DLA PIPER

DLA Piper LLP (US)
500 Eighth Street, NW
Washington, DC 20004
www.dlapiper.com

Thomas M. Boyd
tom.boyd@dlapiper.com
T 202.799.4361
F 202.799.5361

Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS
of
NATIONAL BUSINESS COALITION FOR E-COMMERCE AND PRIVACY

FREE ANNUAL FILE DISCLOSURES RULEMAKING -- COMMENT
Rule No. R411005

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Washington, DC 20004
www.dlapiper.com

Thomas M. Boyd
tom.boyd@dlapiper.com
T 202.799.4361
F 202.799.5361

YOUR FILE NO. R411004

December 8, 2009
VIA EMAIL

Katherine Armstrong
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comments on Implementation of Sec. 205 of the Credit CARD Act

Dear Ms. Armstrong:

The National Business Coalition for E-Commerce and Privacy (the "Coalition") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM")to implement Section 205 of the Credit CARD Act ("Act") requiring disclosures in advertisements for free credit reports.[1] The Coalition is comprised of sixteen brand name companies [cite to a list of members] concerned about freedom of commercial speech and the practical workability of public policy initiatives to regulate E-Commerce and privacy. Each member company is deeply invested in its brand, and each is equally dedicated to protecting consumers from identity theft and fraud, as well as protecting the privacy and the security of data that pertains to its current or future customers. These companies take a back seat to no one when it comes to protecting consumers from identity theft and fraud, and acting openly and unambiguously when marketing their products and services.

The Coalition is deeply concerned that the Commission's proposed rulemaking lacks an evidentiary foundation, would unconstitutionally shunt aside both commercial and non-commercial speech, and raises serious precedential issues that need to be addressed. We therefore urge the Commission to modify its Final Rule in a number of places so that it can achieve the important statutory goal of providing consumers with "prominent" disclosures of their right to obtain a free annual credit report pursuant to federal law , as distinct from offerings that provide a free credit report with other commercial

services, such as credit monitoring, without excessively and unnecessarily regulating and burdening Internet advertising.

We wholeheartedly agree with Congress' and the Commission's goal of protecting consumers from deceptive marketing that misleads them into believing that they are receiving the free federally required annual credit report guaranteed them under the Fair and Accurate Credit Transaction Act of 2003 (the FACT Act). Furthermore, we support requiring clear and conspicuous and proximate disclosures of the difference between privately offered plans that bundle a consumer report and the free government-mandated report. We also support a number of provisions of the proposed rule which fulfill this goal in an appropriately tailored way, including barring sites from requiring consumers to register or to purchase something else in order to obtain the annual file disclosure.

However, we question the underlying premise of the proposed rule -- namely, that consumers are so "confused" and "distracted" by current advertising practices that excessive obligations of the kind imposed by this proposed rule are necessary. Apart from the fact that the entities that create the reports, by virtue of the FACT Act, are obliged to provide them free of charge to consumers, and do so without compensation of any kind for the revenue lost as a result of that mandate, the Commission cites only anecdotal news coverage of consumer complaints as evidence to support its claims of consumer confusion and distraction. Nowhere in the proposed rule is there any legally sufficient or admissible evidence that the confusion and distraction the NPRM claims actually occurs. In our judgment, before the Commission takes steps that effectively negate the capital investment of covered firms, it needs to generate clear and demonstrable evidence that there is a severe problem in need of such dramatic steps. Such evidence has not been presented in this case.

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[1] 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. 52,915 (Oct. 15, 2009).

Moreover, protecting consumers from deception by ensuring that all entities which advertise access to free reports provide a prominent disclosure in line with the FTC v. Consumerinfo.com Stipulated Final Judgment would provide a much needed level playing field among competitors. This is very different than censoring both commercial advertising and non-commercial communications on sites that offer access to credit reports and to other services that advance financial literacy and help to protect consumers from identity theft.

We urge the Commission to rethink the NPRM's assumption that all other messages on a Website offering a free credit report be suppressed until after a consumer receives a notice that they are entitled to a free annual disclosure under federal law. . The proposed approach assumes that clear, conspicuous and proximate disclosures in this area are inadequate to avoid consumer deception, an approach diametrically opposed to the FTC's long-standing *dot.com disclosures* principles and to a long line of FTC precedent interpreting the meaning of the term "prominently."

This huge and unjustified leap in interpreting the basis for the Commission's authority in this rulemaking would have serious consequences. Its use of widely disparate type sizes, while consistent with the Pay Per Call Rule, is less justified in this instance because its effect would be to deny consumers ready access to important information about identity theft and to non-confusing, clearly differentiated commercial speech about products and services that further financial literacy and help protect against identity theft and fraud.

What is more, no hyperlinks to the sites of companies that have invested in creating and maintaining the site would be allowed. This, we believe, is inconsistent with the very words of the statute. Section 205(a) requires that "any advertisement for a free credit report in any medium shall prominently disclose . . . that free credit reports are available under federal law." The purpose here is quite clear, and it is an unjustified overreach on the part of the Commission to then mandate that any such advertisement

must now have a separate "landing page" that effectively eviscerates the ability of the advertiser to promote any other related product or service.

This "landing page" requirement applies to all commercial Internet websites that advertise the provision of a free credit reports to consumers, and the proposed rule restricts the advertiser from providing any meaningful information to the consumer other than how to reach the annual credit report official site and a much smaller and less compelling link to the sponsoring company's website would be available. This is a clear and impermissible restraint on commercial speech and non-commercial speech (all messages are banned) as well as a viewpoint-based restriction on expression on the NPRM's single landing page in mandating different-sized text for the government approved message versus the private sector message.

As noted above, the statutory language of Section 205 speaks only of "prominent", not "unavoidable" notice, *compare* 15 U.S.C. § 1681j(g)(1) *with* NPRM at 24. For Internet website disclosures, Section 205 authorized the Commission to choose between disclosures "on the advertisement or the website on which the free credit report is made available." § 205(b)(2)(B). Nothing in the statute gives the Commission the right to mandate the creation of this unique and unprecedented landing page. Nor is there any clear precedent for this requirement, of which Congress could have been aware. Even Senator Carl Levin's (D-MI) floor statement, which was added to the Record after the fact and was not made before the Senate when Members actually voted on the amendment, stated: "I want to be perfectly clear . . . that this provision is intended to allow the FTC to require disclosure [1] on an Internet ad, [2] on the website to which the ad is linked, [3] on the 'home' website of the company advertising 'free' credit reports, or on any combination of the three." 155 Cong. Rec. S6178 (June 4, 2009) (statement of Senator Levin). Nowhere is there any indication that the Commission has the

authority to compel speech in the form of a special landing page on which the government dictates all of the content.

Given the serious First Amendment implications of delaying both commercial and non-commercial speech and of compelling government approved speech on a private website while barring the site from saying anything else, *cf. Wooley v. Maynard*, 430 U.S. 705 (1977), the Commission should moderate its position when drafting a final rule. Indeed, it is a core principle of statutory construction to avoid interpreting statutes in the sort of aggressive manner adopted by the NPRM where the interpretation would create a serious First Amendment issue.[2] Banning commercial or other speech until after a consumer actually receives a disclosure about the annual credit report provided under federal law is far more than a routine time, place and manner restriction. In the context of Internet web browsing, the consumer will be done with a transaction and away from the website in question before any advertising or other advertising can be displayed. By then, the audience is gone. Thus, notwithstanding the NPRM's assertions that the restrictions do not prevent truthful advertising and the marketing of products and services once the consumer has obtained the disclosure, this restriction is clearly not "narrowly tailored," consistent with the requirements of the Supreme Court's commercial speech test, especially given the obvious availability of the disclosures specifically mentioned by Congress in lieu of the "single landing page."

Under FACTA, the government required the maintenance of the centralized source website by private sector entities. The government may offer its own free credit report website paid for with government funds. However, it cannot force private sector entities to erect and pay for such sites and, at the same time, prohibit them from offering, in a timely manner, prominently distinct commercial and non-commercial speech that is relevant to consumers seeking government-mandated free credit reports.

Finally, we are concerned that the sort of micro-management reflected in the NPRM, and upon which we have commented, would set a troubling precedent that invites abuse. For example, future rules proposed by the Commission might be so bold as to differentiate between which products and services Internet advertisers and website owners might choose to prioritize or market, citing as a basis the argument that consumers might be confused about the availability of a government-preferred product. It is not enough to presume, anecdotally, that consumers are confused and distracted, and then bootstrap that presumption as a basis for far-reaching and potentially counterproductive regulation when a narrower approach specifically set forth in the statute would suffice. The adoption of Section 205 was not an open invitation for the Commission to abridge commercial speech, or to intrude on private property to the detriment of its owners. The goals of section 205 can be achieved effectively by less draconian steps, and we hope that in reviewing these comments, as well as others it receives on this point, the Commission fully appreciates the shaky statutory and constitutional grounds and dubious precedent involved in the single landing page and related requirements discussed in these comments.

Very truly yours,

DLA Piper LLP (US)

Thomas M. Boyd
Counsel to the National Business Coalition

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[2] *See Peretz v. United States*, 501 U.S. 923 (1991) (holding that clear evidence of Congress' intent is necessary before magistrates may take on a role that raised a substantial constitutional questions).