



December 4, 2009

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex T)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**Neal Dittersdorf**

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Re: **Free Annual File Disclosures, Rule No. R411005**

Dear Sir/Madam:

These comments to the Federal Trade Commission's (the "FTC" or "Commission") Notice of Proposed Rulemaking<sup>1</sup> ("Notice") are filed by Intersections Inc. ("Intersections"). Intersections is a publicly traded company based in Chantilly, Virginia that provides consumers with a suite of products and services designed to help protect against identity theft and increase their awareness about the state of their credit and their personal information.

We appreciate the effort that the Commission and its staff have made pursuant to the Credit Card Accountability Responsibility and Disclosures (CARD) Act of 2009 to develop new regulations designed to prevent consumer confusion in advertisements for "free credit reports." However, Intersections objects to the disclosure requirements proposed in Section 610.4(d) on the basis that they are overbroad and could actually frustrate the ability of consumers to obtain identity theft protection. Specifically, the disclosure requirements of Section 610.4(d) would still apply even where a free credit report was not the dominant portion of an offer for a suite of goods and services intended to protect against identity theft. For the reasons described below, we urge the FTC to modify the disclosure requirements contained in proposed Section 610.4(d) so that they are more narrowly tailored to address the root problem of deceptive marketing without impacting more protected speech than is necessary.

#### **EXECUTIVE SUMMARY**

Intersections strongly urges the Commission to clarify that the disclosure requirements contained in proposed Section 610.4(d) would not apply when a company is offering a combination of goods and services and where the complimentary credit report is only one aspect of the cumulative offer. Specifically, Intersections offers bundled packages ("Bundled

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<sup>1</sup> Free Annual File Disclosures Amendments to Rule to Prevent Deceptive Marketing of Credit Reports and to Ensure Access to Free Annual File Disclosures, 74 Fed. Reg. 52915 (proposed Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 610).

Products”) that may include Internet surveillance, financial account monitoring, an identity theft risk assessment, public records reports and monitoring, access to an identity theft recovery unit for assistance in the event of identity theft or fraud, technological tools to help prevent phishing and keylogging by identity thieves, monitoring of consumers’ credit files, easy-to-read credit profiles based on data from all three consumer reporting agencies, and identity theft insurance. These Bundled Products are marketed in differing configurations that contain variations of the above benefits depending upon the offer. The Commission should distinguish Bundled Product offers, where the credit report is not a dominant part of the offer, from offers where the free credit report is dominant. The free credit report would not be a dominant part of a free trial offer for a Bundled Product when the offer focuses on all of the elements of the Bundled Package, and any free trial offer does not emphasize the free credit report. In contrast, the free credit report is dominant in offers where the advertisement leads with the free credit report and the references to other services are subordinate.

The disclosure requirements of proposed Section 610.4(d) should not apply to offers for Bundled Products, where a free credit report offer is not dominant, because there is no likelihood that consumers will be deceived into believing that a free trial offer for a Bundled Product that includes a credit report as one component of the offer is the free federally mandated annual credit report. For example, an individual subscribing to an Intersections Bundled Product will receive access to Intersections’ identity theft recovery unit in the event he or she becomes a victim of identity theft, e-mail or text message notifications if suspicious activity is discovered in his or her credit file, and quarterly updates of changes to his or her credit file. In some cases, a subscriber will also receive other features such as public record monitoring alerts and software and other privacy protection technology. If a consumer were to compare an offer for a free trial of Intersections’ Bundled Products with the annual federally mandated disclosure, it would be clear to the consumer even upon a cursory review that he or she was reviewing separate and wholly unrelated products.

The goal of preventing consumer confusion between the federally mandated annual disclosure and commercial “free credit report” offers is not furthered by applying the disclosures in proposed Section 610.4(d) to advertisements for these Bundled Products. Indeed, if Intersections must redirect consumers seeking its Bundled Products to a landing page containing information on the free annual file disclosure, a consumer could easily be confused into believing that the free annual file disclosure provides all the “bells and whistles” of a Bundled Product. Once directed away from Intersections’ web site, the customer may not return to sign up for protective services such as credit monitoring. The FTC, however, has indicated that 11% of identity theft victims first discovered the misuse of their account information through a credit monitoring service.<sup>2</sup> Thus, the use of these disclosures on offers for Bundled Products actually injures consumers by directing them away from products and services that have been shown to notify consumers that their identity has been stolen.

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<sup>2</sup> FED. TRADE COMM’N, 2006 IDENTITY THEFT SURVEY REPORT 3 (Nov. 2007), *available at* <http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf> [hereinafter FTC REPORT].

In the event that the Commission concludes that Intersections and its Bundled Products are not exempt from the disclosure requirements of proposed Section 610.4(d), the Commission's Congressional mandate to enact a rule preventing the deceptive marketing of credit reports on Internet web sites can be accomplished through the use of a prominent disclosure when the credit report is the non-dominant portion of the offer. This disclosure should appear on the landing page (or first point of communication) containing the offer rather than on a separate landing page. The Commission's goal of preventing the deceptive marketing of credit reports through telephone requests and telemarketing offers can best be accomplished by requiring that consumers be informed of their right to receive a free credit report under federal law prior to completing the enrollment in a Bundled Product, when the consumer's attention is focused on whether to accept the offer, rather than at the beginning of a telephone call.

A brief description of Intersections and our detailed comments to the Commission's proposal follow.

### **INTERSECTIONS INC. AND ITS GOODS AND SERVICES**

Intersections is a publicly traded company based in Chantilly, Virginia, with offices in Virginia and New Mexico. Intersections provides consumers with a variety of services designed to help them protect against identity theft as well as increase their awareness about the state of their credit. These services are marketed alone or through a number of Bundled Products, either directly to consumers under its brand name IDENTITY GUARD® or under various trademarks through large U.S. financial institutions and other financial services providers. Intersections currently has approximately 4 million subscribers and employs over 650 individuals.

Intersections' Bundled Products have been recognized as one of the most important services that consumers can use to help protect their identity and monitor their credit. Intersections' IDENTITY GUARD® Total Protection package was named "Best in Class" in the Javelin Strategy and Research's 2009 Consumer Identity Protection Services Scorecard. After comparing more than twenty services on the basis of customer service, product features, and overall product value, Javelin concluded that IDENTITY GUARD® Total Protection provides "the most comprehensive protection for its product category."<sup>3</sup> PC World magazine also gave IDENTITY GUARD® Total Protection its highest rating versus several other providers. IDENTITY GUARD® stood out for its comprehensive protection, including security software for the computer.<sup>4</sup>

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<sup>3</sup> JAVELIN STRATEGY & RESEARCH, 2009 CONSUMER IDENTITY PROTECTION SERVICES SCORECARD: COMPETITION INTENSIFIES AS VENDORS AGGRESSIVELY EXPAND OFFERINGS 5, 31 (MAY 2009).

<sup>4</sup> Dan Tynan, Identity-Theft Protection: What Services Can You Trust?, P.C. WORLD (April 29, 2008), <http://www.pcworld.com/article/id,145077/article.html>.

The FTC has recognized that identity theft is a major concern for consumers - a 2006 report prepared for the FTC found that approximately 3.7% of the adult population, or 8.3 million individuals, had been a victim of identity theft in 2005.<sup>5</sup> For instance, Federal Reserve Chairman Benjamin Bernanke and Senator Harry Reid have both been victimized by identity thieves.<sup>6</sup> Identity theft victims may have new accounts fraudulently opened in their name, have their credit card numbers stolen, or have their bank account or social security numbers misused. Often it takes several months or possibly years to rectify the harm caused by identity theft. The FTC itself has noted that there are benefits to taking preventative action against identity theft. For instance, 11% of consumers who have been victims of identity theft discovered the fraud through a credit monitoring service, a service that is included in the Bundled Products offered by Intersections.<sup>7</sup>

Intersections Bundled Products provide a valuable way for consumers to take these types of preventative measures against identity theft. Some key features of Intersections' Bundled Products may include:

- Internet surveillance that monitors for unauthorized trading of consumers' social security number, credit card account numbers, and bank account numbers;
- Financial account monitoring;
- Identity theft risk assessment;
- Easy-to-read credit profiles based on data from all three consumer reporting agencies;
- Monitoring of consumers' credit files at all three consumer reporting agencies;
- Periodic updates of changes to consumers' credit profiles at the three consumer reporting agencies;
- Access to an identity theft recovery unit for assistance in the event of identity theft or fraud;
- Technological tools to help prevent phishing and keylogging by identity thieves;
- A public records report;
- Public records monitoring that alerts consumers to changes in public licenses and registrations, addresses, civil, criminal, and bankruptcy court filings;
- Antivirus, anti-spyware, and firewall software;
- Lost wallet protection to provide assistance in canceling lost credit cards;
- Identity theft insurance; and
- Other identity theft protection products and services.

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<sup>5</sup> FTC REPORT 3.

<sup>6</sup> Michael Isikoff, *Bernanke Victimized by Identity Fraud Ring*, NEWSWEEK, Aug. 25, 2009, <http://www.newsweek.com/id/213696>; Ted Barrett, *Senator Reid Victim of Identity Theft*, CNN, July 27, 2006, <http://www.cnn.com/2006/POLITICS/07/27/reid.identity.theft/index.html>.

<sup>7</sup> FTC REPORT 8, 39.

These tools and services are designed to put consumers in control of their identity and educate them about the current state of their credit by providing them with the ability to access, monitor, and track their personal identity history and credit status anytime, online. Intersections' Bundled Products consist of multiple configurations of some or all of the above-listed benefits.

**COMMENTS ON THE COMMISSION'S PROPOSED AMENDMENTS TO THE FREE ANNUAL DISCLOSURE RULE, 16 CFR PART 610**

The Commission's proposed amendments to the Free Annual Disclosures Rule<sup>8</sup> are designed to implement Section 205 of the Credit CARD Act of 2009, which requires that certain advertisements for "free credit reports" include prominent disclosures regarding the availability of free annual credit reports to consumers.<sup>9</sup> The proposed amendments are designed to "prevent consumers from confusing these 'free' offers with the federally mandated free annual file disclosures available through the single centralized source."<sup>10</sup> The FTC has submitted that consumers are deceived and misled by the current advertising of "free credit reports," and, as a result, are confused about where to go to obtain their federally mandated free credit report.

The proposed amendments in Section 610.4(d) include a number of specific disclosures for various advertising mediums, including television, radio, print, Internet, and telemarketing. For instance, proposed Section 610.4(d)(4) requires that any web site offering free credit reports must first display a separate landing page to consumers before the consumer may obtain the report from the web site. The separate landing page must display the following disclosure: "THIS IS NOT THE FREE CREDIT REPORT PROVIDED FOR BY FEDERAL LAW. TO GET YOUR FREE REPORT, VISIT WWW.ANNUALCREDITREPORT.COM OR CALL 877-322-8228." The disclosure must be visible to consumers without requiring them to scroll on the web page. This landing page must occupy the full screen with no other information, graphics or material shown on the page except for a statement (under the disclosure) directing consumers to the company's web site.<sup>11</sup>

Further, Sections 610.4(d)(6) and (7) require the following disclosures for telephone requests and telemarketing solicitations, "YOU HAVE REACHED [NAME OF COMPANY OR SERVICE]. THIS IS NOT THE SOURCE FOR THE FREE CREDIT REPORT PROVIDED FOR BY FEDERAL LAW. TO GET YOUR FREE CREDIT REPORT, CALL 877-322-8228 OR VISIT WWW.ANNUALCREDITREPORT.COM" and "THIS IS NOT THE SOURCE OF THE FREE CREDIT REPORT PROVIDED BY FEDERAL LAW. TO GET YOUR FREE CREDIT REPORT, CALL 877-322-8228 OR VISIT WWW.ANNUALCREDITREPORT.COM,"

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<sup>8</sup> 16 C.F.R. pt. 610.

<sup>9</sup> Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009).

<sup>10</sup> 74 Fed. Reg. 52915.

<sup>11</sup> The proposed rule also requires that the disclosure must also contain an operational hyperlink that will direct consumers exclusively to [www.AnnualCreditReport.com](http://www.AnnualCreditReport.com), and this hyperlink must appear before any hyperlink to the company's web site. Further, the typeface of the disclosure must be at least twice the size of any hyperlink to the company's web site or display of the company's web site Uniform Resource Locator. See Free Annual File Disclosures Amendments to Rule to Prevent Deceptive Marketing of Credit Reports and to Ensure Access to Free Annual File Disclosures, 74 Fed. Reg. 52915 (proposed Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 610).

respectively. The proposed Section 610.4(d)(6) currently requires that consumers must “first” receive the relevant disclosure before any of other part of the sales presentation when they dial a phone number appearing in an advertisement that represents that free credit reports are available by calling the number while proposed Section 610.4(d)(7) requires that the disclosure be given at the first mention of the credit report.

The proposed rule is unclear whether the disclosures of proposed Section 610.4(d) would apply to the Bundled Products described above, and Intersections is concerned that consumers will be confused upon encountering the required disclosures in advertisements and hearing the disclosures during telephone requests and telemarketing solicitations for these products.

**I. The Disclosures Required by Proposed Section 610.4(d) Should Not Apply to Advertisements for Bundled Products Because Consumers are Unlikely to Confuse these Products with the Federal Free Annual File Disclosures.**

The FTC’s stated goal of these proposed rules is to prevent consumers from being misled into believing that a company offering a “free credit report” is actually providing consumers with their annual federally mandated free credit report.<sup>12</sup> Specifically, the FTC believes that advertisements that use “free credit report” offers have the potential to mislead consumers because they believe they are accessing their free federal credit report through these offers.<sup>13</sup>

As an initial note, the Commission should distinguish between Bundled Product offers, where the credit report is a non-dominant part of the offer, and offers where the free credit report is dominant. The free credit report is not a dominant part of the free trial offer when the offer focuses on all of the elements of the Bundled Package. For example, the free credit report is not dominant when the free trial offer places emphasis on credit monitoring, credit scores, identity theft assistance services, identity theft insurance, and credit reports in combination, or other products and services, without special emphasis on the credit report alone. In contrast, the free credit report is dominant in offers where the advertisement leads with the free credit report and contains only passing references to other services. For instance, the “attention grabber” of the advertisement might say “GET YOUR FREE CREDIT REPORT HERE!” while references to

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<sup>12</sup> 74 Fed. Reg. 52916 (“As a result of this advertising, consumers are often misled about where to obtain the free annual file disclosure mandated by federal law.”); *see also* 155 Cong. Rec. S6,179 (daily ed. June 4, 2009) (statement of Sen. Levin) (“[T]he goal of section 205 is to eliminate consumer confusion and deception by preventing commercial promotions from posing as the Federal free annual report program, and by ensuring that consumers know how to get their truly free annual reports.”).

<sup>13</sup> Complaint for Injunction and Other Equitable Relief, *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal., Aug. 15, 2005), available at <http://www.ftc.gov/os/caselist/0223263/050816comp0223263.pdf> (finding one advertisement stating “FREE! FREE! FREE! Get Your FREE Credit Report Online in Seconds!!!!”); *see, e.g.*, Credit Score Cowboy: Get Your Free Credit Report and Credit Score Online Instantly, <http://www.creditscorecowboy.com> (last visited Nov. 17, 2009) (“Get Your FREE 3 Credit Reports and All 3 Credit Scores Instantly.”)

other services are subordinate and contained only in the disclosure or other less predominant language.

Intersections does not object to the currently proposed disclosures contained in Section 610.4(d) for offers where the “free credit report” is the dominant part of the offer and the “primary” means to attract consumer attention. However, the application of these proposed disclosure requirements should, in order to further the goal of the legislation and the proposed amendments, be limited to advertisements that could reasonably result in consumers being confused into believing they were obtaining their free annual federal credit report. Where a company offers a free trial for a Bundled Product that includes a credit report as a non-dominant component of the offer, the disclosure requirements proposed by Section 610.4(d) should not apply since consumers would not likely be confused into believing they were receiving their federally mandated free credit report.<sup>14</sup>

The federally mandated annual file disclosure only contains an individual’s credit report, which discloses all of the information in a consumer’s credit file and a record of everyone who has received a report about the consumer. Intersections’ Bundled Products consist of multiple configurations of features designed to help prevent identity theft. For instance, IDENTITY GUARD® Total Protection includes, among other things: Internet surveillance to detect trading or public display of a consumer’s social security, credit card and bank account numbers; identity monitoring to alert consumers to new credit card and cell phone applications using consumers’ personal information; a public record report and public record monitoring; anti-keylogging software; an internet security suite with anti-virus, spyware and malware software; an online vault where a consumer can store valuable information; access to Intersections’ identity theft recovery unit; a three-bureau credit report; and credit monitoring.

Bundled Products should be exempt from the disclosure requirements of Section 610.4(d) because there is no likelihood that consumers will be deceived into believing that an offer for a Bundled Product that merely includes a complimentary credit report as one component of the package is the free federally mandated annual credit report. If a consumer were to compare a Bundled Product with the annual federally mandated disclosure, it would be clear to the consumer, even based upon the initial advertising, that they were reviewing wholly separate and unrelated products. By applying these disclosures to advertisements for these packages, the goal of preventing consumer confusion between the federally mandated annual disclosure and commercial “free credit report” offers is not furthered.

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<sup>14</sup> 155 Cong. Rec. S6,179 (daily ed. June 4, 2009) (statement of Sen. Levin) (“Many of these marketers deliberately obscure the difference between the free reports to which consumers have a right under Federal law—which come with no strings attached—and the ‘free reports’ that marketers condition on purchases of credit monitoring, credit scores, or other products.”).

## **II. The Disclosures Required by Proposed Section 610.4(d) Should Not Apply to Advertisements for Bundled Products Because Consumers Seeking these Products will be Confused by the Disclosures and Dissuaded from Purchasing these Valuable Services.**

As discussed above, the Bundled Products offered by Intersections include a number of valuable benefits, the combination of which are used to combat identity theft on a quasi-real time basis.<sup>15</sup> The benefits and protections of these Bundled Products are not comparable to the benefits received from an annual review of a credit report, and are designed to combat specific types of identity theft issues, including those identified by the FTC in its 2006 Identity Theft Survey Report. For instance, a consumer who is only entitled to review their free federally mandated credit report once a year would not receive notice that her identity was stolen until she checked her free credit report one year later. Further, a consumer who merely checks the free federal credit report would not be provided with any tools to manage or address any resulting problems. However, a consumer who has subscribed to a Bundled Product that includes credit monitoring and prompt notices of fraudulent activity can take action before the damage is too great. In fact, the 2006 FTC Report found that 11% of identity theft victims first discovered the misuse of their account information through a credit monitoring service, a component of Intersections' Bundled Products.<sup>16</sup> Additionally, the FTC has identified a growing concern that phishing schemes are being used to perpetrate identity theft.<sup>17</sup> To combat this, a consumer may wish to enroll in a Bundled Product, such as IDENTITY GUARD® Total Protection, that includes anti-phishing and anti-keylogging software. Finally, the FTC Report found that the dispute resolution process, including communicating with the consumer reporting agencies, was the most difficult aspect of the recovery process for 38% of identity theft victims who had to spend ten or more hours resolving disputes.<sup>18</sup> Companies have responded to this concern by offering identity theft recovery assistance such as Intersections' Identity Theft Recovery Unit to provide guidance and support during the recovery process.<sup>19</sup>

If the proposed disclosure requirements of 610.4(d) are imposed on offers for Bundled Products, consumers would actually be harmed rather than protected. Specifically, consumers will be harmed in two separate ways when they encounter the federally required disclosures of proposed Section 610.4(d) on advertisements for Bundled Products or during telephone requests or telemarketing offers for Bundled Products.

First, consumers seeking to enroll in these products online will encounter immediate disclosures on an intervening landing page notifying them that the products they are attempting

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<sup>15</sup> See *supra* Part A (explaining benefits included in IDENTITY GUARD® Total Protection).

<sup>16</sup> FTC REPORT 33.

<sup>17</sup> Phishing - OnGuard Online, <http://www.onguardonline.gov/topics/phishing.aspx> (last visited on Nov. 17, 2009).

<sup>18</sup> FTC REPORT 52.

<sup>19</sup> Dan Tynan, Identity-Theft Protection: What Services Can You Trust?, P.C. WORLD (April 29, 2008), <http://www.pcworld.com/article/id,145077/article.html>.

to purchase or review are not the free credit report provided for under federal law and that they can obtain the free credit report by visiting [www.AnnualCreditReport.com](http://www.AnnualCreditReport.com) or by calling a toll-free number. Upon reaching this intervening landing page, a significant percentage of consumers are likely to go to [www.AnnualCreditReport.com](http://www.AnnualCreditReport.com) and complete the process for obtaining their credit reports. As a result, some consumers will never receive the information about the additional identity theft protection tools they were interested in receiving, and others may receive their annual free credit reports only, without understanding that they are not also receiving those continuing identity theft protection tools they originally sought, such as Internet surveillance, public record monitoring, credit monitoring or anti-phishing software. Further, the intervening landing page would direct the consumer to the centralized source site where only the nationwide consumer reporting agencies may continue to market their fee-based products, and other legitimate providers are thus effectively denied the opportunity to offer their products to those consumers.<sup>20</sup>

Similarly, consumers who call to enroll in an offer for a Bundled Product, or who receive a telemarketing call offering a Bundled Product are likely to be confused, or even end the call upon hearing the disclosures about how to obtain a free credit report. As a result, some consumers will never receive the information about the identity theft protection tools they were interested in receiving when they initiated the telephone calls. Once again, consumers may be diverted from services they were seeking, and fail to understand that by obtaining only their annual free credit reports they are not receiving those other services.

Second, consumers are less likely to subscribe to Bundled Products if they encounter confusing disclosures during the initial stages of enrollment. For instance, a consumer interested in enrolling in a trial for a package via telephone because it includes Internet surveillance and public record monitoring is likely to be confused upon hearing “YOU HAVE REACHED [NAME OF COMPANY OR SERVICE]. THIS IS NOT THE SOURCE FOR THE FREE CREDIT REPORT PROVIDED FOR BY FEDERAL LAW. TO GET YOUR FREE CREDIT REPORT, CALL 877-322-8228 OR VISIT [WWW.ANNUALCREDITREPORT.COM](http://WWW.ANNUALCREDITREPORT.COM)” since she was under no assumption that the telephone number was associated with the free annual disclosures.

Under these scenarios, a consumer is likely to abort the enrollment process rather than continue because of the confusion caused by the disclosures. As a result, a consumer will not have all of the tools including Internet surveillance, credit monitoring, and identity theft recovery assistance to aggressively help combat identity theft. Consumers should be able to subscribe to Bundled Products that include Internet surveillance and credit monitoring without encountering

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<sup>20</sup> Thus, while potentially diverting consumers from legitimate offers by companies who are not nationwide consumer reporting agencies, the intervening landing page appears to give a government endorsement of some providers over others. Those consumers who make requests for free disclosures through the centralized source – which was established under FTC direction, as has been widely publicized – and then receive commercial marketing on that site may be led to believe that the companies making those offers government-endorsed providers for those other services.

disclosures which will confuse and dissuade them from enrolling in products designed to decrease their vulnerability to identity theft and increase the likelihood that they will be alerted to identity theft. The requirement that the disclosures contained in proposed Section 610.4(d) be included on advertisements for Bundled Products may ultimately hurt consumers by preventing them from subscribing to these types of services which have been demonstrated to alert consumers to suspicious activity. Thus, advertisements for Bundled Products should be exempt from the required disclosures due to the likelihood that consumers will be confused by the disclosures. This confusion will result in harm to consumers as they will be less likely to take preventive steps against identity theft.

### **III. The Disclosures Required By Section 610.4(d) Unduly Restrict the Dissemination of Truthful Information Based Solely on Content and Imposes Restrictions that are More Extensive than Necessary to Prevent Deceptive Marketing of Credit Reports.**

The disclosures required under proposed Section 610.4(d), in particular those of Section 610.4(d)(4)(i)-(iii) regulating Internet web sites, restrict the dissemination of truthful information based solely on the nature of the content and imposes restrictions that are more extensive than necessary to prevent deceptive marketing of credit reports. If the proposed rule is finalized, the FTC risks violating the First Amendment.

The proposed disclosures contained in the rule unduly restrict the disclosure of truthful, accurate, and non-misleading information about consumer products and services that include complimentary credit reports as a component of Bundled Products. As such, the proposal seeks to prohibit the free expression that is protected by the First Amendment to the U.S. Constitution.<sup>21</sup> The proposed rule's restrictions fail the fundamental tests established by the U.S. Courts by which government-imposed restrictions are to be measured.<sup>22</sup> The *Central Hudson* test asks: (i) whether the expression concerns lawful activity and is not misleading; and (ii) whether the asserted governmental interest is substantial. If the answer to each of these questions is "yes," then the following questions must be considered: (iii) whether the regulation directly advances the governmental interest asserted; and (iv) whether the regulation is more extensive than is necessary to serve the asserted interest.

There are a number of ways in which the FTC could amend the proposed rule in order to satisfy basic principles of constitutional law and regulatory requirements and strike a proper balance between consumer protection and consumer access to the market.

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<sup>21</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

<sup>22</sup> *See Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).

#### **IV. The Goal of Preventing Deception in the Marketing of “Free Credit Reports” Can be Accomplished by Using Prominent Disclaimers.**

Intersections supports fully the intent of Section 205 of the Credit CARD Act of 2009 and the Notice implementing this legislation. The Credit CARD Act required the Commission to adopt disclosures to prevent deceptive marketing of credit reports and to require prominent disclosure of specific information in advertisements for free credit reports; however, the FTC’s proposed amendments exceed the narrow instructions from Congress.

If the FTC does not agree to exempt Bundled Products, then Intersections believes that a disclaimer would still achieve the goal of protecting the public while being much less restrictive of free speech. The FTC, in its settlement involving Consumerinfo.com,<sup>23</sup> determined that a simultaneous disclosure of a representation and a prominent clarifying disclosure in the same place would protect consumers from the deceptive marketing of “free credit reports” on Internet web pages. The FTC has currently required a disclosure similar to the below on Internet landing pages (or at the first point of communication with consumers):

By enrolling, you will begin your free trial membership in **[NAME OF SERVICE]**. If you don’t cancel your membership within the **[NUMBER OF DAYS]**-day trial period, you will be billed **[PRICE]** for each month that you continue your membership.

**[NAME OF COMPANY]** is not affiliated with the annual free credit report program. Under a new Federal law, you have the right to receive a free copy of your credit report once every 12 months from each of the three nationwide consumer reporting companies. To request your free annual report under that law, you must go to [www.annualcreditreport.com](http://www.annualcreditreport.com).

This disclosure regime imposes less restrictive disclosure requirements and has worked effectively to prevent the deceptive marketing of credit reports. There is no need for the FTC to discard this approach and replace it with one that restricts and suppresses truthful commercial speech. The disclosure standard mandated by the *Consumerinfo.com* settlement clearly works to ensure that consumers are aware of their right to obtain free annual file disclosures through the centralized source.

Thus, Intersections urges the FTC to retain the above disclosures for Bundled Product offers that merely include a complimentary credit report as one component of the offer. Intersections further requests that the FTC continue to require the placement of the disclaimer on the landing page or first point of communication, rather than on a separate landing page.

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<sup>23</sup> FTC v. Consumerinfo.com, Inc., SACV05-801 AHS (MLGx), Stipulated Final Judgment and Order at 3-4 (C.D. Cal., Aug. 15, 2005), available at <http://www.ftc.gov/os/caselist/0223263/050816stipfnl0223263.pdf>.

For telephone requests and telemarketing solicitations for Bundled Products that include a free credit report, Intersections believes that consumers should be provided with the above disclosure prior to completing the enrollment in the service and not at the very beginning of the telephone call. By allowing a company to engage in the sales presentation prior to providing the disclosure, consumers are given an opportunity to understand that the Bundled Product is different from the annual free credit report and to contemplate whether they wish to enroll. However, consumers are still protected from any deceptive marketing of the credit report because they are provided with the disclosure prior to enrolling in the offer or providing a method of payment.

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For the reasons described above, we urge the FTC to modify the disclosure requirements contained in proposed Section 610.4(d) so that they are more narrowly tailored to address the root problem of deceptive marketing without impacting more protected speech than is necessary.

We appreciate this opportunity to comment on the Notice. Please feel free to contact me at 703-488-6161 if you would like to discuss our comments further.

Respectfully submitted,

Neal Dittersdorf  
Chief Legal Officer