



Division of Financial Practices

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

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 consum

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 disclosures⁵ 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).

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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 1990) 7-16.

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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.

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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 consum

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 comme
