sir or Madam:

The American Financial Services Association appreciates this opportunity to comment on the Proposed Rule issued by the Federal Trade Commission (the "FTC") proposing new disclosures regarding consumers' right to opt out of prescreened solicitations. The Proposed Rule is required by section 213(a) of the Fair and Accurate Credit Transactions Act (the "FACT Act"). AFSA is the national trade association for consumer credit providers. The credit products offered by AFSA's members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance.

AFSA is a member of the Coalition to Implement the FACT Act. As a member of the Coalition, we fully align ourselves with their submitted comments. AFSA offers these additional comments.

The Notice Requirement

We appreciate the FTC's efforts to make the prescreening disclosure "simple and easy to understand," as required by Section 213(a) of the FACT Act. However, we believe the proposed layered-notice approach would not effectively educate consumers about the benefits of prescreening and would distort consumer choices regarding the prescreening opt-out. Consumers may also wrongly perceive such a conspicuous and cautionary notice as a "do-not-mail" opt-out.

Because the layered notice focuses much more closely on the opt-out process than on the benefits of prescreening, we oppose the layered-notice approach taken by the Proposed Rule. We support the improved notice ("version 2") in the Proposed Rule, because we believe it would effectively satisfy Congress's instruction that the FTC make the prescreening disclosure "simple and easy to understand" by allowing consumers to make a balanced choice about opting out of prescreened solicitations.

Prescreening Opt-Out Notices for Electronic Solicitations

AFSA would like to reiterate our opposition to the layered-notice approach taken by the Proposed Rule. However, should the FTC chose to use the layered-notice approach, AFSA requests the prescreening opt-out notices to not apply to electronic solicitations.

The FCRA requires a prescreening opt-out notice with each "written solicitation." However, the FCRA clearly does not treat "electronic" communications as being "written." In Section 610, for example, the FCRA generally requires that consumer reporting agencies provide certain disclosures "in writing." However, if the agency wishes to provide those disclosures "by electronic means," the agency must first obtain the consumer's authorization. 15 U.S.C. 1681h(b)(2). Similarly, Section 15 requires that users of consumer reports provide adverse action notices "orally, in writing, or electronically," another clear demonstration that "electronic" communications are not deemed "written" under the FCRA. In the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., Congress likewise distinguished between communications that are "in writing" and those that are "electronic." The Act provides that laws requiring records be "in writing" may be satisfied by an "electronic record" provided that certain enumerated requirements are met. 15 U.S.C. 7001(c). If electronic records were deemed writings, these provisions of the Act would be meaningless.

For the above reasons, we respectfully urge the FTC to strike from the proposed rules any reference to electronic solicitations.

If the FTC should chose to maintain a reference to electronic solicitations, AFSA strongly recommends the FTC to consider the compliance effects of the rule. The Proposed Rule would require the short notice to be located "[o]n the front side of the first page of the principal promotional document in the solicitation, or, *if provided electronically, on the first screen*."[1] We are concerned that the Proposed Rule could be read to impose more difficult standards for the disclosure of the short notice on electronic solicitations than it imposes on mailed solicitations.

Many lenders make prescreened solicitations online. These online solicitations are often provided in the form of a box, statement, pop-up or other link that consumers must click on in order to obtain more information about the offer. In effect, the link functions as an "envelope" that the consumer must "open" to find out about the offer, and the screen that the consumer is directed to after clicking on the link functions as the cover letter presenting the offer. The requirement to place the short notice on the first electronic screen could be interpreted to mean the first screen that refers to the offer or the link. Such a requirement would be similar to requiring lenders to place the short notice on the envelope of a mailed solicitation. The FTC, however, indicates in the Supplementary Information that it would consider the "principal promotional document" to include the prescreened solicitation's cover letter or "the document that is designed for consumers to see first when they *open the envelope*."[2]

[1] Proposed 16 C.F.R. § 642.3(a)(2)(iii) (emphasis added).
[2] 69 Fed. Reg. at 58,863 (emphasis added).

The substance of the requirements for online solicitations should not be different from mailed solicitations. Online links generally communicate little more information to consumers than do the envelopes of mailed solicitations. Both the links and the envelopes are designed to attract consumers to "open" the documents in order to find out more information about the offer. Moreover, requiring a short notice to be displayed prominently on a link would supplant all other information and would discourage consumers from activating the link. In addition, imposing different standards for the display of the short notice depending on whether the solicitation is made by mail or electronically likely would detract from future innovations by lenders in providing consumers prescreened solicitations online.

Accordingly, we believe that the final rule should clarify that it is the first full screen of the promotion, rather than the link, that should include any short notice.

Consumer Benefits

Prescreening generates significant benefits that consumers should know about when they make their opt-out decision.

- Prescreening plays a critical role in the national credit granting process.
- Prescreening lowers costs for consumers, because of vigorous price competition among issuers.
- Prescreening improves the consumer's buying experience.
- Accounts obtained through prescreening have a loss rate of approximately one-fourth to one-half of those associated with accounts obtained through other means.
- Fewer consumers are victimized by identity thieves and other fraudulent operators when prescreening is used as a vehicle to provide them credit.

In light of the significant benefits generated by prescreening, we disagree with what appears to be the fundamental underlying premise of the Proposed Rule: that the primary goal of the prescreening opt-out disclosure should be to maximize the total number of consumers that opt out of receiving prescreened solicitations. We believe that the goal of the prescreening opt-out disclosure is to allow consumers to make a balanced, informed choice about opting out. We do not believe that the layered approach would effectively accomplish that goal, and we believe that it would result in several significant negative consequences, which we outline below.

1. The Layered Notice Would Generate Significant Consumer Confusion about How to Decide Whether Opting Out of Prescreened Solicitations Would be Valuable to the Consumers.

Unlike the "Do Not Call" list, opting-out of prescreening will not reduce the flow of mail to consumers. Instead, lenders would be likely to revert to the mass-mailing practices that were prevalent before prescreening was developed. Consumers would likely receive more non-prescreened "invitations to apply" that will be more general and more expensive than targeted prescreened offers. As a result, consumers would be more likely to apply for credit without knowing the precise terms for which they are eligible, which could lead to more consumer complaints by individuals who are not eligible for the best terms. We believe that consumers who have read the "warning label" provided in the layered notice would be extremely surprised and confused by this result.

We believe the layered notice is flawed, because it will encourage ill-informed decisions that may harm consumers and competition. Solicitations based on prescreening are one of the primary drivers of credit card competition responsible for a robust and highly competitive market. It allows consumers to become informed about other options, to shop for, select, and obtain better terms, particularly as their credit scores improve. Encouraging them to opt out with a "cigarette warning" style notice on the first page without a balancing explanation of the potential benefits of inclusion would harm consumers and competition. The layered notice would likely lead many of these consumers to opt out without a full understanding of the consequences of that decision.

Referring to the term "prescreening" on the front page will also be confusing to some consumers, because it is likely that some consumers will be unfamiliar with the term. The front-page notice would not educate consumers about the benefits of prescreening and would therefore produce, for some consumers, an uniformed decision about whether to opt out.

The front page notice also includes a toll-free number which consumers may mistakenly assume they can also use to reply to the credit offer. This could also lead to consumer frustration and confusion. In addition, it may require the toll-free operators redirect consumers to call the lender's toll-free number to apply for credit. Consumers would be informed if they read the longer disclosure on the back of the letter before deciding to opt-out. The "warning label" required by the layered-notice approach makes it far less likely that a consumer would read the longer notice, realize the benefits of prescreening, and make a more educated decision about whether to opt-out of receiving additional prescreened solicitations.

In amending the Fair Credit Reporting Act in 2003, Congress directed the FTC to increase the public awareness of not only the right to opt out, but also of the benefits and consequences of this decision. Specifically, Congress recognized that a consumer's decision to opt out of receiving prescreened offers of credit has greater consequences than "simply deciding to limit the number of direct mail pieces delivered to the" consumer.[3] For instance, Congress recognized that many consumers only will become aware of their eligibility for better credit terms after receiving prescreened credit offers.[4] As a result, Congress sought to ensure that a consumer's decision to opt out was made in an informed manner because of the possible consequences of this decision.

[3] Letter from Representatives Bachus and Kanjorski to Chairman Majoras, FTC (Oct. 12, 2004).
[4] *Id*.

To minimize consumer confusion, we therefore support a single disclosure that informs consumers about the benefits and costs of prescreening, such as version 2 in the Proposed Rule.

2. The Layered Notice Would Limit Consumers' Access to Credit and Would Increase the Cost of Credit.

Consumers who opt-out of prescreened solicitations would likely receive more expensive offers of credit, because credit issuers would not be able to verify the creditworthiness of that consumer. Prescreening allows lenders to review a consumer's creditworthiness at two different points in time:

1. Marketing Stage – when identifying creditworthy consumers using prescreen criteria.

2. Application Stage – when reviewing credit applicants using the prescreen criteria and information supplied on the application.

Having two snapshots of a consumer's credit profile, rather than one, gives lenders the ability to track changes in their profile from marketing to application stage and use this information to more accurately gauge the consumer's true credit risk to the institution. Lenders can then make precise adjustments to offer terms like Annual Percentage Rate ("APR") or credit line (subject to UDAP limitations) that increase the likelihood an applicant will be approved and minimize the lender's credit risk. This refinement keeps the cost of credit low.

The cost of credit is also impacted by processing costs. According to a recent Visa Functional Credit Study, credit processing costs are approximately $10 per account for prescreened solicitations, $25 per account for non-prescreened solicitations, and $18 per account for branch/indirect solicitations. Capital One's experience supports this position. Processing costs for Capital One's internet non-prescreened offers are approximately seven times greater than the costs associated with similar prescreened offers. We transfer these cost efficiencies to our customers through lower interest rates and better product terms.

Because the prescreening opt-out now lasts for five (5) years, it is likely that consumers who opt-out of prescreened solicitations will miss the opportunity to receive better credit offers as their credit improves over that five-year period. This will disadvantage consumers who are new to the credit reporting system, such as immigrants and young people. It is particularly important for those with little credit history to become aware of new products. The eligibility of these consumers improves fairly rapidly, as they demonstrate their ability to repay debts successfully. Without prescreened solicitations, those consumers will be unaware of products with better credit terms and products that better suit their needs. Similarly, consumers who improve past bad behavior will become eligible for more attractive products over time. The layered notice would likely lead many of these consumers to opt out without a full understanding of the consequences of that decision.

We believe that the goal of the prescreening opt-out disclosure should be to educate consumers in a balanced fashion about the merits of prescreening, the potentially negative consequences of opting out, and method by which a consumer may opt out. The layered notice would focus the consumer's attention on the method of opting out by prohibiting lenders from explaining the other points mentioned above on the front page. We do not believe that such an approach effectively balances all of the goals that Congress had when it asked the FTC to make the disclosure "simple and easy to understand."

3. The Layered Notice Would Be Inconsistent with Regulation Z.

We are also concerned that the layered notice would overshadow more important terms and disclosures, thereby creating a potential legal conflict with the requirements contained in lending regulations. For instance, requiring lenders to disclose the short notice and toll-free number on the front page undermines the prominence of Regulation Z disclosures like the Schumer Box. The front page notice would draw the consumer's attention away from the more important Regulation Z disclosures and description of terms that are critical for the consumer to understand before applying. We do not believe that the typical consumer would find the prescreening opt-out to be a more important element of the credit transaction than the pricing terms.

B. The Cost Estimates of Compliance in the Proposed Rule Are Too Low, Because The Estimates Do Not Reflect Many Significant Costs to Lenders.

The costs to the industry are many dozens of times higher than the estimate contained in the Proposed Rule, because the Proposed Rule does not account for a number of costs. The Proposed Rule estimates that the time to revise the notice and re-format the solicitation is about eight (8) hours and that about seven hundred fifty (750) entities will be affected. Incredibly, the Proposed Rule estimates that the cost to the entire industry of the proposed layered notice will be $110,000 and $167,000. The per-bank cost estimate would therefore be approximately $537.24. This is based on two hours of professional's time (at $31.55 per hour) and 6 hours of technical labor. We believe these estimated total costs are far too low, because they do not account for a number of costs to lenders and consumers and, worse, may reflect a fundamental misunderstanding of how financial businesses operate.

The Proposed Rule does not account for the following costs: Aside from the ministerial costs of adding the layered notice to solicitations, lenders would face the costs associated with sending less-targeted solicitations to potential customers: these less-targeted solicitations would be far less efficient at matching the consumer to the right product, and would therefore generate significant additional marketing costs. As discussed above, issuers would be likely to mass-mail these less-targeted solicitations as "Invitations to Apply." In addition, other costs are difficult to quantify, but would surely be borne by the industry, such as having to build new credit risk models to compensate for opt-out populations and training our call center associates to be prepared for the consumer confusion that we discussed earlier in the letter. We believe that these costs could run in the millions of dollars for each lender, thereby costing the industry tens or hundreds of millions of dollars. The Proposed Rule does not account for any of these costs, and their exclusion suggests that the FTC should significantly re-evaluate the Proposed Rule.

The Final Rule Must Provide Lenders More Time to Comply with the Disclosure Requirements.

Lenders would need more than sixty (60) days to comply with the new regulation, because solicitations are planned several months before mailing, and last-minute copy revisions are very expensive. In addition, consumers are often asked to respond to prescreened solicitations by a certain date. Mail delays caused by last-minute copy revisions would cause lenders to also alter these expiration dates and their application decision models. Also, many prescreened solicitations are based on templates that are "locked-down" to prevent inadvertent errors that may lead to disclosure violations. Lenders may revise these templates as infrequently as once or twice per year.

For the foregoing reasons, we request that the FTC allow the financial services industry at least nine (9) months to comply with any new disclosure requirements.

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Conclusion

We appreciate the opportunity to comment on the Proposal and again thank the Commission for their efforts. Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 466-8606.

Respectfully submitted,

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