



*MBNA America Bank, N.A.
1100 North King Street
Wilmington, Delaware 19884-0127*

October 28, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex R)
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: FACTA Prescreen Rule - Project No. R411010

Ladies and Gentlemen:

This comment letter is submitted on behalf of MBNA America Bank, N.A. ("MBNA") in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment by the Federal Trade Commission ("FTC"; "Commission"), published in the Federal Register on October 1, 2004. Pursuant to the Fair Credit Reporting Act ("FCRA"), as amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), the Proposed Rule would regulate the format, manner and type size of the "opt-out notice" that must be provided with prescreened offers of credit and insurance. MBNA appreciates the opportunity to comment on this important matter.

BACKGROUND ON PRESCREENING

In 1996, Congress amended the FCRA and, inter alia, made the furnishing and obtaining of consumer reports for the purpose of providing prescreened solicitations an independent permissible purpose. Specifically, a consumer reporting agency ("CRA") may furnish a consumer report to a person the CRA has reason to believe intends to use the information in connection with a credit transaction, not initiated by the consumer, if the transaction consists of a firm offer of credit, the CRA has an opt-out notification system, and the consumer has not opted out.

The FCRA requires a lender to provide, with each written solicitation, a clear and conspicuous notice that information contained in a consumer report was used in connection with the firm offer of credit, and that the offer was extended because the consumer satisfied the lender's initial credit-worthiness criteria. The notice must also indicate, to the extent applicable, that credit may not ultimately be extended if the consumer does not continue to meet the lender's selection criteria, does not meet any applicable additional criteria established in advance by the lender, or does not furnish required collateral. The notice must also inform the consumer of the right to prevent the use of consumer report information in connection with prescreened solicitations in the future, and must include the address and toll-free telephone number for opt-out notification. Finally, the opt-out notice must "be presented and in such format and in such type size and manner as to be simple and easy to understand, as established by the [FTC], by rule."

NOTICE REQUIREMENTS IN THE PROPOSED RULE

The Proposed Rule establishes baseline requirements for the content and form of the opt-out notice, including a requirement that the notice be provided in a "layered" format comprised of both a short and a long notice. The short notice is to be a "simple and easy to understand statement" that informs consumers of their right to opt out of receiving prescreened solicitations, and sets forth the toll-free number that can be called to exercise this right and the location of the long notice. The Proposed Rule sets forth detailed requirements concerning the form of the short notice, including that it must be: (1) prominent, clear and conspicuous; (2) in at least 12-point type, and larger than the type size of the principal text on the same page; (3) located on the first page of the principal promotional document; (4) formatted so the statement is distinct from other text, and (5) in a typeface that is distinct from other typefaces used on the same page. The Proposed Rule provides a model notice that states: "To stop receiving 'prescreened' offers of [credit or insurance] from this and other companies, call toll-free, [toll-free number]. See OPT-OUT NOTICE on other side [or other location] for details."

The long notice is also to be a "simple and easy to understand statement" that provides consumers with the other information required by section 615(d) of the FCRA. The Proposed Rule sets forth detailed requirements concerning the form of the long notice, including that it must: (1) be clear and conspicuous; (2) appear within the solicitation; (3) be at least 8-point type, and not smaller than the type size of the principal text on the same page; (4) include a heading, in capital letters and underlined, that reads "OPT-OUT NOTICE"; (5) be in a typeface that is distinct from other typefaces used on the same page; and (6) set apart from other text on the page with the left and right margins indented. The Proposed Rule provides a model notice that states: "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 Proposed Rule defines “simple and easy to understand” as “plain language designed to be understood by ordinary consumers”, and provides factors to be considered in determining whether the standard has been met.

THE PROPOSED OPT-OUT NOTICE IS OVERLY PROMINENT

The Proposed Rule requires an opt-out notice that will be the most prominent information presented in the entire prescreened solicitation. The statutory directive that the opt-out notice “be presented and in such format and in such type size and manner as to be simple and easy to understand” neither requires nor contemplates that it would be more prominent than critical financial information about the terms of the offer, e.g., information in the “Schumer Box”.

In the Supplementary Information the Commission identifies two components critical to making a notice simple and easy to understand: (1) language and syntax that effectively communicate the intended message; and (2) presentation and format that “call attention to the notice” and enhance its readability. While we agree that calling attention to information helps to make it easy to understand, we believe strongly that giving more prominence to certain information than to other important information in the same message will distort the reader’s understanding and make the overall message more difficult to understand. Specifically, by giving more prominence to the statement that a consumer has the right to opt out than to an appropriate explanation of the effects of opting out, the notice is likely to cause consumers to believe they should opt out, even though doing so will eliminate future access to important information about the terms of credit for which they are qualified.

In summary, the Proposed Rule places its primary emphasis on calling attention to the opt-out notice, specifies in great detail how notices must be presented in the prescreened solicitation and gives more prominence to opt-out information than to other information presented in the solicitation, much of which is required by federal law. We believe this is not an appropriate way to make the notice “simple and easy to understand”. To the contrary, we believe the prominence of the opt-out notice may adversely affect consumers’ understanding of both prescreened solicitations and their opt-out rights.

PROMINENCE OF THE OPT-OUT NOTICE WILL ADVERSELY AFFECT CONSUMERS

Formatting requirements set forth in the Proposed Rule will make the short notice the most prominent information displayed on the first page of the principal promotional document. Upon opening a prescreened solicitation, a consumer will be drawn first to the short notice, thereby making this notice the most prominent information displayed in the entire solicitation, and making it less likely the consumer will read other important information in the solicitation document, including the offer of credit itself and other legally required disclosures. Indeed, a likely unintended consequence of the prominence, format and wording of the short notice is that consumers will see it as a suggestion that he or she should avoid prescreened solicitations. Thus, the notice may lead many consumers simply to discard the solicitation without considering it,

even where the solicitation provides terms more beneficial to the consumer than his/her current credit account.

Even if the consumer does not discard the solicitation, the short notice will, at the very least, divert attention from the credit terms of the prescreened offer, including those disclosures required by law. Regulation Z, which implements the Truth in Lending Act, requires a prescreened offer for a credit card to prominently display the Schumer Box, in which are included the annual percentage rate, annual or periodic fees, and the minimum finance charge, and to display, clearly and conspicuously, certain credit terms for all accounts. Regardless of where a lender inserts the Schumer Box, or places other required disclosures, they will be less prominent than the short notice, even though there is a statutory requirement that the Schumer Box is “prominent” and other disclosures are “clear and conspicuous.” Consumers will be distracted from the required disclosures, thereby frustrating the goal of Regulation Z “to promote the informed use of consumer credit by requiring disclosures about its terms and costs.”

In summary, prominence of the short notice, in conjunction with the model language, will likely encourage consumers to opt out of future prescreenings instead of encouraging them to make an informed opt-out decision. The model language for the short notice is not neutral; rather, it informs consumers how “[t]o stop receiving ‘prescreened’ offers”, and does so in a typeface that is to be larger than all other information on the first page. The likely effect will be to induce a consumer to opt out, regardless of whether prescreening is beneficial to that consumer and regardless of whether his/her opt-out decision is truly informed.

THE PROPOSED RULE DOES NOT FAIRLY TAKE INTO ACCOUNT THE BENEFITS OF PRESCREENING

We believe the Proposed Rule’s approach to prescreening is not balanced and ignores the well-documented benefits of prescreened offers of credit. An appropriate balanced approach to making opt-out notices simple and easy to understand should give due account to the consumer benefits of prescreening, and should not influence more consumers to opt out than would otherwise do so. The goal should be for consumers to make informed decisions concerning the pros and cons of prescreening, decisions that are not unduly influenced by the form or content of the notices they receive.

Prescreening confers significant benefits on consumers, as it increases the transparency of the market for consumer credit and enhances consumers’ ability to shop for credit by helping them understand the terms for which they qualify. Prescreening provides consumers with more choices, thereby increasing competition, reducing prices and fostering innovation. Prescreening also reduces lender costs, and the attendant savings are passed on to consumers. Congress recognized these benefits when it amended the FCRA in 1996 and sought to preserve these benefits by clarifying the permissibility of prescreening.

WE SUGGEST AN ALTERNATIVE APPROACH THAT IS FAIR AND BALANCED

We believe the Commission's final rule ("Final Rule") should provide for a balanced, neutral opt-out notice that is easy to locate and understand, and gives lenders at least a couple of options for providing the required notice. At the very least, the Final Rule should permit lenders to provide either: (1) a short notice on the first page of the solicitation that directs consumers to a longer notice; or (2) a single, but easy to find, longer notice.

We believe the Final Rule should permit lenders, as one option, to adopt a layered approach in providing the opt-out notice, i.e. a lender could provide a simple and easy to understand short notice that informs the consumer of his/her right to opt out, and directs the consumer to the long notice. It would be reasonable for this notice to appear in the text on the front side of the first page of the principal promotional document, in the same type size as the principal text on that page. For instance, having the short notice as a separate paragraph in the cover letter would permit it to flow within the context of the prescreened solicitation in a manner that the consumer can easily find, while not providing undue emphasis or prominence.

We believe that language such as the following would be more appropriate for the short notice: "You may choose to opt out of receiving this type of credit offer from us and other lenders. See the other side for details." This model language is simpler and would be easier for consumers to understand in comparison to the FTC's proposed language.

The long notice should be a simple and easy to understand statement that informs a consumer how to opt out and provides the other information required by section 615(d). This notice would appear in the location described in the short notice, and lenders should be permitted to include a reasonable summary of the benefits of prescreening that does not detract from the purpose of the notice. Inclusion of such a summary would enable consumers to make a truly informed decision.

We believe the following language would be appropriate for the long notice: "We sent you this offer of credit based on your credit report. This offer of credit shows that you meet certain criteria. You may not be approved if you do not continue to meet these criteria. You may choose to opt out of receiving this type of offer from us and other lenders by: (1) calling toll-free, ###-###-####; or (2) by writing, CRA, Address. If you opt out, you may not know if you qualify for the offers of credit that you receive."

Alternatively, we believe that lenders should be permitted to provide a single opt-out notice that is simple and easy to understand. This notice could be provided in any part of the solicitation so long as it is easy to locate, i.e., it is in at least 8 point type and is no smaller than the principal text on the page in which it appears; or begins with a heading in capital, underlined letters that reads "OPT-OUT NOTICE;" or is in a typeface that is distinct from other information on the page; and, in any case, is set apart from other text on the page or is otherwise presented in a way that calls attention to the notice. In addition, the model language of the long notice discussed above could be used.

* * *

MBNA appreciates the opportunity to comment on this important topic. 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 the undersigned.

Sincerely,

MBNA America Bank, N.A.

By/s/Joseph R. Crouse
Joseph R. Crouse
Legislative Counsel
(302) 432-0716