



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

Office of the General Counsel

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 supporting the Rule, including the deference to be 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 Associate Director's response and additional review by my staff, I cannot conclude that the study and report in question failed to adhere to appropriate method and design criteria, as discussed below.

Specifically, you assert that the study and report failed to employ two specific statistical methods, *i.e.*, demographic quotas and validation, and thus improperly skewed the study results. First, you assert that the use of such methods would have eliminated bias against ethnic and socio-economic minorities. Second, you assert that the alleged misuse of an age quota resulted in bias against the elderly. I discuss each of these assertions below in turn.

Ethnic and socio-economic bias

Your reconsideration request relies on research guidelines issued by the Advertising Research Foundation ("ARF") and other references to argue that ethnic and socio-economic quotas should have been established, to ensure that such populations were reflected in the study. You argue that the FTC should have known these populations might be inadvertently excluded because the Dec. 2004 Federal Reserve Board's own Prescreen Report ("FRB Prescreen Report"), considered in the FTC's Prescreen Rule, suggests possible discrepancies between the opt-out rates of minorities and non-minorities.

As noted earlier, neither the ARF guidelines nor the other cited references apply to the FTC's conduct of its study and, in any event, do not specifically mandate the use of the quotas that you suggest. The ARF guidelines, for example, generally address the importance of demographic quotas for mall-intercept studies, but the guidelines are silent on which specific quotas would be required, if any. Rather, the guidelines note that a "critical issue" is the "number" of characteristics to be included in the quota samples. The guidelines explicitly recognize that it may be impossible to obtain a desired sample size if too many quotas are included. Accordingly, the guidelines provide that quotas should be specified only for the most relevant characteristics, and leave that decision wholly to the discretion of the survey designers. ARF Guidelines at section K., ch. 5, p. 28. Likewise, none of other references you cite demonstrates that quota sampling was required to ensure against possible biases in this particular case, or that any bias was, in fact, present in this particular study and report. I am also unaware of any provision of the Data Quality Act, OMB's implementing guidelines, or the FTC's own information quality guidelines that directly mandates the use of quotas.

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 major element of your request focuses on the age range (18-74) of survey respondents, which you assert resulted in bias against the elderly. In particular, you question the Associate Director's assertion that exclusion of respondents over the age of 74 was necessary to eliminate sight-related issues, and argue that it makes no difference whether this exclusion was the decision of the Commission's consultant or the FTC staff.

I do not consider the Commission consultant's role in this matter to be the issue here, nor do I read the Associate Director's response as attempting to explain or defend the study or report on those grounds. Nor is it necessary to address or explain the Associate Director's stated reasoning for the exclusion, which is not the basis for my response to your reconsideration request.

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 and purpose for the Prescreen Rule also clearly explains that the study was only one element in its overall consideration of the regulatory approach that it chose to adopt in the final rule. Having fully disclosed these conditions and limitations, it appears the agency process has been sufficiently transparent to reasonably ensure that the study is not improperly used or relied upon to support conclusions beyond its intended scope.

Accordingly, for the reasons stated above, I have determined to deny your request. Although your arguments have been given full consideration, and you have been permitted to

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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 you are a "consumer" and CRE is a "regulatory watchdog." CRE Initial Request at 27. That test, however, if adopted, would be too broad, since it would include any member of the public with some general interest in the agency's actions. I am unaware of any direct economic, legal or other cognizable interest that would qualify CRE as a party entitled to seek relief under the guidelines in this matter, nor does your request properly assert or demonstrate any such interest.

Nonetheless, even though the guidelines do not permit CRE to seek relief in this matter, I believe the agency has fully addressed the arguments raised by your initial request and your request for reconsideration.

Sincerely,

John D. Graubert
Principal Deputy General Counsel

cc: Joel Winston