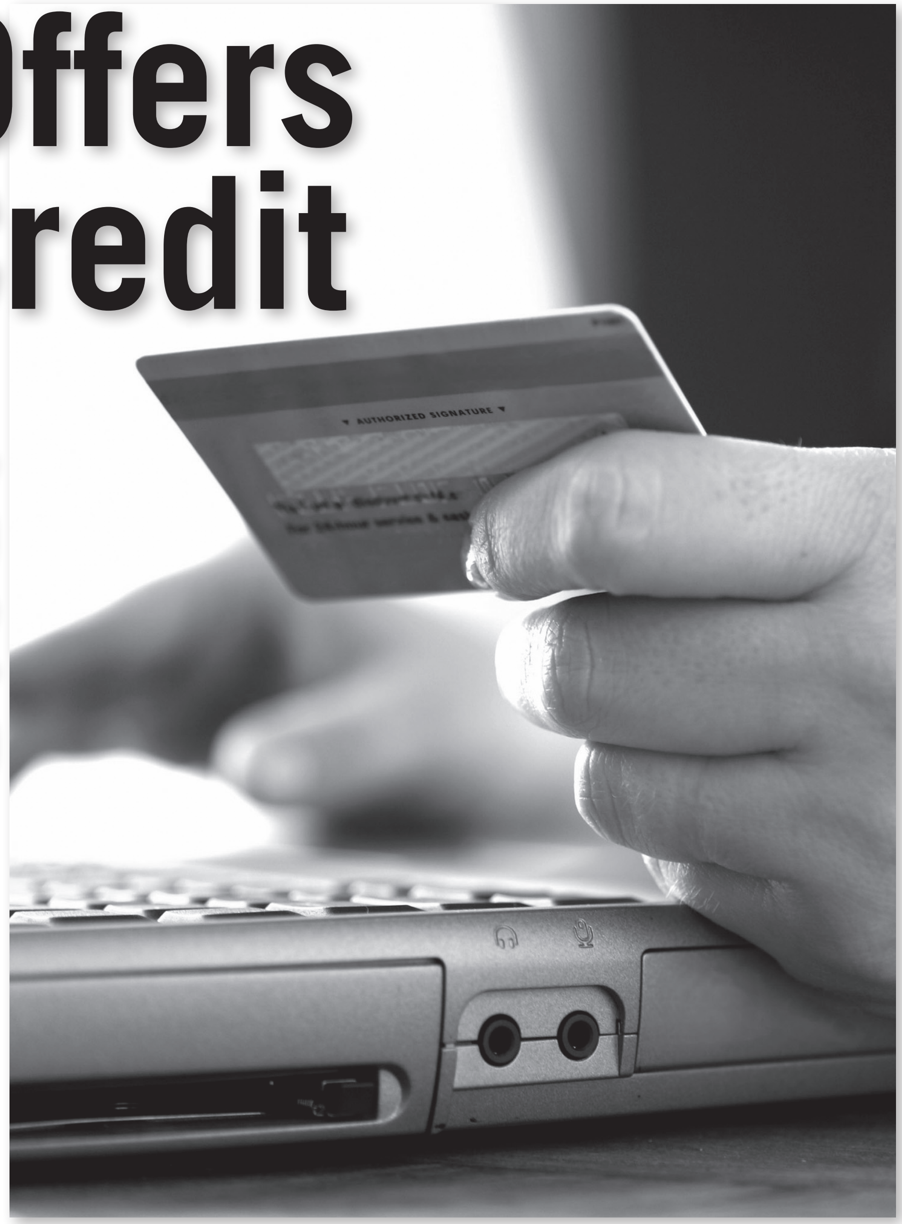
Firm Offers of Credit



What Every Lender Should Know Before Putting an Offer in the Mail

By Chad Pinson*

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Introduction

Every day millions of Americans receive "You're Pre-Approved!" mailers or flyers from car dealerships, credit card companies, cell phone providers, and a host of companies from every business sector that involves the extension of credit to consumers. These mailers, known as "offers of credit," are pre-screened loan solicitations sent by a multitude of lenders.

In an effort to contact potential borrowing customers, creditors often send these offers of credit to consumers known to have certain characteristics. Typically those consumers are identified when the creditor (i) contacts a consumer reporting agency, (ii) represents to the consumer reporting agency that the creditor intends to extend a firm offer of credit, and (iii) provides the characteristics it desires in its potential borrowers to the consumer reporting agency, such as at least one open account in good standing, or no current delinquent accounts on file. The credit reporting agency then provides to the creditor a list of consumers matching the criteria requested by the creditor.[1] The creditor uses that list to send flyers or mail pieces offering credit (or insurance) to the potential borrowers on the consumer reporting agency list.

Well done offers of credit are a win-win for creditors and consumers. Creditors are able to focus their efforts to make potential borrowers aware of the terms on which they will offer credit for a particular product or in a particular market. Consumers are exposed to sources and terms of credit to which they would not otherwise have access. Poorly done offers may expose an unwary creditor to billions of dollars in damages if consumers receive a mail piece or offer that does not comply with applicable law.[2]

Critically, the Fair Credit Reporting Act ("FCRA") only permits a creditor to obtain and use these lists if they intend to — and do — make "firm offers of credit" to the potential customers on the lists returned by the credit reporting agency.[3] In other words, a creditor accessing and using consumer credit information from a consumer's credit file in this way must actually extend an offer "that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer."[4] Those creditors that send a mail piece that amounts to an advertisement or solicitation that is not backed by an intent to extend credit to all who receive it on the terms specified in the offer will potentially be liable for statutory damages.[5] Recent court decisions have spurred a flurry of class action lawsuits against creditors accused of sending credit solicitations that are not "firm offers of credit" as defined by the FCRA.[6] These courts, mostly in the Seventh Circuit, presiding over such cases have limited the definition of "firm offers of credit," making the standard more stringent.[7]

This paper will address (1) the evolution of the FCRA as it relates to firm offers of credit, and the unsettled nature of court interpretation of the FCRA's definition of a "firm offer of credit," (2) reasonable creditor conduct when extending offers of credit in light of the FCRA, case law, and FTC rules. This section will provide guidelines to creditors regarding FCRA compliance, and (3) potential rewards and risks when making offers of credit.

I. OVERVIEW AND BACKGROUND

A. The FCRA

To millions of Americans, the words "You're pre-approved to participate in an exclusive offer from [insert credit company]!" or "Receive a credit card with limits up to [insert dollar amount]!" are familiar. Starting in college, or earlier, many of us have probably received hundreds of these pre-screened solicitations in the mail. The FCRA is a federal statute that, among other things, regulates the use of these pre-screened solicitations by controlling the collection and use of consumer credit information.[8] When enacting the FCRA, Congress intended to both facilitate commerce and ensure the protection of consumers.[9] Companies extending prescreened offers of credit do so based on criteria found in consumers' credit reports, usually compiled by consumer reporting agencies.[10] While a consumer's credit information is not generally available to businesses or individuals, the FCRA allows companies or individuals, under certain exceptions known as "permissible purposes," to obtain credit information despite the fact that the consumer did not initiate or authorize the release.[11]

1. Firm Offers of Credit Explained and Defined

If a creditor represents to a consumer reporting agency that it intends to extend a firm offer of credit to a consumer, the creditor may obtain that consumer's credit information from the credit reporting agency. This is an exception under the FCRA that provides a "permissible purpose" for a business or individual to obtain a consumer's credit information without the consumer's prior consent or approval.[12] Generally, businesses run a firm offer "program" which requests that a credit reporting agency return the names and addresses of all individuals in the credit reporting agency's database that meet certain parameters or criteria so that the business-creditor can then extend a "firm offer of credit" to each of those consumers in the form of a mass mailing of a mail piece or flyer.

By allowing the release of information for the purpose of a "firm offer of credit," Congress intended to "balance any privacy concerns created by pre-screening with the benefit of a firm offer of credit or insurance for all consumers identified through the screening process."[13] Congress may have believed consumers were more disposed to reveal credit information in return for guaranteed offers of credit than for the normal sales pitches.[14]

Under the statute, a "firm offer of credit" is defined as "any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer."[15] The offer may be conditioned on three specific requirements: (1) pre-selected criteria bearing on the consumer's creditworthiness; (2) verification "that the consumer continues to meet the specific criteria used to select the consumer for the offer;" and (3) consumer's furnishing any collateral that was both established before the selection of the consumer for the offer and disclosed to the consumer in the offer.[16]

2. Clear and Conspicuous Notice

In addition, the FCRA requires that any firm offer of credit must provide a "clear and conspicuous" statement disclosing statutorily required information.[17] The notice must inform the consumer that, among other things, (i) information from the consumer's credit report was used to identify them as a recipient of the offer, (ii) the consumer received the offer of credit because the consumer satisfied the criteria specified by the creditor, (iii) the consumer must continue to meet the offer criteria, and put up any pre-established collateral, in order to receive the credit, and (iv) the consumer has the right to opt out of future offers by prohibiting the unsolicited use of information contained in the consumer's credit file.[18] These disclosures are implicated and required only when a firm offer of credit has been extended.[19] At least one Court has held that violating this requirement "does not nullify a firm offer of credit and does not create a separate violation."[20]

3. No Private Right of Action For Issues With Firm Offer Disclosures

In 2003, Congress enacted the Fair and Accurate Credit

A court must examine the entire context of the offer to determine whether the offer was a "guise for solicitation rather than a legitimate credit product."

Transaction Act ("FACTA"),[21] which amended section 1681m. As amended, the section includes the statement that "[t]his section shall be enforced exclusively under section 1681s by the Federal agencies and officials identified in that section."[22] Courts interpreting this amendment have held that the amendment applies to section 1681m in its entirety, eliminating any private right of action for violations of the "clear and conspicuous" requirement and vesting that right or duty solely with the FTC.[23]

4. FTC Rules—Long & Short Notice

On January 31, 2005, the Federal Trade Commission ("FTC") issued a final rule requiring all section 1681m notices for "firm offers of credit" to include both a "short notice" and a "long notice."[24] Under the rule, short notices must appear within the offer of credit, and must describe the consumer's opt-out rights and the method by which to exercise those rights.[25] Likewise, the long notice must include the "clear and conspicuous" disclosure required by section 1681m(d).[26] In an effort to improve pre-screen notices to make them simpler and easier to understand, the FTC requires that each notice conform to certain visual rules, concerning font size and type, as well as the position or location of the notice, while also requiring that each notice have certain substantive content.[27]

5. Private Remedies and Potential Exposure

If a creditor's firm offer of credit program fails to conform to the FCRA's requirements, an affected consumer may be able to recover for injuries sustained as a result of the creditor's violations.[28] In the event of willful noncompliance[29] with the FCRA's rules regarding firm offers of credit, statutory damages may range from no less than $100 to no more than $1,000.[30] An entity found to be negligent in failing to comply with these rules may be found liable to the consumer for actual damages sustained as a result of the negligence, plus costs and reasonable attorneys' fees.[31] However, it is important to reiterate that there is no private right of action for failure to comply with the notice requirements of section 1681m.[32]

The FCRA regulates the use of credit information, balancing the competing needs of consumers and lenders. Consumers' primary concerns are their privacy as well as the accuracy of their credit reports.[33] Firm offers of credit do, however, allow creditors to more efficiently and effectively target consumers while providing consumers with exposure to a wider variety of lending sources, more information about available lending options, and more opportunities to obtain desired credit.[34] Courts and lawmakers attempt to balance these competing forces when interpreting the FCRA.

B. Satisfying The Definition of a "Firm Offer" Before *Cole*

Courts have struggled with the FCRA's meaning of a "firm offer since the inception of the statute."[35] Historically, courts construed the concept broadly to encourage pre-screened loan solicitations.[36] Courts interpreted a "firm offer" as *any* offer of credit that the offeror intended to honor.[37] Typically courts only required a firm offer to include a minimum amount of guaranteed credit.[38] Courts determined that offers were "firm" if some amount of money, however nominal, was guaranteed, and the offeror could show that the offer of credit would be honored if the consumer satisfied the necessary criteria.[39] Therefore courts only required some nominal value, any value, in order to satisfy the FCRA's definition of "firm offer of credit." Under that state of the law, plaintiffs rarely sued under the FCRA related to firm offers of credit.[40] This changed in November 2004, when the Seventh Circuit Court of Appeals, in *Cole v. U.S. Capital, Inc.*, tightened judicial interpretation of the FCRA's definition of a "firm offer of credit."

***C. Cole v. U.S. Capital, Inc.* — Interpreting the FCRA**

In *Cole*, the plaintiff received a pre-screened credit mail piece offering a pre-approved credit card with limits up to $2000 and automotive credits up to $19,500.[41] In a much smaller font, the mail piece stated that the plaintiff was selected based on information from a credit report.[42] The piece then explained that the creditor's offer was subject to the plaintiff continuing to satisfy the initial criteria established for the firm offer program, and that interest rates for the credit could vary from as low as 2.9% to as high as 24.9%.[43]

The *Cole* plaintiff brought a putative class action in the Northern District of Illinois seeking statutory damages for alleged violations of the FCRA.[44] She argued that the flyer was not a firm offer of credit because:

> (1) it was a sham to justify obtaining credit information to conduct targeted marketing; (2) the offer was too vague to be accepted; (3) the language of the flyer was ambiguous or inconsistent; (4) the reservation of a right to require the consumer to pay off existing car loans constituted an option to withdraw the $300 offer; and (5) the disclosure did not comply with the requirements of § 1681m(d) because it was not clear and conspicuous.[45]

The district court disagreed and found that there was a guarantee of a $300 credit line, noting that it was conclusory to argue the amount would not have been honored.[46] Therefore, the district court determined that the flyer constituted a "firm offer of credit" under Section 1681.[47]

The plaintiff appealed, and the Seventh Circuit Court of Appeals reversed, rejecting the argument that an offer is a "firm offer" so long as some amount of credit is guaranteed and would be extended if the consumer responded to the offer.[48] The court of appeals then stated that, in examining an offer of credit for compliance with the FCRA, a court must examine the entire context of the offer to determine whether the offer was a "guise for solicitation rather than a legitimate credit product."[49] Agreeing with the Federal Trade Commission, the Seventh Circuit Court of Appeals held that the offer must have value from the consumer's perspective, and that an offer of credit without value is the "equivalent of an advertisement or solicitation."[50] Finally, the *Cole* court stated that the terms of credit, including the amount of credit extended, interest rate, the method of computing interest, and the length of the repayment period, should be evaluated to determine whether the offer had value or not.[51] After concluding that many courts' previous standards for a "firm offer" were too loose, the court held that the "*entire* offer and the effect of *all* the material conditions" must be taken into account when testing an offer of credit for compliance with the FCRA.[52]

In *Cole*, the Seventh Circuit Court of Appeals found several factors dispositive in determining that the creditor's offer was not a firm offer of credit: (1) it was not clear whether the offer would actually be honored; (2) it was questionable whether the offer had value given the small amount of credit offered and the limitations of the offer; and (3) several material terms were missing — the *precise rate of interest*, the method by which interest would be compounded, and the repayment period.[53] Consequently the court of appeals found that the district court erred in dismissing the plaintiff's complaint in reference to the definition of a "firm offer of credit."[54]

The *Cole* court further discussed whether the flyer met the FCRA's requirement of "clear and conspicuous" language.[55] Like the definition of a "firm offer of credit," the definition of "clear and conspicuous" is not well defined under the FCRA.[56] The *Cole* court held that in order to render an offer "clear and conspicuous," the offer must be presented in such a way that the consumer's attention will be drawn to it, given the location of the notice within the document, font style, and spacing, among other things.[57] Several factors lead the *Cole* court to determine that the notice was not "clear and conspicuous": (1) the disclosures were condensed into a single paragraph at the bottom of the flyer in one inch of space; (2) the disclosures were in the smallest font on the page; and (3) the notice was not distinct in any way either through color, emphasis, or font style.[58]

Cole set a new standard for determining both (1) whether the contents of a mail piece constitute a "firm offer of credit," and (2) whether the notice in a mail piece is "clear and conspicuous" under the FCRA. The new standard suggests firm offers must confer actual value to the consumer based on the entirety of the offer's terms and conditions. The standard also likely requires the terms of the offer to be complete and concrete, and include a precise rate of interest. Notices to consumers concerning the firm offer of credit must also draw the consumer's attention. While courts, especially in the Seventh Circuit, follow the *Cole* approach, cases interpreting and applying *Cole* fall short of providing clear rules for creditors to follow. Nevertheless, examining the case law following *Cole* provides some level of clarity in ascertaining whether a creditor is satisfying the FCRA when making an offer of credit.

D. Satisfying the Definition of a "Firm Offer" After Cole

1. Post-Cole Seventh Circuit Court Decisions

Not surprisingly, the *Cole* decision served as a catalyst for a flurry of cases alleging that prescreened offers of credit were not firm offers under the FCRA.[59] The Seventh Circuit did not revisit the *Cole* standard until *Murray v. GMAC Mortgage*,[60] where the appellate court overturned the district court's denial of class certification in an FCRA case.[61] In *GMAC Mortgage*, the Seventh Circuit clarified *Cole*: the proper inquiry was not an analysis of *each recipient's* reaction to the offer, but instead, an analysis of the *offeror's* conduct — specifically the contents of the offer made by the lender.[62] The *GMAC* court rejected any argument that potential class members' claims were too individualized to allow for class action recovery.[63] The court further shifted focus away from the individualized consumers' reactions and centered more on the "four corners" of the offer to determine whether it had the requisite value.[64] Thus the court allowed for class action recovery, and opened the door for putative class action suits against creditors.

a). Offers for Service Provided on Credit

Until recently, no court had addressed how *Cole*'s requirement of precise interest rates and credit terms would apply to offers involving monthly payments for services rendered the prior month. In *Murray*[65] *v. New Cingular Wireless Servs., Inc.*, the U.S. District Court for the Northern District of Illinois applied *Cole* and determined that an offer for pre-approval of a free cellular phone with activation of wireless services constituted a "firm offer of credit" under the FCRA.[66] The court held that the provision of wireless service qualified as "credit" because (1) consumers pay for service at the end of the month rather than buying minutes in advance, (2) consumers can exceed the minimum allotted minutes per month, and (3) the wireless service provider was placed at risk of non-payment for the services provided.[67] While the terms of the *New Cingular* mailing were imprecise and lacked certain terms, the court found that the absence of these terms did not make it impossible for the consumer to accept the offer.[68] Because interest rates were not material to the offer, it was irrelevant that no interest rate was included.[69] Otherwise, the mailing was clear, and the court held that the offer of credit for services was a "firm offer."[70]

b). Limits on Private Rights of Action

While *Cole* and its progeny such as *GMAC* may have opened the door wider for plaintiffs' class action suits related to offers of credit, the door was subsequently shut in other respects. For example, in *Perry v. First Nat'l Bank*, a consumer brought an action against a creditor in the Northern District of Illinois, alleging a violation of the "clear and conspicuous" disclosure requirements under section 1681m(d) of the FCRA.[71] The defendant moved for summary judgment, which the district court granted.[72] The district court held that the plaintiff did not have a statutory right to bring a private cause of action under section 1681(m)(3), because the 2003 FACTA amendment to the FCRA eliminated the right to bring such actions.[73] The plaintiff appealed, arguing that FACTA only eliminated private rights of action to enforce section 1681m(h), not section 1681m in its entirety.[74] The Seventh Circuit Court of Appeals disagreed holding that Congress intended to preclude private actions under the entire section.[75] The court concluded that the unambiguous language of the FCRA demonstrated that Congress intended to preempt private causes of action to enforce section 1681m, and affirmed the district court's decision to dismiss the plaintiff's claim.[76] While *Perry* did not preclude plaintiffs from asserting claims under other sections of the FCRA, such as claims that an offer was not a "firm offer of credit," the decision effectively put an end to FCRA claims based on the disclosure requirements of section 1681m.[77]

2. Post-Cole Outside The Seventh Circuit

Other courts have disagreed with *Cole*, instead applying less stringent standards to determine that mail pieces at issue constituted firm offers of credit under the FCRA. For instance, in *Putkowski v. Irwin Home Equity Corp.*, the U.S. District Court for the Northern District of California disagreed with the Seventh Circuit's interpretation of a "firm offer of credit."[78] In *Putkowski*, consumers brought a putative class action against a lender, alleging violations of the FCRA and relying upon the strict *Cole* interpretation of the requirements for a "firm offer of credit."[79] The defendant moved to dismiss, which the California district court granted.[80] In its mail piece, the lender offered a range of potential interest rates and loan amounts. The plaintiffs argued this disqualified the mail piece from being a "firm offer" under the Seventh Circuit's interpretation of the FCRA.[81] The district held that there was nothing in the FCRA that prohibited a range of credit or interest rates, or required that the firm offer be of sufficient value.[82] Therefore, the offer of credit was a "firm offer" under the FCRA.[83]

In *Soroka v. Homeowners Loan Corp.*,[84] plaintiffs brought an FCRA claim against offerors of home loans in Florida district court.[85] The plaintiffs alleged that the defendant omitted essential terms in its offer of credit so that it was not a "firm offer" under the *Cole court*'s interpretation of the FCRA.[86] The home loan offer did not have an interest rate or a term on the face of the offer.[87] Departing from *Cole*, the *Soroka* court did not require a precise interest rate or credit term, and recognized that the information omitted was still readily available to the plaintiff.[88] The court used the *Cole* rationale — the court must look to "all the material conditions that comprise the credit product" to determine whether the offer was something more than a sham.[89] Thus the district court considered the offer of credit a "firm offer," and held for the defendants/creditors.[90]

Second Circuit courts have departed wholesale from the *Cole* analysis and are hesitant to read its value requirement into the statutory text. For example, in *Gross v. Washington Mutual, Inc.*,[91] the U.S. District Court for the Southern District of New York found that the "sufficient value" requirement established in *Cole* was not required by the FCRA.[92] There, a plaintiff filed a putative class action claim against defendants because the defendants' offer of home equity credit was not a firm offer under the FCRA.[93] The offer had a range of interest rates and credit limits.[94] The court held that because Congress had not placed the *Cole* requirements in the FCRA, those requirements would not be the standard in the Second Circuit.[95]

While some courts, especially those in the Second Circuit, do not agree with the *Cole* analysis, other courts, especially in the Seventh Circuit, have remained fairly consistent in applying the *Cole* standard to firm offer analysis. Counsel representing both creditors and consumers must be mindful of each of these varying standards when dealing with offers of credit.

II. MOVING FORWARD – LENDER CONDUCT AND COMPLIANCE

A. Acceptable Forms of Offers

Though FCRA case law is unsettled and the standard and definitions of a "firm offer" and "clear and conspicuous" notice are subjective, courts have generally held that they are better able to find value in an offer that includes the following factors within its "four corners":

- Precise interest rates for offers requiring the payment of interest;
- Precise offer terms, such as loan amount, loan period, how the rate is calculated, etc.;
- Description of the method of computing interest;
- Minimum guaranteed credit;
- Payment periods; and
- Guarantee that the offer will be honored if the consumer continues to meet income, asset, and no bankruptcy qualifications and provides any required collateral.[96]

• While this list is by no means exhaustive, and some case law suggests that not all of these terms are required of every offer, courts do tend to favor terms that are precise and unchanging.[97]

• Based on the statutes and recent court decisions, a creditor should keep in mind a number of questions when making an offer for credit. For example:

- If the consumer is required to pay interest upon acceptance, does the offer include a set interest rate?
- Does the offer include a description of the method of computing interest?
- Does the offer guarantee a minimum amount of credit?
- Does the offer include a description of the payment periods?
- If the consumer continues to meet income, asset, and no-bankruptcy qualifications, is the offer guaranteed?
- Does the offer include the proper notice?

These are questions and factors to be considered in the "long notice" under the FTC's final rule of January 31, 2005.[98] The "short notice" requires that the offer inform consumers about the right to opt out of receiving prescreened solicitations, specify a toll-free number for consumers to call to opt out, and direct consumers' attention to the existence and location of the long notice.[99]

There are other facial or visual requirements under the FTC final rule. The "short notice" must be:

- Prominent, clear, and conspicuous;
- In a type size that is larger than the type size of the principal text on the same page, but in no event smaller than twelve-point type;
- On the front side of the first page of the principal promotional document in the solicitation, or, if provided electronically, on the first page and in close proximity to the principal marketing message;
- Located on the page and in a format so that the statement is distinct from other text, such as inside a border; and
- In a typeface that is distinct from other typeface used on the same page, such as bolded, italicized, underlined, or in a contrasting color.[100]
- Likewise, the "long notice" must be:
- In a type size that is no smaller than the type size of the principal text on the same page, and, for solicitations provided other than by electronic means, no smaller than eight-point type.
- In a type size that is distinct from other type style used on the same page, such as bolded, italicized, underlined, or in a contrasting color.
- Set apart from the other text on the page, such as by including a blank line above and below the statement, and by indenting both the left and right margins from other text on the page.[101]

The long notice must also appear in the solicitation, but the FTC Rule does not necessarily require that the long notice be in the same document as the short notice.[102] The following, on page 63, are examples of long and short notices provided by the FTC.

B. In or Out — Non-Standard Offers of Credit

Courts have addressed whether certain firm offers of credit, such as credit cards,[103] auto loans,[104] home loans,[105] and student loan consolidations,[106] are subject to the *Cole* requirements. However, few courts have addressed whether the *Cole* requirements also apply to offers for other goods and services, or whether the FCRA's firm offer rules apply at all to non-standard offers such as unwritten or telephone offers.

1. Services

While some offers for credit require precise interest rates and payment calculations under *Cole*, other offers, such as those for services, may not require the payment of interest unless the consumer has made late payments.[107] Because the *Cole* requirements might not be applicable to services for credit, the standards for a "firm offer of credit" in those contexts may still be ambiguous or unsettled.

Though the *New Cingular* court applied the *Cole* rationale in determining whether the offer for services at issue had value, the case suggests that this inquiry would be different for different offers of credit, and courts would search for "value" in each offer on a case-by-case basis.[108] For instance, from *Cole*, a creditor might assume that it must have precise interest rates and payment terms

LONG NOTICE

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a the last century, we saw how technology was changing the way people do things.

HEADER

Percent Rate for	Other ABCs	Variable info material	Grace or repases Are placed here	Computing the balast	Annual Fee	Usual Place Finance Charge
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TERMS AND CONDITIONS

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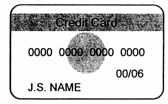
<u>PRESCREEN & OPT-OUT NOTICE</u>: This "prescreened" offer of [credit or insurance] is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria [including providing acceptable property as collateral]. If you do not want to receive prescreened offers of [credit or insurance] from this and other companies, call the consumer reporting agencies [or name of consumer reporting agency] toll-free, [toll-free number]; or write: [consumer reporting agency name and mailing address].

Notice to Some Residents: te a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way.

SHORT NOTICE



Here's a Line About Credit

J.S. Name
12345 Friendly Street
City, ST 12345

PFOR 00 MON
FIXED ABC

BALANCE TR
FOR 00 MONTHS

NO MONTHS FEE

INTERNET SECURITY
SECURITY

ONLINE FRAUD PRO
GUARANTEE

YOUR BALANCE
PAY YOUR BILL

FEE-FREE REWARDS
PROGRAM

Dear Ms. Name,

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a the last century, we saw how technology was changing the way people do things. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a the last century, we saw how technology was changing the way people do things.

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a the last century, we saw how technology was changing the way people do things.

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way peop. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit a smart kind of credit card.

So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way people. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card.

We saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology.

Sincerely,

John W. Doe
President, Credit Card Company

You can choose to stop receiving "prescreened" offers of [credit or insurance] from this and other companies by calling toll-free [toll-free number]. See <u>PRESCREEN & OPT-OUT NOTICE</u> on other side [or other location] for more information about prescreened offers.

in making an offer of credit for an automobile or credit card, but alternatively, for a service offer of credit, *other* terms may be more important. Thus if the interest rate is not material to the offer, *New Cingular* suggests it need not be included.[109] If courts apply *this* rationale, then offers of credit for service may be made under the FCRA, though they must include "material" terms that may or may not include precise interest rates. Confusion, however, might result in determining whether a term is "material" to an offer, and creditors should consider carefully the structure of any offer of credit for services.

2. Verbal Offers

The FCRA does not specify whether a firm offer must be made in writing.[110] At least one court has held that an insurance quote over the phone after obtaining a consumer's credit report constituted a firm offer of insurance.[111] FTC commentary also suggests that pre-screened offers are subject to the FCRA regardless of the medium.[112] Therefore, offers of credit made through other methods besides direct mail may still be subject to the FCRA and FTC requirements.

3. Databases Other Than Those Maintained By Credit Reporting Agencies

Some commentators argue that consumers' rights under the FCRA should be expanded.[113] Consumer advocates argue that databases not currently subject to the FCRA but used for similar purposes, still invade privacy rights.[114] Proponents of this view argue that consumers should have the right to know what information is being collected about them and how that information is used in any scenario.[115] Conversely, information resellers and law enforcement representatives argue that providing consumers this access is unnecessary and could harm fraud prevention and criminal investigations.[116] Also, expanding consumer rights would create substantial costs in marketing these products and make it more costly for consumers to shop around for credit or insurance.[117]

4. Trigger Loan Offers

Some lenders identify potential customers by acquiring the names of consumers whose credit reports have been pulled by another lender in the same industry. These credit pulls by competitors are "triggers" signaling to the market that a consumer is looking for a particular type of loan, such as a mortgage or auto loan.[118] The FTC requires brokers or lenders contacting consumers through trigger leads to make firm offers of credit under the FCRA.[119] Some states are actually exploring restricting this practice.[120] For example, Minnesota has enacted a statute that bars the sale of consumer information based on a mortgage credit inquiry trigger.[121] The CDIA, a consumer reporting services trade association, has challenged the law on grounds of preemption by the FCRA, as well as under the First Amendment.[122] As of the writing of this paper, the CDIA has obtained a preliminary injunction against enforcement of the Minnesota statute, but the long-term enforcement of the statute is still at issue. Massachusetts, Alabama, Connecticut, Maine, and Rhode Island have also recently drafted or enacted legislation governing trigger loan leads. Lenders and consumers alike should monitor these statutes, and challenges to them based on FCRA preemption, to better understand the direction the law is taking regarding trigger loan leads. Lenders that obtain consumer credit information from a credit reporting agency for the purpose of contacting that consumer regarding a prospective offer of credit would be wise to assume their activities are governed by the FCRA regardless of the medium utilized, and regardless of the product, good, or service underlying the offer. Front-end compliance is much easier than an after-the-offer discovery that the offer was actually subject to the FCRA.

There are both risks and rewards involved when using offers of credit to generate business.

C. Further Guidelines

Though the FCRA and the FTC rules provide some guidance as to what is required in making a "firm offer of credit," the law in the area is still developing at a rapid pace. New opinions are issued nearly every week, and whether an offer of credit is considered a "firm offer" depends largely on the specific facts of that case. While it is nearly impossible to offer a complete and concrete set of rules for creditors to follow, there are still some guidelines that creditors should abide. These suggestions give creditors the strongest possible defense against a challenge to the propriety of their offer of credit.[123]

First, and most important, *recognize that if you have obtained consumer credit information from a consumer reporting agency for the purpose of contacting the consumer regarding a prospective lender/borrower relationship, you are almost certainly subject to the FCRA.*

Second, *establish consumer criteria for firm offers and then document those criteria.*[124] The FCRA demands that creditors make pre-set criteria with the intent to honor the offer if a consumer continues to meet them.[125] Setting pre-set criteria and abiding by it will establish continuity among credit offers.

Third, *analyze the type of offer being made, determine the terms that are material to such an offer, set those terms, document them, and include them in the offer.*

Fourth, *establish systems that identify the consumer, once he or she responds to the offer, as someone on the list of prescreened offers.*[126]

Fifth, *establish and implement a system of compliance review.*[127] Compliance experts or legal counsel could be involved in this process to ensure that those evaluating a consumer are using the pre-set criteria. They could also ensure that all offers of credit conform to FTC and FCRA requirements. To further demonstrate compliance under the FCRA, the creditor should make regular updates and audits to the pre-set criteria and the screening process. Also, creditors could re-examine marketing programs that use pre-screened offers, making sure that "firm offers" are indeed being offered and are not simply targeted marketing.

Sixth, *carefully review all offers of credit.*[128] While the law is still unsettled as to which terms are material for a particular offer, creditors might be able to mitigate the risk of noncompliance by disclosing as many of the offer terms as possible. The more terms and conditions that are expressed in the offer, the more likely a court will find the mailer is a "firm offer of credit."

Seventh, *do not fall to the temptation of using an offer of credit to merely advertise or solicit business.* When in doubt . . . don't.

Finally, in order to keep pace with the changing law, *be cognizant of all legal changes, through statutes or case law.* It is important to carefully watch how the law is changing, especially in districts where a creditor does business or might have business contacts.

III. CONCLUSION — REWARDS, RISKS, AND THE FUTURE OF FIRM OFFERS OF CREDIT

Cole and its progeny include class action suits against creditors and credit reporting agencies. Plaintiffs file actions representing each of the millions of people who were on the credit reporting lists that received offers of credit. In *GMAC*, the plaintiff's name was one of 1.2 million consumers to whom GMAC sent the mail piece at issue.[129] Statutory damages may be awarded up to $1,000 per person,[130] and potentially the defendant in *GMAC,* could have paid $1.2 billion in statutory damages if it received an adverse judgment.[131] There are both risks and rewards involved when using offers of credit to generate business.

Creditors utilizing compliant firm offers often see increased business from ideal borrowers with little to no legal issues involved. Likewise, consumers continue to enjoy exposure to additional lenders and credit terms arising from firm offers of credit. Creditors must weigh their options and, if embarking on a firm offer program, ensure compliance with the FCRA. Consumers must also carefully weigh their decision to opt out under the FCRA and bar creditors from including them in firm offer programs.

The current legal landscape suggests that while plaintiff class action suits may have had their heyday in recent years, especially in the Seventh Circuit, the tide is turning. For example, California,[132] Florida,[133] and New York[134] courts do not agree with the Seventh Circuit's *Cole* analysis, and even Congress, through the FACTA amendment, eliminated private rights of action under certain FCRA sections.[135] The market and the court system both seem accepting of lenders wishing to extend offers of credit so long as they are "firm offers" that comply with the FCRA. Lenders obtaining consumer information from a credit reporting agency for the purpose of contacting the consumer regarding a prospective loan should, therefore, institute internal controls and procedures geared to ensure compliance with the FCRA.[136]

* **Baker Botts, LLP, Dallas, Texas 75201. Acknowledgements to James Bristow and Kate Rumsey.**

1 *See* Federal Deposit Insurance Corporation (FDIC), FDIC Law, Regulations, Related Acts, Prescreening by Financial Institutions and the Fair Credit Reporting Act, http://www.fdic.gov/regulations/laws/rules/5000-2900.html (last visited July 16, 2007); *see also* Earl Phillips, *Class Action May Determine Whether Each of 1.2 Million Offers of Credit was "Firm,"* 04-06 Consumer Credit & Truth-in-Lending Compliance Report 8, 8 (Apr. 2006).

2 Under the Fair Credit Reporting Act (FCRA), which will be discussed more fully below, damages resulting in violations of the act can range from $100 to $1000 per harmed consumer. In class action suits with hundreds to thousands of plaintiffs, damages might be awarded in the billions of dollars. *See* 15 U.S.C. § 1681n(a)(1)(A). This is only theoretical. Thus far, no awards near this magnitude have actually materialized from a class action lawsuit. *See also* R. Scott Johnson, *Prescreened Offers—Useful But are They Firm Offers of Credit?*, 60 Consumer Fin. L.Q. Rep. 593 (2006); Phillips, *supra* note 1.

3 For discussion on the FCRA, *see generally*, Michael Epshteyn, Note, *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?*, 93 Georgetown L.J. 1143 (2005); FDIC, *supra note* 1.

4 15 U.S.C. § 1681a(l).
5 15 U.S.C. § 1681n(a)(1)(A) (damages range from $100 to $1000 a person).
6 *See, e.g.*, *Cole v. U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004) (holding for plaintiffs in a class action under the FCRA and setting a new standard for "firm offers of credit").
7 *Id.* at 725–31.
8 15 U.S.C. § 1681, *et seq.*
9 15 U.S.C. § 1681(a)(4) (stating congressional purpose—"There is a need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and respect for the consumer's right to privacy.").
10 15 U.S.C. § 1681b*; see also* Johnson, *supra* note 2, at 593.
11 15 U.S.C. § 1681b.
12 15 U.S.C. § 1681b(c)(1).
13 S. Rep. No. 103-209, at 13 (1993).
14 *See Trans Union Corp. v. FTC*, 267 F.3d 1138, 1143 (D.C. Cir. 2001).
15 15 U.S.C. § 1681a(l).
16 15 U.S.C. § 1681a(1)(1)–(3).
17 15 U.S.C. § 1681m(d).
18 15 U.S.C. § 1681m(d)(1)(A)-(E).
19 *Killingsworth v. Household Bank, N.A.*, No. 05 C 5729, 2006 WL 250704, at *3 (N.D. Ill. Jan. 31, 2006).
20 *Id.*
21 Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Pub. L. 108-159, 117 Stat. 1952, 1960 (2003) (codified as amended at 15 U.S.C. § 1681m(d)). For background and legislative history on the FACTA amendment, *see* Epshteyn, *supra* note 3, at 1154–58.
22 15 U.S.C. § 1681m(h)(8).
23 *See infra* note 71(discussing *Perry v. First Nat'l Bank*).
24Prescreen Opt-Out Disclosure, 70 Fed. Reg. 5022 (to be codified at 16 C.F.R. pts. 642 & 698) (Jan. 31, 2005), *available at* http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-1678.pdf;
25 *Id.* at 5032–33.
26 *Id.*
27 *Id.* The exact requirements will be discussed more fully below, *see infra* p. 60 and notes 100-02. (listing the short and long notice requirements under the FTC regulation); *see also* Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5022.
28 15 U.S.C. § 1681n(a)(1)(A).
29 *See Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201 (2007) (setting willfulness standard for conduct governed by the FCRA).
30 *Id.*
31 15 U.S.C. § 1681n(a).
32 *See also infra* p. 61 and note 71 (discussing *Perry v. First Nat'l Bank*).
33 *See* Epshteyn, *supra* note 3, at 1150.
34 *See Id.*; OptOutPrescreen.com, What are the Benefits of Receiving Firm Offers, https://www.optoutprescreen.com/opt_form.cgi (last visited July 25, 2007).
35 Richard E. Gottlieb & Naomi A. Carry, *Under Attack: The Seventh Circuit Weighs in on Prescreened Offers of Credit*, 59 Consumer Fin. L.Q. Rep. 180, 181 (2005).
36 *Id.*
37 *See, e.g., Kennedy v. Chase Manhattan Bank USA, N.A.*, 369 F.3d 833 (5th Cir. 2004); *Sampson v. W. Sierra Acceptance Corp.*, No. 03 C 1396, 2003 WL 21785612 (N.D. Ill. Aug. 1, 2003); *Tucker v. Olympia Dodge of Countryside, Inc.*, No. 03 C 0976, 2003 WL 21230604 (N.D. Ill. May 28, 2003); *Gamble v. Citifinancial & Landers*, No. 3:02CV693, 2002 WL 31643028 (D. Conn. Nov. 19, 2003).
38 *See, e.g.*, *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d at 841.
39 *See Sampson*, 2003 WL 21785612 at *2 ("[T]his pre-approval could be for any amount, perhaps even as low as $1. Nonetheless, the FCRA does not require a firm offer to be in any particular amount . . . .").
40 15 U.S.C. § 1681n(a)(1)(A); Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 Hastings L.J 877, 892 (2003).
41 *Cole*, 389 F.3d at 722.
42 *Id.*
43 *Id.* at 723.
44 *Id.*
45 *Id.* at 724.
46 *Id.* (reasoning that some consumers would be eligible for more than the minimum amount of credit).
47 *Id.*
48 *Id.* at 728.
49 *Id.*
50 *Id.* at 726–27 ("[A] liberalized interpretation that would permit the creditor to send only promotional material to [consumers] would not be justified because the consumers would not be receiving the same clear benefit in exchange for the creditor's use of their credit histories . . . ." (quoting Federal Trade Comm'n, Statement of General Policy: Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18,804, 18,807 (May 4, 1990)).
51 *Cole*, 389 F.3d. at 728. This list is by no means exhaustive, and the court found that there might be other factual issues relevant to the value inquiry. *Id.* at 728 n.9.
52 *Id.* at 727 (emphasis in original).
53 *Id.* at 728 ("Although the offer indicates that interest rates may vary from 3.0 to 24.9 percent, the precise rate of interest for a particular consumer is unknown.").
54 *Id.*
55 *Id.* at 728–29.
56*See* Gottlieb & Carry, *supra* note 35, at 182. *See also Cole*, 389 F.3d. at 729 ("The FCRA does not define the term 'clear and conspicuous' and, in fact, there is little case law interpreting the term as used in § 1681m.")
57 *Id.* at 731.
58 *Id.*
59 *See Johnson*, *supra* note 2, at 594.
60 *Murray v. GMAC Mortgage*, 434 F.3d 948 (7th Cir. 2006); *see also Johnson supra* note 2 at 594.
61 *GMAC Mortgage*, 434 F.3d at 956.
62 *Id.* at 955–56.
63 *Id.* at 955; *see also* Johnson, *supra* note 2, at 594.
64 *GMAC Mortgage*, 434 F.3d at 955.
65 The class plaintiff was the same in both *GMAC* and *New Cingular*. The same putative class representative has also appeared in several other lawsuits.
66 *Murray v. New Cingular Wireless Servs., Inc.*, 432 F. Supp. 2d 788 (N.D. Ill. 2006).
67 *Id.* at 791.
68 *Id.* at 792.
69 *Id.*
70 *Id.*
71 *Perry v. First Nat'l Bank*, 459 F.3d 816, 818 (7th Cir. 2006). *See also Murray v. HSBC Auto Finance*, No. 05 C 4040, 2006 WL 2861954 (N.D. Ill. Sept. 27, 2006*); Murray v. Sunrise Chevrolet, Inc.*, 441 F. Supp. 2d 940 (N.D. Ill. 2006); *White v. E-Loan, Inc.*, 409 F. Supp. 2d 1183 (N.D. Cal. 2006); *Bruce v. Grieger's Motor Sales, Inc.*, 422 F. Supp. 2d 988 (N.D. Ind. 2006).
72 *Id.* at 819.
73 *Id.*
74 *Id.* at 820.
75 *Id.* at 822 (citing, *inter alia*, *Bruce v. Grieger's Motor Sales, Inc.*, 422 F. Supp. 2d 988, 990–93 (N.D. Ind. 2006); *Murray v. Cross Country Bank*, 399 F. Supp. 2d 843, 845 (N.D. Ill. 2005)).
76 *Perry*, 459 F.3d. at 823.
77 There is only one decision that holds the private right of action survived the FACTA amendment. *See Barnette v. Brook Road, Inc.*, 429 F. Supp. 2d 741 (E.D. Va. 2006) (finding that Section 312(f) of the FACTA amendment did not allow elimination of the private right of action). *But see Perry*, 459 F.3d. at 823 (rejecting this argument

and holding that this section says nothing about *who* has the right to bring suit); *Cavin v. Home Loan Center, Inc.*, 236 F.R.D. 387 (N.D. Ill. 2006) (holding there was no private right of action under Section 1681m); *Hernandez v. Citifinancial Servs.*, No. 05-2263, 2005 WL 3430858 (N.D. Ill. Dec. 9, 2005) (same).
78 423 F. Supp. 2d 1053, 1060 (N.D. Cal. 2006).
79 *Id.* at 1059.
80 *Id.* at 1064.
81 *Id.* at 1059.
82 *Id.* at 1060 ("There is also nothing in the FCRA that would prohibit a potential lender from indicating that a responding recipient may later obtain more favorable terms than the minimum terms presented in the mailer.")
83 *Id.* at 1060, 1064; *Cole*, 389 F.3d at 728 (holding that because "the precise rate of interest for a particular consumer is unknown," among other factors, the offer of credit was not a firm offer).
84 *Soroka v. Homeowners Loan Corp.*, No. 8:05 CV 2029 T 17MAP, 2006 WL 4031347 (M.D. Fla. June 12, 2006).
85 *Id.* at *1.
86 *Id.* at *1–3.
87 *Id.* at *3.
88 *Id.* at *5.
89 *Id.* at *5–6.
90 *Id.* at *5.
91 *Gross v. Washington Mutual, Inc.*, No. 06 Civ. 4340, 2007 WL 1404435 (S.D.N.Y. May 10, 2007). *See also Nasca v. J.P. Morgan Chase Bank, N.A.*, No. 06 Civ. 3472, 2007 WL 678407, at *4 (S.D.N.Y. Mar. 5, 2007) (also holding that it did not agree with the *Cole* analysis and prevented itself from imposing a new requirement in the FCRA that should be added by Congress*); Schwartz v. Goal Financial LLC*, 485 F. Supp. 2d 170 (E.D.N.Y. 2007) (agreeing with the *Nasca* court and finding there was a firm offer of credit in a student loan consolidation offer of credit).
92 *Gross* at *4.
93 *Id.* at *1.
94 *Id.* at *2 ("Plaintiff . . . states that interest rates range from 3.75 percent to 18 percent; thus, not stating the precise rate of interest to be charged. . . . Plaintiff argues that the absence of the amount of credit to be extended and the rate of interest to be charged prevent the mailing from constituting a firm offer of credit.").
95 *Id.* at *4 (stating that it was "loathe to import a requirement into a statutory definition that was not placed there by Congress. If Congress believes the statutory definition of 'firm offer of credit' does not adequately protect a consumer's interest . . ., it is for Congress to act; it is not for the judiciary . . . ." (quoting *Nasca v. J.P. Morgan Chase Bank, N.A. et al.,* No. 06 Civ. 3471, 2007 WL 678407, at *4 (S.D.N.Y Mar. 5, 2007))(internal quotations omitted).
96 *See* Johnson, *supra* note 2, at 594, for discussion of advice in using prescreened offers. *See also* FDIC, *supra* note 1 (discussing further actions a creditor may take in extending a "firm offer.")
97 *See Cole*, 389 F.3d. at 728.
98 Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5032–33.
99 *Id.*
100 *Id. See also* Gottlieb & Carry *supra* note 35 at 183. For a visual example of what a short notice may look like, *see* Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5034 app. (a)(1).
101 Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5032–33. For a visual example of what a long notice may look like, *see Id.* at 5035 app. (a)(2).
102 *See* Gottlieb & Carry, *supra* note 35, at 183.
103 *See Cole*, 389 F.3d at 722.
104 *Id.*
105 *See Soroka*, 2006 WL 4031347, at *1.
106 *See Schwartz*, 485 F. Supp. 2d at 172.
107 432 F. Supp. 2d at 792.
108 *Id.*
109 *Id.*
110 *See* 15 U.S.C. § 1681a(l) (The definition only states " . . . *any* offer of credit or insurance to a consumer that will be honored . . . .") (emphasis added).
111 *See Scharpf v. AIG Mktg.*, 242 F. Supp. 2d 455 (W.D. Ky. 2003).
112 *Compare* 15 C.F.R. § 600 (prescreening defined as the "process whereby a consumer reporting agency . . . compiles lists of qualified consumers . . . to be solicited . . .by direct mail solicitations."), *and* 16 C.F.R. § 600 (deleting "direct mail solicitations" in the definition of "prescreening" and stating that the comment was "amended to reflect that a prescreened list is subject to the FCRA, regardless of the medium through which the client that ordered its solicits consumers.").
113 GAO Rep., Key Federal Privacy Laws Do Not Require Information Resellers to Safeguard All Sensitive Data – Part 2 (2006).
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 *See* Eileen Ambrose, *Credit Bureaus Sell Your Phone Number to Lenders*, Balt. Sun, June 17, 2007, at 1C.
119 *Id.*
120 Brian Bergstein, *Safeguarding Privacy*, Cin. Post, June 5, 2007, at B (referring to President Harry Dinham, of the National Association of Mortgage Brokers). *See also* Bob Tedeschi, *After Applying, Fielding the Calls*, N.Y. Times, Oct. 29, 2006, at 12 (quoting the director of Maine's Office of Consumer Credit Regulation –"unless a lender makes a firm offer of credit—with a specific loan amount, a percentage rate and the length of the payoff term—the call violates the federal Fair Credit Reporting Act."); Kenneth R. Harney, *Questionable Mortgage Pitches Cropping Up*, Chi. Trib., Sept. 10, 2006, at 4; Kenneth R. Harney, *Hanging Up on Annoying Calls From "Trigger List" FTC Acts to Stop Lender Practice*, Chi. Trib., Mar. 25, 2007, at 2 ("Critics argue that trigger lists open the door to bait-and-switch schemes" and quoting an FTC official that the "[FTC] does have enforcement authority against bait-and-switch scams and misuse of consumers' credit information."); Bonnie McGeer, *1Q Earnings: Scrutiny for a Credit Bureau Lead Service*, Amer. Banker, Apr. 20, 2007, at 1 ("[I]n at least five states, law makers who say they have been flooded with complaints are considering bills that would either prohibit 'trigger leads' or establish rules for their use.");
121 *See* Minn. Stat. § 13C.01(3).
122 *See CDIA v. Swanson*, No. 07CV-3376DSD/JJG in the United States District Court for the District of Minnesota.
123 *See* Thomas J. Cunningham, *Guidelines for Making Firm Offers of Credit*, http://www.mortgagebankers.org/files/Conferences/2006/Reg_Compliane/GuidelinesforComplyingwiththeFCRA.pdf (last visited July 25, 2007).
124 *Id.* at 1.
125 15 U.S.C. § 1681a(l).
126 *See* Cunningham, *supra* note 123.
127 *Id.*
128 *Id.* at 3.
129 434 F.3d 948 (7th Cir. 2006); *see* Phillips, *supra* note 1, at 8.
130 15 U.S.C. § 1681n(a)(1)(A).
131 $1,000 per person, multiplied by 1.2 million people equals $1.2 billion. There has yet to be an award of this magnitude based on a firm offer class action.
132 *See, e.g., Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053, 1060 (N.D. Cal. 2006).
133 *See, e.g., Soroka v. Homeowners Loan Corp.*, No. 8:05 CV 2029 T 17MAP, 2006 WL 4031347 (M.D. Fla. June 12, 2006).
134 *See, e.g., Gross v. Wash. Mut., Inc.*, No. 06 Civ. 4340, 2007 WL 1404435 (S.D.N.Y. May 10, 2007).
135 *See supra* note 21 and accompanying text (discussing the FACTA amendment).