

November 20, 2009

Before the
FEDERAL TRADE COMMISSION
FREE ANNUAL FILE DISCLOSURES RULEMAKING
Rule No. R411005

COMMENTS OF:

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I. Introduction

Manatt, Phelps & Phillips, LLP welcomes this opportunity to submit comments to the Federal Trade Commission in response to its Notice of Proposed Rulemaking on proposed amendments to the Commission's Free Annual File Disclosure Rule, 16 CFR Part 610 (the "Rule"). These comments are submitted on behalf of clients who advertise free credit reports.

The proposed amendments would require certain advertisements for free credit reports to include prominent disclosures designed to prevent consumers from confusing these offers with the federally-mandated free annual file disclosures available through a single centralized source. The proposed amendments would implement Section 205 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "Credit CARD Act"), which requires the Commission to issue a rule by February 22, 2010, to prevent deceptive marketing of credit reports.

These comments only address certain issues raised by the proposed amendments. They are not intended to be comprehensive comments on the proposed amendments.

In summary, we recommend that the Commission clarify an ambiguity raised by the Credit CARD Act with respect to the disclosures that are required in television and radio commercials when the FTC issues the amendments to the Rule but before the effective date of the amended Rule. We recommend that the Commission make it clear, either in the Rule or in the Supplementary Information in the Federal Register notice of adoption of the Rule, that only the disclosures required by the Credit CARD Act for television and radio commercials need be made during this interim period, rather than the "interim disclosures" required by the Credit CARD Act. The disclosures required for television and radio commercials by the Credit CARD Act are: "This is not the free credit report provided for by Federal law." The "interim

disclosures” required by the Credit CARD Act are: “Free credit reports are available under Federal law at: ‘AnnualCreditReport.com.’”

II. The Ambiguity Raised by the Credit CARD Act for Interim Disclosures

Section 205(a) of the Credit CARD Act requires that all advertisements for free credit reports broadcast on television or radio include the following disclosure: “This is not the free credit report provided for by Federal law.”

Section 205(a) states, in relevant part:

(1) IN GENERAL. – Subject to rulemaking pursuant to section 205(b) of the Credit CARD Act of 2009, any advertisement for a free report in any medium shall prominently disclose in such advertisement that free credit reports are available under Federal law at: ‘AnnualCreditReport.com’ (or such other source as may be authorized under Federal law).

(2) TELEVISION AND RADIO ADVERTISEMENT. – In the case of an advertisement broadcast by television, the disclosures required under paragraph (1) shall be included in the audio and visual part of such advertisement. In the case of an advertisement broadcast by television or radio, the disclosure required under paragraph (1) shall consist only of the following: ‘This is not the free credit report provided for by Federal law’.

Section 205(b) states, in relevant part:

(1) Not later than 9 months after the date of enactment of this Act, the Federal Trade Commission shall issue a final rule to carry out this section.

(3) INTERIM DISCLOSURES. – If an advertisement subject to section 612(g) of the Fair Credit Reporting Act, as added by this section, is made public after the 9-month deadline specified in paragraph (1), but before the rule required by paragraph (1) is finalized, such advertisement shall include the disclosure: “Free credit reports are available under Federal law at: ‘AnnualCreditReport.com’.”

This language raises an ambiguity because the disclosures required for television and radio commercials are different from the “interim disclosures.” The section of the Act on television and radio commercials states that the disclosure required shall consist “only” of “This is not the free credit report provided for by Federal law,” but the section on the interim disclosures that are required for advertisements made public after February 22, 2010, but before

the FTC Rule is “finalized,” states that such advertisements “shall include” the disclosure “Free credit reports are available under Federal law at: “AnnualCreditReport.com’.”

In addition, the word “finalized” in the interim disclosures section of the Credit CARD Act creates ambiguity. This is not a term that is defined in the Administrative Procedure Act. There is ambiguity as to whether it means when the Rule is issued in final form by the Commission, or when the Rule becomes effective.

Neither the Commission’s proposed amendments to the Rule nor the Supplementary Information in the Federal Register notice address these issues. The Federal Register notice alludes to them in the following questions on which the Commission invited comment:

When the amendments to the Free Reports Rule should go into effect, in light of the requirement for interim advertising disclosures in Section 205 of the Act? Are there particular sections of the proposed Rule amendments that require more time for covered entities to comply with the proposed Rule’s requirement?

III. Recommendations to Resolve the Ambiguity Raised by the Credit CARD Act for Interim Disclosures

We recommend that the Commission make it clear, either in the Rule or in the Supplementary Information in the Federal Register notice of adoption of the Rule, that only the disclosures required by the Credit CARD Act for television and radio commercials are necessary for television and radio commercials during the interim period beginning on February 22, 2010 and before the Rule becomes effective, rather than the “interim disclosures” required by the Credit CARD Act. We believe that this is the most reasonable interpretation of the Act. It is also the most workable interpretation.

This is the most reasonable interpretation of the Act because when the Commission issues the Rule on February 22, 2010, in final form, the Commission will have “finalized” the rule. That is the case regardless of when the Rule goes into effect.

Another possible interpretation of the Act is that the interim disclosures must be made in television and radio commercials beginning on February 22, 2010, and before the FTC Rule goes into effect, and that the disclosures for television and radio commercials must be made after the Rule goes into effect. This interpretation is unreasonable and unworkable. First, it negates the wording of the television and radio advertisements section of the Act, which states that “In the case of an advertisement broadcast by television or radio, the disclosure required under paragraph (1) shall consist only of the following: ‘This is not the free credit report provided for by Federal law’.” (emphasis added). Second, it is unworkable because it would require advertisers and advertising agencies to create two sets of commercials: one set to run beginning on February 22, 2010, and the second set to run when the Rule goes into effect. This would substantially and unnecessarily increase the costs to produce television and radio commercials.

In discussions with Commission staff, we understand that the Commission plans to issue the Rule by February 22, 2010, and that the effective date will be at least 30 days after the Rule is issued. In fact, the Administrative Procedure Act provides: “The required publication or service of a substantive rule shall be made not less than 30 days before its effective date,” subject to certain exceptions which are not applicable here. 5 U.S.C. § 553(d). Therefore, unless the Act is interpreted as we recommend, advertisers and advertising agencies would have to produce one set of commercials to begin running on February 22, 2010, and another set of commercials to begin running a month or more later. That does not make sense. It would also be confusing to consumers to include different disclosures in otherwise the same commercials at different periods of time.

We believe that it is preferable for the Commission to address this issue in the Rule, but it is also adequate for the Commission to address it in the Supplemental Information in the Federal Register notice.

IV. Conclusion

We recommend that the Commission clarify an ambiguity raised by the Credit CARD Act with respect to the disclosures that are required in television and radio commercials when the FTC issues the amendments to the Rule but before the effective date of the Rule. We recommend that the Commission make it clear, either in the Rule or in the Supplementary Information in the Federal Register notice of adoption of the Rule, that only the disclosures required by the Credit CARD Act for television and radio commercials – “This is not the free credit report provided for by Federal law” – need be made during this interim period, rather than the “interim disclosures” required by the Credit CARD Act.

We thank you for your consideration of the recommendations made in these comments.

Respectfully submitted by:

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