DEFENDER
THE NADC NEWSLETTER

Anne P. Fortney

Sidebar

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Trigger Leads in Auto Finance Are Clearly Permitted by the Fair Credit Reporting Act

Anne P. Fortney, Esq.

Trigger leads began in the mortgage industry but also provide opportunities for consumers who apply for motor vehicle financing, whether the application is to a dealer or to a direct lender. A trigger lead is a form of prescreened consumer report furnished by a consumer reporting agency to its creditor subscriber. It informs the creditor when a consumer is in the market for a credit transaction and meets the creditor's pre-established selection criteria. The creditor or other subscriber to the service sends its selection criteria to the consumer reporting agency in advance and must make a "firm offer of credit" to any consumer who meets the pre-established criteria.[1]

The Federal Trade Commission (FTC) specifically recognizes the permissibility of trigger leads in the mortgage context: "Federal law allows this practice if the offer of credit meets certain legal require-

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1 *See*, 16 C.F.R. Pt. 600, App., FTC Commentary on the Fair Credit Reporting Act, § 604, cmt. 6 ("Prescreening is permissible under the FCRA if the client agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit.").

Trigger Leads in Indirect Auto Finance Are Invalid Under the Fair Credit Reporting Act

Randy Henrick, Esq[1]

For auto dealers, obtaining financing for customers is an important service as well as a critical source of dealer revenue. In 2008, industry studies estimated that auto dealers obtained close to 50% of their gross revenues from helping customers obtain financing. Assisting a customer to obtain financing is part of developing the customer relationship, and a personal process in which the dealer invests time earning the customer's trust and assisting the customer with obtaining the best financing package for their needs.

"Trigger leads," a process approved by the FTC for people seeking online mortgage quotes that typically don't involve any of the personal relationship elements of a dealer arranging consumer financing, are of dubious validity under the Fair Credit Reporting Act ("FCRA"). They are a product offered by the three national consumer reporting agencies--Equifax, Experian, and

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1 NOTICE: The views expressed herein are solely those of the author, Randy Henrick, in his personal capacity. They do not represent the views of his employer, DealerTrack, Inc., or any other entity with which Mr. Henrick is associated. He alone is responsible for this content.

President's Message

Rob Cohen

I figure that I have at least another month before the Cash for Clunkers knowledge that I have accumulated becomes as irrelevant as my mastery of the rule against perpetuities. With that, I thought one more C4C article was in order.

The Clunker program was a nightmare for us attorneys who devote most (if not all) of our time counseling dealers on regulatory compliance. It's not that these regulations were more complicated than other federal regulations. In fact, with a couple of notable exceptions, most of the provisions of the CARS Act regulations were pretty straightforward. What made this law change different from the hundreds of others through which our office has guided dealers was the sheer speed at which everything happened. As hundreds of frantic dealers called our office, I felt a bit like a game show contestant in a lightning round.

It is interesting to me that the top two questions we received (and we received each of these questions at least 100 times) were:

1. Can we keep more than $50 of the scrappage value?
2. Is it ok to accept a salvaged title trade-in vehicle?

Why is this interesting? Because these two questions could not be further apart in terms of simplicity; the first question being the hardest one to answer and the second one being the easiest. If the call came in with the second question, I was done in five seconds flat. The answer is yes. That's it. No explanation required. In sharp contrast, if the first question was asked, that was a fifteen minute discussion (although I was eventually able to trim that down to about seven minutes).

Now, I know what a lot of you billable-hour-seekers are thinking, longer answers mean more money. Well, that doesn't exactly work in our office. You see, we have a "hotline" where dealers can call as often as they like for a flat monthly fee. So, Cash for Clunkers impacted our office kind of like Hurricane Katrina impacted insurance companies.

The truly sad part about the Clunkers program is that when things finally started clicking for NHTSA and dealers, poof! The program was over.What irks me the most about how this program was implemented is that no one thought it would be a good idea to get the manufacturers more heavily involved. Seriously, which makes more sense; NHTSA working with 20,000 entities (dealers) with whom they really have no experience, or with a couple dozen manufacturers with which they often work? Oh, and by the way, nearly every manufacturer already has built-in programs to process and fund dealer incentives. But, I imagine that Citigroup wouldn't be nearly as happy if NHTSA took that approach.

Collectively, this was a Herculean effort on the part of dealers and NHTSA. And, after all is said and done, the program was successful (at least in the short run). Through it all, I was glad to have access to the big brains that participate on the NADC list serve. Member responses always help me quell some the insecurities associated with making a judgment call on a novel issue.

As I am finishing up with this letter, my phone is starting to ring again. What? You're not calling about Cash for Clunkers? Maybe that relevancy period I mentioned just got shorter. I better bone-up on GM's 60 Day Money Back Guarantee program. It's good to be needed.

Rob Cohen, President of Auto Advisory Services, Tustin, CA, is President of NADC.

New Members

NADC welcomes the following new members:

Full Members

Charles (Skip) D. Davidson
Davidson Law Firm
Little Rock, AR

Roger K. Frandsen
McGrath Lexus/General Counsel
Chicago, IL

Bohdan Neswiacheny
Law Office of Bohdan Neswiacheny
Orange Park, FL

Fellow Members

Jill A. Guidicy
Braman Management Association
Miami, FL

Michael G. Little
Johnson, Pope, Bokor, Ruppel & Burns, LLP
Clearwater, FL

Jeffrey J. Storch
Boardman Law Firm
Madison, WI

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ments." [2] The FTC explains that the legal requirements are those that apply to any prescreened offer, and says "consumers can benefit" because "prescreened offers can highlight other available products and make it easier to compare costs while [they] carefully check out the terms and conditions of any offers."[3] Thus, the FTC's statements apply to trigger leads in any prescreening context.

As the FTC recognizes, the federal Fair Credit Reporting Act (FCRA) governs trigger leads and other forms of prescreening. To understand how the FCRA governs trigger leads, we consider the FCRA's prescreening provisions, the history behind those provisions and the definition of "firm offer of credit." Congress formally charged the FTC with responsibility for issuing interpretations of the FCRA when doing so would be in the public interest.[4] From 1972 until 1988, the FTC published a number of interpretations addressing the FCRA's applicability to prescreening.[5] The FTC determined that prescreening involved consumer reports and concluded that a consumer reporting agency could provide prescreening to a creditor as long as the creditor had a "present intent to do business with each consumer."[6]

In August, 1988, the FTC published a proposed FCRA Commentary, which included the agency's interpretation of prescreening. For the first time, the FTC used the phrase "firm offer of credit," stating: "The proposed Commentary requires that a firm offer of credit be made to consumers who have been 'prescreened' by a consumer reporting agency."[7] When the FTC published its final FCRA Commentary two years later, it retained its longstanding interpretation that a user of prescreened data must intend to make "a firm offer of credit" to all prescreened consumers.[8] The FTC's position was reinforced by the Federal Financial Institutions Examination Council (FFIEC).[9] Because of the practical problems posed by the agencies' interpretation, Congress amended the FCRA in 1996 to specifically provide for prescreening and to allow for some "post-screening."[10]

Congress called the new provision "furnishing reports in connection with credit or insurance transactions that are not initiated by consumer."[11] The legislative history to this section explains that it governs the use of prescreened reports and notes that it "seeks to balance any privacy concerns created by prescreening with the benefit of a firm offer of credit ...."[12] Therefore, under the FCRA, a consumer reporting agency may provide a prescreened report if the user intends to make a "firm offer of credit" to the consumer.[13]

Congress used the phrase "firm offer of credit" to describe the requirement for prescreening, because that was the term used by the FTC and the FFIEC, but it defined the phrase to mean a conditional offer of credit. The statute specifically provides that a "firm offer of credit" can be conditioned upon the satisfaction of certain contingencies: (1) the consumer's application for credit indicates that the consumer meets creditworthiness criteria established before the prescreening process to determine whether to extend credit pursuant to the offer; (2) information in the consumer's consumer report, information in the consumer's application for credit, and/or other information bearing on creditworthiness, establishes that the consumer continues to meet the criteria used to select the consumer for the offer; and/or (3) the consumer furnishes any required collateral.[14] As one Court of Appeals explained: "[A] firm offer of credit under the Act really means a firm offer if you meet certain criteria."[15]

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2 FTC Consumer Alert: *Shopping for a Mortgage? Your Application May Trigger Competing Offers* available at <www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt171> (last viewed Sep. 3, 2009). It has been suggested that the FTC published this consumer education information at the request of the industry (made "under cover of darkness"). Such a charge is completely unsubstantiated, and can only be based upon a complete lack of understanding of the FTC's processes. There is no formal or informal procedure by which any credit industry representative can direct the choice or content of the FTC's consumer publications. Any suggestion to the contrary impugns the integrity of the FTC's consumer protection professionals and the credit industry.

3 *Id.*

4 *See*, 16 C.F.R. § 1.73.

5 16 C.F.R. § 600.5; 38 Fed. Reg. 4945, 4947 (Feb. 23, 1973); *see also*, FTC Staff opinion letters from 1978 though 1988, in Clontz, *Fair Credit Reporting Manual* (1989) Cumulative Supplement (Warren, Gorham and Lamont).

6 *Id.*

7 FTC Proposed Interpretations, *Fair Credit Reporting Act; Statements of General Policy or Interpretation; Proposed Official Commentary*, 53 Fed. Reg. 29696, 29698 (Aug. 8, 1988).

8 FTC Final Rule, *Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act*, 55 Fed. Reg. 18804, 18807 (May 4, 1990).

9 FFIEC Policy Statement – Prescreening by Financial Institutions and the Fair Credit Reporting Act available at <http://www.fdic.gov/regulations/laws/rules/5000-2900.html> (last viewed Sep. 3, 2009).

10 Pub. L. 104-208, 110 Stat. 3009 (1996).

11 FCRA § 604(c); 15 U.S.C. § 1681b(c).

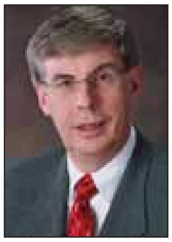
12 "Credit or insurance transaction that is not initiated by the consumer. This term is used throughout the Committee bill to describe prescreening transactions." S. Rep. 104-185, 1995 WL 747809 *33 (Dec. 14, 1995).

13 The consumer reporting agency could also provide a prescreened report if the consumer authorizes the agency to provide the report, a situation that would not apply to trigger leads. FCRA § 604(c)(1), 15 U.S.C. § 1681b(c)(1).

14 *See*, FCRA § 603(l); 15 U.S.C. § 1681a(l).

15 *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 841 (5th Cir. 2004).

Executive Director's Message



Jack Tracey

August, 2009 marked NADC's five year anniversary. Fourteen attorneys and I met in the Hudson Cook, LLP conference room to form the association that was born from Jonathan Harvey's recognition of the need for an organization to serve attorneys representing dealerships. He and Tom Hudson, who had prior experience in forming associations, contacted attorneys they knew who worked with dealers and formed the founding board of directors.

At the early meetings, the board did not know how many dealer attorneys were out there or how to reach them, but they knew that communication would be an essential part of the association's success. The rest is history. We have just under 500 members, and we communicate through a list serve, the annual conferences and workshops and this newsletter.

Members often talk about how important the association is to them. Jonathan, Tom and the rest of the founding board of directors should be proud of what they started.

Reserve the dates, April 11 to 13, 2010 for the 6th annual conference. We had discussed holding the conference in New York at the same time as the NYC Auto Show but, considering the economic conditions, decided against moving to the more expensive venue. We will return to the Four Season Dallas at Las Colinas, which received very favorable reviews from last year's attendees.

Each year, the conference program is created from suggestions made by members. Please let me know what topics interest you. We always need good presenters. If you would be willing to make a presentation at the 2010 conference, or if there is someone in your practice who could make an interesting presentation on a key topic, please contact me.

The NADC membership has historically provided most of the conference content, and we are fortunate to have such willing and able presenters. If you have not been a presenter, please consider becoming one.

The Four Seasons Dallas at Las Colinas offers an award-winning golf course and extensive athletic services. In planning your conference attendance, you may want to consider additional time to take advantage of these amenities.

Contact Jack Tracey, CAE, NADC Executive Director, at: jtracey@dealer-counsel.com

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TransUnion--to lenders and dealers that use them to target away customers from dealers who have carefully cultivated a customer relationship. The three national consumer reporting agencies are actively marketing "trigger leads" to direct lenders and other dealers for use in a manner that invades the privacy of the dealer-customer relationship and undermines the indirect auto finance process.[2]

Trigger leads in the indirect auto finance industry work substantially as follows:

A direct auto finance lender (sometimes in alliance with a local dealer) gives the consumer reporting agency a list of credit criteria for prescreening under the authority of Section 604(c) of the FCRA, 15 U.S.C. § 1681b(c) and the FTC's rules on credit prescreening, 16 C.F.R. Part 342. Much like conventional prescreening, the consumer reporting agency then produces a list of consumers who meet the credit criteria and to each of whom the lender must then make a "firm offer of credit."

However, the new wrinkle of "trigger leads" is that the direct lender (or its dealer partner) gets consumers' names one by one (also called a "prescreen of one") and the consumer reporting agency communicates the consumer's information to the direct lender **only** when a local auto dealer makes an inquiry to the consumer's credit file at the consumer reporting agency. (This element of an auto dealer accessing the consumer's credit is allegedly one of the lender's prescreen criteria although it obviously has nothing to do with creditworthiness and everything to do with marketing to "hot" customers). So when a local dealer having an FCRA permissible purpose accesses the customer's consumer report, the credit bureau then provides the customer's information (which includes the customer's cell phone number, allegedly provided by the credit bureau's "affiliate") to the direct lender or its dealer partner in close to real time.

The direct lender or its dealer partner then calls the customer using the cell phone number to urge them to abandon the original dealer-based indirect financing in favor of their direct loan or for indirect credit with the dealer partner. On a number of occasions, this has occurred while the customer was literally still in the dealership finalizing paperwork for indirect financing. In others of these calls, there are attempts to undercut the sales price of the vehicle and aftermarket products included in the deal.

No effort is made by the consumer reporting agency to determine whether the original dealer's credit file inquiry on the consumer was made in connection with a credit or insurance transaction that was initiated by the consumer. Some are, and some are not, but the consumer reporting agency does not seek or obtain that information and has no way of knowing. It only notifies the prescreening direct lender of the trigger lead whenever an auto dealer accesses the credit file of a consumer who meets the prescreening criteria.

Trigger leads as currently constituted by the national consumer reporting agencies for auto finance - and without regard to how they are marketed – appear to be contrary to the FCRA and certainly violate the spirit of the FTC's prescreening rules as well. A description of the legal argument for why trigger leads are not permitted by the FCRA follows.

Preliminarily, I note the FCRA's purpose that "There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 681(a)(4). Trigger leads invade a consumer's privacy at the auto dealership and facilitate the use of a consumer report for a purpose that neither the FCRA nor the FTC contemplate or permit. This type of prescreening has seriously negative implications for the auto dealer community which is struggling right now in the current economic recession and for which revenues from indirect auto finance are an important element of dealer viability. The consumer is not better served with a cell phone call containing only limited information about a would-be "firm offer of credit" that omits material information and makes no reference whatsoever to the consumer's right to opt out of prescreening, a notice that the FTC requires to be prominent and conspicuous for all printed prescreen firm offers of credit. The FTC has never approved trigger lead "prescreening" in connection with indirect auto finance.

More specifically, the credit bureaus sending trigger leads to direct lenders are not complying with the explicit requirements of FCRA prescreening.

The FCRA mandates that when a consumer reporting agency delivers prescreened names to a lender for the lender to make a firm offer of credit. The consumer reporting agency is limited to providing to the lender only the name and address of the consumer, a non-unique identifier to verify the consumer's identity, and "other information pertaining to a consumer that does not identify the relation-

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2 The Web pages of the three national consumer reporting agencies describing trigger leads products for auto finance lenders are found at:
http://www.experian.com/products/prospect_triggers.html
http://www.transunion.com/corporate/business/serviceSolutions/marketingServices/prescreensLists.page
http://www.equifax.com/consumer/marketing/acquisition/en_us#

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Thus, the FCRA permits consumer reporting agencies to provide a trigger lead as a prescreened consumer report to a creditor. Under the Act, a creditor who receives the report must make an offer of credit to the consumer if the consumer continues to meet the criteria for creditworthiness that were established at the time the creditor received the prescreened report from the consumer reporting agency. The creditor who meets this obligation makes a "firm offer of credit to the consumer."

The FCRA specifically addresses the following objections to trigger leads in a dealer finance situation:

• Objection: The consumer reporting agency does not know whether the consumer has initiated the credit transaction through an application.

Response: It is irrelevant whether the consumer has initiated a credit transaction with the dealer or another creditor. The prescreening provisions apply because the transaction is not initiated by the consumer with respect to the creditor that receives the trigger lead from the consumer reporting agency. If the consumer initiated the transaction with the recipient, or the recipient had another permissible purpose under the FCRA for the consumer report, the FCRA prescreening provisions would not apply.

• Objection: A trigger lead uses non-credit criteria (*i.e.*, whether an auto dealer accesses a customer's credit file at a consumer reporting agency) to inform the user of the consumer's application.

Response: The fact that an auto dealer, or other creditor, obtains a consumer report on an applicant is a creditworthiness criterion. This kind of hard "inquiry" is used as a factor in credit scoring and other determinations of creditworthiness. For that reason, it is also a consumer report, which is why the FCRA prescreening rules apply.

• Objection: The dealer, or other creditor, does not necessarily extend credit to the consumer as a result of the trigger lead.

Response: The user of a trigger lead or other prescreened consumer report need only make a "firm offer of credit" as that phrase is defined by the FCRA. As long as the creditor extends credit to those consumers who meet its pre-established selection and creditworthiness criteria, the creditor complies with the FCRA.[16]

• Objection: The telephone trigger lead is not in writing and does not contain the pre-screening opt-out disclosures.

Response: The FCRA does not require that any prescreened offer be made in writing.[17] The opt-out disclosures are required only if the firm offer of credit

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16 FCRA § 603(l); 15 U.S.C. § 1681a(l).
17 FCRA § 604(c); 15 U.S.C. § 1681b(c).

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is made in writing. Oral firm offers of credit are a common industry practice.[18]

• Objection: The trigger lead provides more than just the consumer's name and address. The consumer's phone number is often included.

Response: The FCRA specifically allows a consumer reporting agency to provide the following information with a prescreened report: (a) the consumer's name and address, (b) an identifier other than the consumer's full Social Security number or similar unique identifier, and (c) other information that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.[19]

The legislative history to the FCRA's firm offer of credit prescreening provision explains that this limitation prevents a consumer reporting agency from providing a full credit report on prescreened consumers until a consumer actually responds to the creditor's offer. However, the provision "does permit a creditor to receive other information … while protecting the consumer's privacy by assuring that the prescreened report does not identify the consumer's specific credit relationship or experience with particular creditors or other entities."[20] Therefore, this provision allows a creditor to receive any "other information," and "other information" can include a telephone number.[21]

• Objection. Because the trigger lead informs the user that the consumer has made a credit application to an auto dealer, it provides information that identifies the "relationship or experience of the consumer with respect to a particular creditor or other entity" in violation of the FCRA's limits on the information that can be included with a prescreened report.[22]

Response: The trigger lead informs the user only that the consumer has made an application for auto finance credit. It does not enable the user to identify the creditor or other entity to which the application was made. In fact, trigger leads do not even indicate whether the creditor that received the application is a bank or an auto dealer.

As noted above, the legislative history explains that the firm offer of credit prescreening provision prevents a consumer reporting agency from providing a full credit report with the prescreened report. The limitation applies to the consumer's "specific credit relationship or experience with particular creditors or other entities" because consumer reports may include the consumer's experience with entities that are not creditors, such as insurers or depository institutions.[23]

Thus, any statutory interpretation which concludes that a trigger lead cannot inform the user of the trigger lead of the consumer's application to an unspecified creditor or other entity has no basis either in the language of the FCRA or its legislative history.

• Objection: A consumer reporting agency may not "furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer."[24]

Response: An "inquiry" is the consumer reporting agency's record that it has provided a consumer report on the consumer to a user. As demonstrated above, throughout the FCRA, "a credit or insurance transaction that is not initiated by a consumer" means a prescreened transaction.[25] Prescreening inquiries are "soft inquiries" and are not included in subsequent consumer reports on the consumer to any user. If the above-described prohibition were read to apply to the prescreened report that the consumer reporting agency provides to the user of a prescreened report, it would preclude any prescreening – a non-sensical interpretation given the FCRA's provisions expressly permitting prescreening.

• Objection: Prescreening for marketing purposes is prohibited by the FCRA.

Response: Courts have specifically found that the FCRA permits prescreening.[26] No court has held to the con-

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18 *See*, FTC Consumer Alert, *supra* n. 2 (discussing the applicability of the Telemarketing Sales Rule to mortgage triggers).

19 FCRA § 604(c); 15 U.S.C. § 1681b(c).

20 S. Rep. 104-185, 1995 WL 747809 *37.

21 *See*, *id*.; FCRA § 604(c); 15 U.S.C. § 1681b(c).

22 FCRA § 604(c); 15 U.S.C. § 1681b(c).

23 S. Rep. 104-185, *supra*.

24 FCRA § 604(c)(3); 15 U.S.C. § 1681b(c)(3).

25 "This term is used throughout the Committee bill to describe prescreening transactions." S. Rep. 104-185, *supra*.

26 *Yonter v. Aetna Finance Co*., 777 F.Supp. 490, 492 (E.D. La. 1991); *Swift v. First U.S.A. Bank*, No. 98-C-8238, 1999 WL 965449 *3 (N.D. Ill. 1999).

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ship or experience of the consumer with respect to a particular creditor or other entity." 15 U.S.C. § 1681b(c)(2).

Additionally, the consumer reporting agency is specifically prohibited and may not "furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer," subject to an exception not applicable to trigger leads or indirect auto finance.[3] *Id*. at § 1681b(c)(3).

Both the FCC and numerous courts have concluded implicitly that a cell phone number is not an element of a consumer's address. *See*, *e.g.*, *Leckler v. Cashcall, Inc.*, 554 F. Supp. 2d 1025 (N.D. Cal. 2008), *vacated on other grounds*, 2008 U.S. Dist. LEXIS 97439 (N.D. Cal. Nov. 21, 2008) (On a customer's loan application, "she was asked to provide her home, cell, and work phone numbers, as well as her email address, home address, and other contact information, all of which she provided."); *U.S. v. Wendehake*, 2006 U.S. Dist. LEXIS 87649 (S. D. Fla. Nov. 30, 2006) (cell phone number and address were delineated as different information fields by the court in its decision). These cases also support the proposition that a landline phone number is also not part of an address.

Delivery to the lender of the consumer's cell phone number is not a permitted element of communications between a consumer reporting agency and a prescreen lender. *Id.* at § 1681b(c)(2)(A). Trigger leads thus do not comply with the FCRA. Claiming that the cell phone number comes from an affiliate (albeit in the same communication without the affiliate being mentioned, let alone identified) does not change the prohibition on providing anything but name and address information for prescreening. If Congress had intended to allow credit bureaus to include cell phone numbers as part of prescreened customer identification to a lender, it would have so provided. It notably did not. The affiliate sham cannot be used to evade the requirements of the FCRA.

Additionally, by informing the lender that the consumer is involved in a credit relationship or experience with a local auto dealer, the trigger lead is contrary to Section 605(c)(2)(C) of the FCRA by "identifying the relationship or experience of the consumer with respect to a particular creditor or other entity." While the dealer is not and may never be a "particular creditor," it is certainly an "other entity."

The phrase "particular creditor or other entity" was carefully chosen in this section to prohibit a consumer reporting agency from referring to either a specific creditor

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3 The only exception to the prohibition on a consumer reporting agency providing a record of inquiries to any person for credit or insurance transactions not initiated by the consumer is that if a consumer requests access to their own credit report, the consumer reporting agency must include a record of all such inquiries for the previous one year period on its disclosure to the consumer. FCRA Section 609(a)(5), 15 U.S.C § 1681g(a)(5).

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trary.[27] By its very nature, prescreening is a form of marketing – and an exception to the general rule that the FCRA does not allow consumer report information to be used for marketing purposes. In a preamble to the FCRA Commentary, the FTC concluded that the harm to consumers from target credit marketing in the form of prescreening was insignificant and that any privacy invasion was modest.[28] The Federal Reserve Board has also recognized that prescreening is a permissible form of marketing.[29]

Much of the confusion about the permissibility of trigger leads, and other prescreening, is based on the FCRA's use of special terminology in describing prescreened transactions and in describing the conditions under which firm offers of credit can be made. It is especially confusing when the Act uses terms such as "credit transaction not initiated by the consumer" to mean a prescreened transaction, or defines a "firm offer of credit" to mean a conditional offer of credit. The Act brings to mind the Queen in Alice in Wonderland – "Words mean what I say they mean!" As we go through the Looking Glass into the wonderland of the FCRA, we must constantly look to the meaning of its words, a meaning that may not apply in the everyday world, but a meaning that is explained within the statute and by its legislative history.

My colleague, Mr. Henrick, attacks prescreening on policy grounds and fails to offer any legal basis for his objections. In fact, to the extent that he discusses the law, he ignores legal precedent, including the legislative history to the FCRA. The following briefly lists Mr. Henrick's statements of the law, followed by my "bullet" responses.

1. "The FTC has never approved trigger lead "prescreening" in connection with indirect auto finance." The legal justification for "garden variety" prescreening does not apply to trigger leads in the case of auto finance.

• In fact, the FTC has approved trigger leads as permissible prescreening under the FCRA.[30] Neither the FCRA, nor the FTC distinguishes between trigger leads in the mortgage and auto finance world.[31]

2. "Nothing in the FCRA or its legislative history even remotely supports the proposition that 'credit or insurance inquiries that are not initiated by the consumer' means only prescreening."

• This statement is flatly contradicted by the FCRA's legislative history: "Credit or insurance transaction that is not initiated by the consumer. This term is used throughout the [FCRA] to describe prescreening transactions."[32]

3. "Cases have held there are other situations of a consumer report [sic] not initiated by a consumer besides a prescreen. See, e.g., *Cole v. U.S. Capital, Inc.*"

• His citation to Cole is misplaced. The court's only reference to "transaction not initiated by the consumer" is to prescreening.[33]

4. "No court has approved the use of trigger leads as being compliant with the FCRA."

• In fact, the many courts that have upheld prescreening draw no distinction between trigger leads and any other form of prescreening.

5. No court has authorized prescreening as a form of marketing.

• This statement ignores case law involving prescreening, including Murray v. New Cingular Wireless Services, Inc., *supra*.

6. It is "nonsense" to say that "the local dealer pulling the consumer's credit report is a legitimate prescreening credit qualifying criteria. … It may impact the consumer's credit score but it is never a factor in the prescreener's granting or denying credit to the customer."

• This statement reveals a fundamental lack of understanding of the FCRA's definition of "consumer report" and its relationship to prescreening. The "inquiry" that results from the dealer's pulling the consumer's inquiry is a consumer report because it meets the FCRA's definition of that term, regardless of how that "inquiry" is used by the recipient of the trigger lead.[34] That is why trigger leads

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27 The litigation addressing the FCRA pre-emption of prescreening in the form of mortgage triggers addressed only that issue because only that issue was before the court. None of the opinions upholding FCRA preemption suggested in any way that mortgage triggers were anything but lawful. *Premium Mortgage Corp. v. Equifax Information Services, LLC, et al.*, 2008 U.S. Dist. LEXIS 76279 (W.D.N.Y. Sept. 20, 2008); *Consumer Data Industry Assn v. Swanson*, 2007 U.S. Dist. LEXIS 55571 (D. Minn. July 30, 2007).

28 55 Fed. Reg. 18804 (May 4, 1990) ("The Commission continues to believe that the current interpretation is in accord with the spirit of the FCRA because the modest invasion of the consumer's privacy that occurs when his or her credit record is reviewed in the prescreening process is offset by a substantial potential gain -- an actual offer of credit."). Neither *TransUnion Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001); *Cole v. U.S. Capital Incorporated*, 389 F. 3d 719 (7th Cir. 2005) held that prescreening marketing was unlawful. The TransUnion case involved the use of consumer reports for non-FCRA permissible purposes. Prescreening was specifically excluded from that litigation. *See*, FTC/Trans Union Order [In the Matter of Trans Union Corp.], 1993 WL 767032 (FTC May 19, 1993). The Court of Appeals decision in Cole dealt only with the question of what constituted a "firm offer of credit" within the FCRA's meaning. Cole had the unfortunate effect of generating a lot of confused litigation until the Seventh Circuit Court of Appeals clarified its interpretation *Murray v. New Cingular Wireless Services, Inc*., 523 F.3d 719 (7th Cir. 2008).

29 "The FCRA allows consumer credit records to be used for these so-called prescreened solicitations…. The Board found that the benefits to consumers of receiving prescreened written offers of credit or insurance are significant." Board of Governors of the Federal Reserve System, 91st Annual Report at 59-60 (2004) available at <http://www.federalreserve.gov/boarddocs/rptcongress/annual04/ar04.pdf> (last viewed Sep. 3, 2009).

30 *See* FTC Alert, footnote 2, *supra.*

31 *See* FCRA § 603(c); 15 U.S.C. § 1681b(c).

32 S. Rep. 104-185, 1995 WL 747809 (Dec. 14, 1995).

33 *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 725, (7th Cir. 2004). There is, of course, "no reference to a consumer report [sic] not initiated by a consumer besides a prescreen."

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or making a general reference to another entity from which a creditor's identity could be determined. In effect, this language prohibits a consumer reporting agency from doing indirectly (giving a description of an "other entity") what it is prohibited from doing directly (naming a specific creditor). The word "particular" should be read to describe a specific creditor and should not be read to qualify the phrase "other entity," which is a general phrase used to indicate a prohibition on disclosing an unnamed "other entity" like an auto dealer or an unnamed bank creditor.

Thus, when the consumer reporting agency informs the prescreen lender that an auto dealer has accessed the customer's credit file, it is identifying a relationship or experience of the consumer with an "other entity," the local auto dealer. This is also contrary to FCRA Section 604, 15 U.S.C. § 1681b(c)(2)(C) and is another basis why trigger leads are not permitted by the FCRA in the indirect auto finance industry.

Additionally, a consumer reporting agency is unable to ascertain the circumstances of the auto dealer's inquiry to the consumer's credit file. A consumer reporting agency has no way of knowing the circumstances of the dealer's inquiry and whether or not the inquiry was made in connection with a credit or insurance transaction not initiated by the consumer. It has only the dealer's certification that it has a permissible purpose to access the consumer's credit file.

A permissible purpose can exist both in situations where the transaction is initiated by the consumer and in transactions where it is not. The consumer reporting agencies don't know and don't endeavor to find out. All they do is communicate the trigger lead whenever an auto dealer accesses the consumer's credit file, for any reason. Since the bureaus don't check, they can't possibly comply with this prong of the prescreening rules. Conventional prescreening doesn't identify with whom the consumer is doing business. Trigger leads effectively do.

The credit bureaus argue that the phrase "credit or insurance inquiries that are not initiated by the consumer" means only prescreens. This is neither logically nor linguistically reasonable nor consistent with the FCRA. The only qualifications the FCRA makes in defining a "credit or insurance transaction that is not initiated by a consumer" is in Section 603(m) where it states this term does not include credit reports pulled for account monitoring or collection purposes. 15 U.S.C. § 1681a(m). Nothing in the FCRA or its legislative history remotely supports the proposition that "credit or insurance inquiries that are not initiated by the consumer" means only prescreening. Permissible purposes delineated in Section 604(a), 15 U.S.C. § 1681b(a) include many other situations of inquiries not initiated by the consumer such as subpoenas and government inquiries.

Like any creditor, an auto dealer can have a permissible purpose to access a consumer's credit file "in connection with a credit or insurance transaction that is not initiated by the consumer." See, *e.g.*, Section 604 of the FCRA, 15 U.S.C. § 1681b(a). In fact, Section 604(a) lists at least five circumstances in which the dealer's inquiry can be in connection with a "credit or insurance transaction that is not initiated by the consumer."[4] The consumer reporting agency knows the dealer has certified it has a permissible purpose but it does not know what that permissible purpose is and, specifically, whether or not the transaction was or was not initiated by the consumer. The point is the credit bureau doesn't know why the dealer's pulled the report and since it does not investigate, it cannot comply with the requirement of FCRA that prohibits communication of "a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer." 15 U.S.C. § 1681b(c)(3).

This prevents any possibility of being able to knowingly comply with Section 604's prohibition that "a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by the consumer." *Id.* at § 1681b(c)(3). For this reason, trigger leads further do not comply with the FCRA by reporting to the direct lender receiving the trigger lead that an auto dealer made a credit inquiry that may or may not represent a transaction not initiated by the consumer.

It is common in trigger lead cell phone calls made by direct lenders or their dealer partners for the consumer to receive no information about their ability to opt out of prescreening as the FTC Prescreening Rule requires for written prescreen offers. 16 C.F.R. Part 342. In fact, if you read the FCRA and FTC prescreening provisions, it appears that a written "firm offer of credit" along with the short and long form opt-out disclosures are almost assumed as the only proper way for creditors to provide prescreen credit offers. It is questionable whether a telemarketing call to a cell phone number is ever a sufficient disclosure and it certainly presents the opportunity for abuse. It would be anomalous for the FTC to require conspicuous and clear notices of opt-out rights in written communications but require absolutely nothing of the sort in oral solicitations. The fact that at least some users of the trigger leads have also solicited the customer for extended service and GAP plans, also suggests the potential for abusive marketing using trigger leads. It has been long settled that prescreening as a guise for marketing

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4 In addition to intending to use the information in connection with a credit transaction involving the consumer, these include using credit information in response to a court order; underwriting insurance which could be at the consumer's request or not;, making a determination of a consumer's eligibility for a license or other government benefit; or in connection with child support obligations. FCRA Section 604(a), 15 U.S.C. § 1681b(a).

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products other than credit is flatly prohibited by the FCRA. *E.g.*, *Trans Union Corp. v. FTC*, 245 F.3d 809, 813 (D.C. Cir. 2001) ("target marketing is not an authorized use of consumer reports under Section 1681b")(citation omitted); *Cole v. U.S. Capital Incorporated*, 389 F. 3d 719 (7th Cir. 2005) (auto dealer prescreening was a guise for product marketing); *Bonner v. Home 123 Corp.*, 2007 U.S. Dist. LEXIS (N.D. Ind. March 9, 2007) at p. 14 ("The purpose behind the FCRA was the belief that consumers were willing to reveal sensitive credit information as long as they received firm offers of credit in return. . . . Sales pitches, by contrast, do not justify the intrusion) (citing Cole).

No court has approved the use of trigger leads as being compliant with the FCRA. The only two decisions on the subject[5] each dealt with state law claims against the trigger leads provider and related only to the subject matter jurisdiction of the court. The first case involved a Minnesota statute that outlawed trigger leads. The second case involved New York common law claims against an Equifax subsidiary that provided trigger leads to mortgage lenders. Both courts ruled they had no subject matter jurisdiction and declined to consider the merits of trigger leads on grounds that the FCRA preempts any state law on the subject of prescreening.[6] The courts merely ruled that state law was pre-empted on the subject. Neither court issued any language in its opinion suggesting that trigger leads are permissible or their use by direct lenders seeking to orally induce indirect dealer finance customers to abort their dealer negotiations is legal.

It may be appropriate for the FTC to issue a ruling or interpretation on the issue of trigger leads with specific reference to indirect auto finance. The argument that trigger leads do not comply with the FCRA is not only legally sound, but also represents a societal benefit in preserving auto dealers' ability to participate in indirect financing for their customers without being threatened by a direct lender concurrently telemarketing the customer (typically by calling their cell phone) urging them to reject the dealer's financing or product offers. Trigger leads interfere with the privacy of the consumer's transaction with the dealer and the good will generated by the dealer during the process of selling and financing the consumer's vehicle. They present an Orwellian image of the customer being tracked by the credit bureau in their day-to-day affairs. These actions and results were never intended by the Congress in allowing prescreening as a limited and strict exception to the general principle of the privacy of consumer reports embodied in the FCRA's purpose.

Trigger leads for people seeking mortgage rates on-line (the circumstance under which the FTC approved trigger leads at the unilateral and private request of a credit bureau) do not apply in the indirect auto finance space. Prescreening was never intended as way to invade consumer privacy by following people electronically to auto dealers and luring them away with cell phone calls. Trigger leads also suggest a possible unfair trade practice of using a wholly non-credit criteria term (an auto dealer accessing a customer's credit file) to entice customers with whom a dealer has spent time and effort developing a positive relationship. Trigger leads are about ensnaring another dealer's customers. They are contrary to both the letter and the spirit of the FCRA. The FTC should see through the various smokescreen arguments that accompany trigger leads (such as it being an unnamed "affiliate" that provides the cell phone number of the prescreened customer or evading the requirement for opt-out notices that the FTC clearly and conspicuously requires in written prescreen notices) and put a stop to them. If not, a court or Attorney General (who now can enforce state privacy and consumer protection laws against national banks[7] and credit bureaus) may step in to do so.

My colleague in this discussion spends most of her article defending garden-variety prescreening but then embodies the clever but misguided arguments used by the credit bureaus to attempt to defend trigger leads in indirect auto finance. She argues:

1) Statutory words don't mean what they clearly and unambiguously say, arguing that "a consumer report not initiated by the consumer" refers only to the prescreener's access of the credit report, not the dealer whose credit inquiry launched the trigger lead. It is a given that the prescreener's consumer report is not initiated by the consumer but that's not the universe of such credit reports. Cases have held there are other situations of a consumer report not initiated by a consumer besides a prescreen. *See, e.g., Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 725 (7th Cir. 2004). So, if the credit bureau does not know the circumstances of the local dealer's pulling the consumer report, it cannot knowingly comply with the limitations of prescreening communications under the FCRA.

2) Cases don't hold what they do, alleging that prescreening is marketing and

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5 *Premium Mortgage Corp. v. Equifax Information Services, LLC*, 2008 U.S. Dist. LEXIS 76279 (W.D.N.Y. Sept. 20, 2008); *Consumer Data Industry Assn v. Swanson*, 2007 U.S. Dist. LEXIS 55571 (D. Minn. July 30, 2007).
6 15 U.S.C. § 1681t.
7 See *Cuomo v. The Clearing House Assn, LLC*, 129 S. Ct. 2710; 174 L. Ed. 2d 464 (2009).

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trigger lead.[34] That is why trigger leads are consumer reports and governed by the FCRA's prescreening provisions.

7. "It would be an illogical reading of the FCRA for one part of the statute to restrict communications to the consumer's name and address while reading an adjacent section to allow communication of a cell phone number which is indisputably not part of an address. As for the identifier permitted, the FCRA states explicitly that it must be "an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer."

• In fact, no provision of the FCRA restricts the credit bureau's "communications to the consumer's name and address" in a prescreening. The FCRA's restriction to "an identifier" that is not "unique to the consumer" prohibits the disclosure of the consumer's full social security number.[35] **The very same subsection** of the FCRA that mentions name and address and the permissible identifiers also specifically permits the credit bureau to provide: any "other information."[36] A cell phone number is any "other information."

Thus, Mr. Henrick's attacks on trigger leads are not based on the FCRA, its legislative history, the FTC's interpretations or court decisions. None of his policy arguments support his legal conclusions. Because the legality of trigger leads is clearly established, any objections to this practice are appropriately addressed to the U.S. Congress and other policy makers.[37] They are not the basis for asserting that the FCRA prohibits trigger leads.

The FCRA crafts an important balance between the consumer's right to privacy and the value of the consumer report to its users. Trigger leads, and other forms of prescreening, reflect that balancing of interests. The leads involve a minimal intrusion into the consumer's privacy in return for something of value – in this case, a competing credit offer when the consumer is most likely to need the benefit of competitive offers. If dealers and others object to the use of trigger leads, it is often because they lose finance customers to other creditors who can offer better credit to the customers. While no business likes the prospect of losing a customer to a competitor, the consumer is the one whose privacy is at issue, and, as the FTC has recognized, the consumer benefits from the competition for his credit business.

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34 FCRA § 603(d); 15 U.S.C. §1681a (d). Information from a consumer reporting agency is a "consumer report" if it is "used or expected to be used or collected in whole or in part" for a permissible purpose under the FCRA. *Id.* Once information is a consumer report, the user's actual use is governed by other provisions of the Act, including FCRA § 603(c); 15 U.S.C. § 1681b(c). *TransUnion Corp. v. FTC, supra.*

35 FCRA § 604(c)(2); 15 U.S.C. § 1681b(c)(2). S. Rep. 104-185, 1995 WL 747809 (Dec. 14, 1995).

36 The user of a prescreened report may receive: "(A) the name and address of a consumer; (B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and (C) **other information** pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity." FCRA § 604(c)(2); 15 U.S.C. § 1681b(c)(2) (emphasis added).

37 The FCRA preempts any state laws that would prohibit or restrict prescreening. FCRA 625(b)(1)(D); *Premium Mortgage Corp. v. Equifax Information Services, LLC, et al., supra*; *Consumer Data Industry Assn v. Swanson, supra*.

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arguing that marketing credit products opens the door to marketing anything else along with it. No case supports this proposition and numerous cases, including those cited above, hold that prescreening that does not make a "firm offer of credit" is impermissible marketing. It is questionable whether the cell phone calls make legitimate "firm offers of credit." However, prescreening to market a lower price on a vehicle, GAP insurance, or aftermarket products is prohibited marketing and the trigger of an oral credit offer doesn't legitimize it.

3) The local dealer pulling the consumer's credit report is a legitimate prescreening credit qualifying criteria. Nonsense. It may impact the consumer's credit score but it is never a factor in the prescreener's granting or denying credit to the customer. It is only a factor to trigger the cell phone call as evidenced by the fact that the consumer was already pre-selected by the credit bureau and not qualified or disqualified by the trigger credit bureau pull.

4) The "other information" the FCRA allows to be communicated in a prescreen offer can be a cell phone number. It would be an illogical reading of the FCRA for one part of the statute to restrict communications to the consumer's name and address while reading an adjacent section to allow communication of a cell phone number which is indisputably not part of an address. As for the identifier permitted, the FCRA states explicitly that it must be "an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer." 15 U.S.C. § 1681b(c)(2)(B). Does that sound like a personal cell phone number to you?

So don't believe it. Trigger leads are the type of wrongful activity that may be a factor leading to more activist regulation of consumer credit and privacy, as may occur with the proposed Consumer Financial Protection Agency that, as proposed, would cover auto dealers. Pushing the outer limits of the law with fallacious arguments to generate business profits over the public good invites government regulation. Trigger leads hurt consumer privacy, violate the fundamental goals of the FCRA, and threaten the indirect auto finance industry. The time to stop them is now.

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