



Office of the General Counsel

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

December 22, 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:

I am responding to your letter dated September 26, 2005, seeking reconsideration of the FTC's initial response, dated August 16, 2005, to your May 20, 2005, letter requesting the correction of a mall-intercept study and report prepared for the FTC in connection with the agency's adoption of the Prescreen Opt-Out Rule. The mall-intercept study was conducted by Synovate, a market research company, to help the FTC understand consumer comprehension of opt-out notices in prescreened credit offers. The subsequent report on that study, by American University Prof. Manoj Hastak, Ph.D., discussed the objectives, methodology, and key findings of the study. As you know, the FTC has made the Synovate study and the Hastak report, including data tabulations, publicly available via the agency's Web site.

In his response to your initial request, Joel Winston, Associate Director, FTC, Division of Financial Practices, declined to adopt the view that the FTC could not properly use, rely upon, or continue the public dissemination of the Synovate study or Hastak report in connection with the Prescreen Opt-Out Rule. *See* FTC Initial Response of Joel Winston, Associate Director, FTC, Division of Financial Practices, at 5. The Associate Director observed that the FTC has successfully conducted mall-intercept studies in the past and explained his belief why such studies remain probative and reasonably reliable in light of the purpose for which they are used, as explained in greater detail in his letter.

Your request for reconsideration challenges the Associate Director's response on several grounds. As a threshold matter, you assert that the FTC must conduct mall-intercept studies using sound statistical methods and show that accepted principles of survey research were applied. *See* Request for Reconsideration at 1-4. The Associate Director's initial response does not reveal any serious dispute over these general propositions. Indeed, the Associate Director's response (at 2) directly asserts that the study was performed in accordance with standards used in the market testing field. Likewise, the FTC's information quality guidelines recognize the use of sound statistical research methods to ensure objectivity. *See* FTC Information Quality Guidelines, § V.F.2.

Neither the agency nor its staff, however, are directly governed by the case law or the various research market guidelines you cite as authority for the relevant standards or burden of proof. The cited case involves a matter between litigants in a commercial dispute, where only

private interests were at stake. In an administrative regulatory setting such as the Prescreen Rule proceeding, other legal standards (*e.g.*, the Administrative Procedure Act) would apply to the judicial review of any mall-intercept studies or other evidence in the administrative record ~~supplied to the Commission, and, in addition, the burden of proof accorded to the agency's regulatory choices and actions, and the allocation of the burden of proof.~~

Moreover, as your request for reconsideration expressly acknowledges (at 7), under the FTC's data quality procedures, it is the requester, not the agency, who has the burden of proof to justify a correction at this purely administrative stage. Applying that standard, and based on the

In this case, it appears your suggested quotas were not used because the Associate Director states that inclusion of additional sampling criteria for education level, income level and ethnicity would not have changed the study results. *See* Initial Response at 5. Although you cite the FRB Prescreen Report for the view that such quotas would influence the study results, such a conclusion cannot be drawn from the report. Assuming strictly for purposes of this response that the FRB Prescreen Report suggests any difference in minority opt-out rates, the FTC's study was not designed to measure such opt-out rates.

Rather, as explained the Associate Director's response and in the study itself, the survey was designed to study consumer *comprehension* (i.e., the noticeability and understandability) of opt-out notices, and not the likelihood of the survey population, or any ethnic or socio-economic segment thereof, to opt-out based on such notices. Your reconsideration request presents no evidence or other argument to demonstrate that minority populations would comprehend the tested opt-out notices differently. Moreover, it would be highly inappropriate to assume such a conclusion about minority survey respondents based on the FRB Prescreen Report, which measures a different, if related, consumer behavior or characteristic.

In any event, to the extent you assert that the FTC should have validated its survey results by testing for differences across malls for possible data biases, the FRB Prescreen Report suggests that such measures were not necessarily needed. In particular, Table 5 of the FRB Prescreen Report (at 33) reproduces University of Michigan survey data (2004) of a "nationally representative selection of 500 respondents" to determine how consumers generally handle solicitations: *i.e.*, whether they open and glance at them—34.2%; open and examine them—10.0%; or throw them away without opening them—55.7%. These results correlate rather closely to results reported in the FTC's own study using similar questions: open and skim through—32.7%; open and read it—13.1%; throw in the trash without opening—52.1%; or something else—2.2%. Without suggesting that this statistical comparison necessarily validates the FTC's own study, I must conclude that these comparative data tend to support, rather than to discount, the Associate Director's assertion of the FTC report's validity and reliability.

Age bias

The other ma

Rather, the issue before me is whether you have met the burden of proof to show a sufficient factual or legal basis for withdrawing and reissuing the study to include survey respondents outside the 18-74 age range. Upon review of your request, it provides no such basis to reasonably conclude that the study results would have materially differed if respondents over the age of 74 had been included. For example, your request provides no factual or legal basis for the view that there would have been any relevant differences in the ability of individuals in the above-74 age group to comprehend the three forms of opt-out notices that were tested in the study, if the study had specifically included that population. Likewise, I find no evidence in your request to suggest that a survey of that age group would *not* show that the layered notice analyzed in the study was more effective in communicating certain information than the current notice used in the industry, as the Associate Director's initial response (at 2-3) explains. Accordingly, I cannot conclude that you have met the required burden to withdraw and reissue the study.

Summary

The relief requested here is significant, *i.e.*, withdrawing and reissuing the entire study for the reasons you allege, as well as the rule or portions thereof and any other documents that rely on the study. Under those circumstances, the burden of proof on the requester is a particularly heavy one.

As explained above, your request for reconsideration has been reviewed carefully, as well as the cited materials, the Associate Director's response, and the Synovate study and Hastek report themselves. In sum, while there appears to be agreement on the general view that sound statistical methods should be used when conducting agency studies, it also appears that, even under standards that may apply in other contexts, there is no requirement to use the specific quota methods that you believe should have been employed here. Furthermore, as explained earlier, your argument that the study needed to be subjected to cross-mall validation is contradicted, not supported, by the FRB Prescreen Report you cite as a basis for alleging mall population biases.

Furthermore, it appears that granting the relief you request would serve little, if any, purpose under the agency's information quality guidelines. As those guidelines explicitly state, objectivity of the agency's information products is ensured, by among other things, transparency. Such transparency enables users to evaluate the validity of a report on their own and determine whether or not to rely upon it. To that end, the FTC, as noted earlier, has made the full report and study, including the underlying data tabulations, available on its public record and Web site. The statement of basis e as7l owilbTtT0cjETsluvais, itclnoteyre, as e Tmas nt that the any,

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pursue this request through the reconsideration phase, please note that neither the Associate Director's response, nor this denial of your reconsideration request, is intended to concede the issue of standing that you allude to in your request. *See* Reconsideration Request at 9.

Under both the OMB and FTC data quality guidelines, such requests for correction and reconsideration under the Data Quality Act may be filed only by "affected" persons. Your original request appears to assert that CRE is an affected entity simply because 0005 0 1 Tfa.846 606.48 /0 1Box