SCHWARTZ & BALLEN LLP
1990 M STREET, N.W. • SUITE 500
WASHINGTON, DC 20036-3465

(202) 776-0700

FACSIMILE
(202) 776-0720

DIRECT
(202) 776-0701

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VIA ELECTRONIC MAIL

Federal Trade Commission
Office of the Secretary
Room H-153
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: RIN 3084-AA94; Free Annual File Disclosures Amendments

Ladies and Gentlemen:

We are pleased to comment on the Federal Trade Commission's (the "Commission") proposed amendments to the Free Annual File Disclosures Rule, 16 C.F.R. Part 610, implementing the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act") (the "Proposed Rule").[1] Section 205 of the CARD Act ("Section 205") amends Section 612 of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681j, to require advertisements for free credit reports to disclose in any advertisement that free credit reports are available under Federal law. The CARD Act directs the Commission to issue a rule to carry out Section 612 of the FCRA ("Section 612").

As a financial services law firm, Schwartz & Ballen LLP provides advice to institutions concerning matters relating to the implementation of the CARD Act and matters relating to compliance with the FCRA. Because our clients will be affected by the Proposed Rule, we believe it is appropriate to comment on the requirements proposed by the Commission.

[1] 74 *Fed. Reg.* 52915 (October 15, 2009).

ADDITIONAL DISCLOSURE STATEMENT

The Commission is proposing to require that print and Internet advertisements contain the following statement:

This is not the free credit report provided for by Federal law.

We believe that this statement should not be required for print and Internet advertisements. In section 612(g)(1), Congress directed that any advertisement for a free credit report in any medium prominently disclose that free credit reports are available under Federal law at AnnualCreditReport.com.[2] However, in recognition of the uniqueness of the media, Congress provided that in the case of an advertisement broadcast by television or radio, the disclosure required under section 612(g)(1) should consist only of the statement "[t]his is not the free credit report provided for by Federal law."[3] Accordingly, Congress directed that the statement "[t]his is not the free credit report provided for by Federal law" substitute for the statement that free credit reports are available under Federal law at AnnualCreditReport.com, which is the disclosure required in media other than television and radio. The Commission, however, has ignored the language of the statute by overlooking the distinction drawn by Congress by requiring that both statements appear in print and Internet advertisements.[4] We believe that the Proposed Rule does not reflect the intent of Congress that only one of the two statements, but not both, appear in an advertisement, regardless of medium. Accordingly, we recommend that the Commission not require that print and Internet advertisements contain the statement that "[t]his is not the free credit report provided for by Federal law."

PROPOSED AMENDMENTS TO ANNUAL FILE DISCLOSURE REQUIREMENTS

The Commission indicates in the preamble to the Proposed Rule that nationwide consumer reporting agencies ("CRAs") and others have advertised free credit reports that are tied to the purchase of services such as credit scores and credit monitoring. CRAs have a particular advantage in this regard because they offer their services in connection with their sponsorship of the website AnnualCreditReport.com, which is where consumers may obtain their free credit reports under Federal law. To address possible consumer confusion attendant with the CRAs' sponsorship of the centralized source for requesting annual file disclosures, the Commission proposes to require CRAs to refrain from advertising or marketing products and services until after consumers have obtained their free annual file disclosures, as set forth in the proposed amendments to sections 610.2(g) and (h). We support this aspect of the proposal and believe that it will reduce the likelihood of consumer confusion as well as reduce the competitive advantage currently enjoyed by the CRAs.

[2] 15 U.S.C. § 1681j(g)(1).
[3] 15 U.S.C. § 1681j(g)(2).
[4] The Proposed Rule also requires a variation of the statement in telemarketing requests and solicitations. *See* section 610.4(d)(6), (7) of the Proposed Rule.

The Proposed Rule states that in the case of requests made by mail or telephone, the consumer has obtained his or her annual file disclosure when the file disclosure is mailed, and a nationwide consumer reporting agency may include advertising for other products or services ("secondary services") with the mailed file disclosure. We do not believe that this is the appropriate standard that should apply because it could confuse consumers as to the nature of the secondary services and will continue to provide CRAs with an unfair competitive advantage. If marketing material is inserted into the same envelope as the credit file, there is a strong likelihood that consumers will be uncertain as to the importance of the additional information. Marketing material included with the credit file will inappropriately benefit from a "halo effect" because consumers are receiving the marketing material that accompanies information that consumers have requested pursuant to a federally mandated right. As a result, consumers may believe that the government has approved of, or is recommending, the secondary services that CRAs are marketing with the credit file.

Moreover, permitting a service representative to make offers of additional products and services over the telephone will also prove confusing to consumers if the offers are made during the same telephone session in which the consumer receives his or her credit file. Again, consumers may believe that the secondary services have been approved by or are being recommended by the federal government because they are being offered at the same time that consumers are exercising their right to receive free credit reports.

We believe that a better approach would be to prohibit any marketing material from being included along with the credit file mailed to consumers, and prohibit CRAs from promoting products and services during the same telephone conversation or web session during which the consumer receives a credit file. Prohibiting CRAs from promoting additional products and services during the same telephone and website session, as well as prohibiting CRAs from including marketing material in the same envelope as the credit file requested by consumers would reduce any possible potential for consumer confusion. We believe that the current confusion among consumers with regard to secondary services cannot be cured simply by requiring disclosure of the role of the CRA in the marketing of the secondary services. Accordingly, we request that the Commission not adopt the proposed definition of when a consumer "has obtained his or her annual file disclosure."

The Commission also proposes to prohibit the centralized source for annual credit reports from:

(1) Containing hyperlinks to commercial or proprietary websites;
(2) Asking or requiring consumers to set up an account as a prerequisite for obtaining an annual file disclosure; or
(3) Asking or requiring consumers to agree to terms and conditions as a prerequisite for obtaining an annual file disclosure.

We support these additional consumer protections and agree that they should be adopted. The centralized source should only be used for responding to a consumer's request for a free credit report. CRAs should not be permitted to obtain information from consumers for future marketing or impose unnecessary conditions on consumers' use of the centralized source.

DEFINITION OF FREE CREDIT REPORT

The Commission proposes that the term "free credit report" be defined as:

> a consumer report or file disclosure that is prepared by or obtained, directly or indirectly, from a nationwide consumer reporting agency (as defined in section 603(p) of the [FCRA]); that is represented, either expressly or impliedly, to be available to the consumer free of charge; and that is, in any way, tied to the purchase of a product or service.

Section 610.4(a) of the Proposed Rule; 74 *Fed. Reg.* at 52927.

We believe that the use of the term "or impliedly" is exceedingly vague and ambiguous in scope, and will unnecessarily result in significant uncertainty in its application. It is not clear what criteria the Commission will apply in determining whether or not a credit report is "impliedly" represented in an advertisement as free of charge. We are concerned that the use of such a vague term will lead to second guessing and will run the risk of exposing companies that make legitimate offers of products and services that include the provision of credit reports as one of several features of the product and service to unnecessary prosecution and litigation.

We are also concerned that the phrase "in any way, tied to the purchase of a product or service" is similarly vague, ambiguous and overly broad in scope. The language could be interpreted to bring within its ambit products and services that contain a bundle of features that include the ability of consumers to receive copies of their credit reports. Often, products and services provide a trial period during which consumers may use the product or service without charge. Consumers are not required to purchase such products and services in order to obtain their credit reports, and they do not condition the availability of credit reports on the consumer obtaining the product or service. Rather, the ability of consumers to obtain credit reports is an integral part of the features of the product or service. Because the consumer's ability to obtain a credit report is only one feature of the product or service that the consumer has agreed to purchase, there is little risk that consumers will believe that they are obtaining the free credit report that is provided under Federal law. Accordingly, we recommend that the Commission clarify that for purposes of the definition of "free credit report," a credit report that is available as one feature of a product or service that contains multiple features is not "tied to the purchase of a product or service."

GENERAL REQUIREMENTS FOR DISCLOSURES

Section 610.4(c)(5) of the Proposed Rule prohibits anything "contrary to, inconsistent with, or in mitigation of, the required disclosure" in any advertisement in any medium. We believe that the use of the term "mitigation" in connection with this provision fails to provide sufficient guidance to businesses with regard to what language is prohibited. We believe that it will be exceedingly difficult for companies to determine whether language used in advertisements will be construed by the Commission as "in mitigation of" the required disclosure. We recognize that the proposed language is derived from the Commission's Pay Per Call Rule. Use of the phrase "in mitigation of" in connection with the Pay Per Call Rule may be desirable because consumers will be charged immediately upon calling a provider. As a result, in circumstances where consumers responding to the advertisement are immediately charged, use of more ambiguous language may be appropriate. However, the Proposed Rule is intended to prevent consumers from confusing offers of free credit reports with the Federally mandated free annual credit report. Typically consumers will make payment for the service by means other than simply placing a telephone call to the service provider. As a result, there is little chance that consumers will be confused in such instances. Accordingly, we recommend that the Commission delete the reference to "in mitigation of" from section 610.4(c)(5) of the Proposed Rule.

MEDIA SPECIFIC DISCLOSURES

Television Advertisements

Section 610.4(d)(1) of the Proposed Rule establishes rigid requirements for advertisements for free credit reports broadcast on television. Specifically, the Proposed Rule requires the visual disclosure for television advertisements to be at least 4 percent of the vertical picture height and appear for a minimum of four seconds. We believe that this requirement is overly rigid and excessively burdensome. The Commission states that the requirement is derived from the Federal Election Commission's ("FEC") requirements for the disclosure of funding sources of political advertisements.[5] The FEC's disclosure cited by the Commission relates solely to the disclosure that the candidate has approved the advertisement in question. This disclosure serves a different purpose than the disclosure required in connection the provision of free credit reports, *viz.*, to inform viewers that the candidate has approved the message they are hearing. The FEC's requirement is intended to put all candidates on a level playing field. Given that the FEC's and the Commission's provisions serve different purposes, we see little reason why the Commission should adopt the FEC's rigid requirement.

[5] 74 *Fed. Reg.* at 52919.

Print Advertisements

Section 610.4(d)(3) of the Proposed Rule requires print advertisements to state the following:

> 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.

We believe that the use of the words "To get your free report . . ." will be confusing to consumers because it will likely conflict with other portions of the advertisement that provide a different website URL and telephone number for the service being advertised. In order to avoid unnecessary confusion, we believe that a better approach would be for the Commission to require the use of the wording set forth in section 612(g)(1) of the FCRA, which provides that "free credit reports are available under Federal law at *AnnualCredit Report.com*."

Internet Websites

Section 610.4(d)(4) of the Proposed Rule requires that any website on which free credit reports are offered must include a separate landing page that will include only the required disclosure language and a hyperlink to the company's website. We strongly oppose this requirement for a landing page as unnecessary and contrary to the purpose of Section 205. Section 205(b)(2)(B) directs the Commission to consider for advertisements on the Internet whether the disclosure set forth in section 612(g)(1) should appear "on the advertisement or on the website on which the free credit report is made available." There is no indication that Congress ever contemplated or expected that the Commission would mandate a separate landing page for Internet advertisements. Moreover, as evidenced by the Commission's requirements for television, radio and print advertisements, a separate landing page is not required in order to ensure that the disclosure is prominent.

We believe that it is inappropriate for the Commission to expand the requirements of Section 205 by imposing an additional burden that Congress did not authorize. We also see little reason for the Commission to apply a different standard for advertisements made through websites and those offered through other media. Such a distinction is particularly uncalled for in view of the rapid convergence of various media. Moreover, a separate landing page will prove confusing to consumers who are interested in receiving the advertised service. Typically, consumers do not confront separate landing pages when they navigate their way through the Internet. They undoubtedly will not understand why they are being presented with a landing page when they are simply trying to obtain information about the advertised product or service. We believe that a better approach would be for the Commission to apply the same standards that it applies to advertisements in other media for free credit reports and simply require the disclosure language to appear on the website where credit reports are offered.

Disclosures for Internet-Hosted Multi-Media Advertising

Section 610.4(d)(5) of the Proposed Rule requires that Internet-hosted multi-media advertisements for "free credit reports" disseminated in both audio and video format include a mandatory disclosure. The disclosure must appear in type that is at least the same size as the largest hyperlink to the company's website, display of the URL of the company's website, or the company's telephone number. We oppose the type-size requirements because they are inconsistent with the requirements governing television advertisements in section 610.4(d)(1) of the Proposed Rule (*e.g.* that the disclosure be at least four percent of the vertical picture height). From the perspective of a consumer, Internet-based multi-media advertising and television advertisements are functionally identical. Both feature a combination of audio and visual components and generally retain a consistent style. Moreover, companies may develop and produce television advertisements and Internet-hosted multi-media advertisements jointly as part of a single process. Given these similarities, we believe the Commission should develop a single standard for prominent disclosure applicable to each of these types of media.

Telephone Requests

Section 610.4(d)(6) of the Proposed Rule requires that when consumers call a telephone number appearing in an advertisement for free credit reports, the first message they hear must be the mandatory disclosure statement. We oppose the requirement that such disclosure be the first thing heard by the caller. We believe that this requirement will likely be interpreted by consumers that they have dialed an incorrect telephone number and will likely terminate the call. We do not believe that including the company's name in the communication ameliorates the potential for consumer confusion. We suggest that a better approach would be to apply the standard set forth in section 610.4(d)(7) of the Proposed Rule, which governs telemarketing solicitations. Under section 610.4(d)(7), the mandatory disclosure is required at the first mention of a credit report. This would satisfy the prominence requirement of Section 205 while serving as a workable standard for companies.

Telemarketing Solicitations

Under section 610.4(d)(7) of the Proposed Rule, the mandatory disclosure is required at the first mention of a credit report. Consistent with the purpose of Section 205, we believe that the disclosure should be required only at the first mention of a <u>free</u> credit report. If no mention is made that the credit report is free, we see little authority for the Commission to require that companies make the disclosure.

Finally, we note that the word "for" is missing from the disclosure contained in section 610.4(d)(7). We believe that the language of the disclosure should be conformed to that of other disclosures to read as follows:

> This is not the source for the free credit report provided *for* by Federal law. (Emphasis added)

* * * *

We appreciate the Commission's consideration of our comments.

Sincerely yours,

Gilbert T. Schwartz