



Leading the Marketing Community

December 4, 2009

Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex T)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: "Free Annual File Disclosures Rulemaking, Rule No. R411005"

Dear Mr. Secretary:

The Association of National Advertisers (ANA) appreciates the opportunity to provide these comments on the Notice of Proposed Rulemaking on amendments to the Commission's Free Annual File Disclosures Rule, 16 CFR Part 610.

Founded in 1910, the Association of National Advertisers (ANA) leads the marketing community by providing its members with insights, collaboration and advocacy. ANA's membership includes 350+ companies with 9,000 brands that collectively spend over \$250 billion in marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote and protect all advertisers and marketers. More information is available at www.ana.net

We appreciate the efforts of the Commission to provide consumers with more clear information about how they can obtain the free annual file disclosures from the nationwide consumer reporting agencies (CRAs) through the single centralized source that was created under the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act). We understand that there has been some confusion between the rights of consumers under the FACT Act and "free credit reports" that have been offered by CRAs which are tied to the purchase of some product or service from the CRA. We commend the Commission for working to bring some clarity to this complicated and confusing area.

Most of the disclosures for various media included in the proposed rule were specifically mandated by Congress in the Credit Card Accountability Responsibility and Disclosure Act of 2009.

However, we have very serious concerns about the disclosure requirements in the proposed rule for Internet ads for free credit reports sponsored by CRAs. Proposed section 610.4(d)(4) requires that any website on which “free credit reports” are offered for sale must first display on a separate landing page the following visual disclosure:

“This is not the free credit report provided by Federal law. To get your free report, visit www.AnnualCreditReport.com or call 877-322-8228.”

The landing page must contain no other information aside from the statement: “Go to [hyperlink to company’s website.]” The proposed disclosure must be visible to consumers without requiring them to scroll down the webpage. The disclosure must contain an operational hyperlink directing consumers to www.AnnualCreditReport.com that appears before the hyperlink to the advertised company’s commercial website, which must be at least twice the size as the hyperlink to the company’s website. Finally, the proposed rule provides that the landing page must occupy the full computer screen and that no other information, graphics or materials may be shown until the consumer has affirmatively selected one of the two hyperlinks.

We believe that these disclosure requirements for Internet ads go far beyond the intent of Congress in adopting the Credit CARD Act of 2009. They go far beyond any disclosure requirements ever proposed by the Commission. They would set a very dangerous precedent for the regulation of online advertising in general. Finally, we believe the proposed rule for Internet ads raises serious First Amendment concerns. We strongly urge the Commission to reconsider and adopt disclosure rules for Internet ads that restrict less speech.

The Proposed Rule Exceeds Congressional Intent

Section 205(2)(B) of the Credit CARD Act directs the Commission to promulgate a rule “for advertisements on the Internet [that] shall include whether the disclosure . . . shall appear on the advertisement or the website on which the free credit report is made available.” Rather than picking one of the two options provided by Congress, the Commission has adopted a third approach – requiring a separate landing page that imposes a barrier between the Internet user and the CRA’s website.

This goes substantially beyond the two options included in the legislation. Also, to our knowledge, the Commission has never before proposed such an overly restrictive approach. The FTC has consistently interpreted the term “prominently” to mean that a disclosure must be in close proximity to the advertising claim that it modifies. Congress specifically gave the Commission the option to require that each company that offers a “free credit report” display the required disclosure prominently on the company’s website. In fact, that is the approach the

Commission has adopted in enforcement actions in this area. Such an approach can effectively prevent consumers from being misled without an unprecedented, intrusive measure such as a separate landing page.

The Proposed Rule Would Set a Dangerous Precedent

The requirement for a separate landing page, which a consumer must view before accessing the marketer's message, would set a very dangerous precedent for the regulation of online advertising for all other products and services. The financial impact of this requirement in this narrow industry may be relatively small. However, we are very concerned about the huge potential impact that could result if the Commission were to impose a similar disclosure regime for ads for other products and services that appear online.

Advertising is a critical funding source which helps provide the vast array of online content that consumers want. According to the Interactive Advertising Bureau (IAB), there was \$23.4 billion spent on advertising and paid search on the Internet in 2008. To put that in perspective, the Internet today is a bigger advertising medium than radio or outdoor and about the same as consumer magazines.

Requiring a separate landing page for online ads where disclosures are necessary could become so intrusive that it would drive both consumers and marketers away from the Internet, thereby diminishing the flow of ad dollars into this promising media channel. Such a result would be particularly counterproductive given the current economic challenges facing many companies.

The Proposed Rule Raises Serious First Amendment Concerns

Advertising has substantial protection under the First Amendment. Under the commercial speech test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, any government restriction on truthful advertising must directly and materially serve an important governmental interest without restricting speech more extensively than necessary to serve that interest.

We believe that the proposed rule for Internet disclosures raises several serious First Amendment concerns. First, by requiring a separate landing page, the proposal singles out Internet ads for "free credit reports" for very different regulatory treatment than Internet ads for any other product or service. In addition, the proposed rule treats Internet ads for "free credit reports" differently than similar ads in other media forms. While print ads may show the required disclosure in half the type size as the advertising message, the online disclosure must be twice the size of the commercial hyperlink.

Finally, the proposed rule would essentially force the Internet ads from CRAs to promote the centralized website, www.AnnualCreditReport.com, rather than their own commercial websites. Companies would be required to present a message on a separate landing page, using the detailed formatting restrictions mandated in the proposed rule, which attempts to divert consumers from commercial websites and steer them to the centralized website that the Commission apparently prefers.

Congress specifically gave the Commission two options for disclosures in online ads that would effectively prevent consumers from being misled. Under those circumstances, we believe the proposed rule for Internet disclosures restricts speech far more extensively than necessary to serve the government's interest. We urge the Commission to adopt one of the options specifically included in the legislation.

Thank you for your consideration of our views.

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