Comments of the

National Consumer Law Center
(On behalf of its Low-Income Clients)

and

Consumer Action
Consumers Union
Consumer Federation of America
National Association of Consumer Advocates
National Community Reinvestment Coalition
Sargent Shriver National Center on Poverty Law
U.S. Public Interest Research Group

Regarding

Notice of Proposed Rulemaking
Free Annual File Disclosures, Rule No. R411005
Amendments to Prevent Deceptive Marketing of Credit Reports

Federal Trade Commission
16 CFR Part 610

RIN 3084-AA94

December 7, 2009

These comments are submitted by the National Consumer Law Center (on behalf of its low-income clients),[1] and Consumer Action,[2] Consumer Federation of America,[3]

[1] **The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (6th ed. 2006) is one of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Todd Blodgett, Consumer Fellow, and Chi Chi Wu, editor of NCLC's *Fair Credit Reporting* treatise, and are submitted on behalf of the Center's low-income clients.

[2] **Consumer Action** (www.consumer-action.org) is a national non-profit education and advocacy organization that has served consumers since 1971. Consumer Action (CA) serves consumers nationwide by advancing consumer rights in the fields of credit, banking, housing, privacy, insurance and utilities. CA offers many free services to consumers and communities. Consumer Action develops free consumer education modules, training, and multi-lingual materials for its network of more than 9,000 community based organizations. The modules include publications in Chinese, English, Korean, Spanish and Vietnamese.

Consumers Union,[4] National Association of Consumer Advocates,[5] National Community Reinvestment Coalition,[6] Sargent Shriver National Center on Poverty Law,[7] and U.S. Public Interest Research Group.[8] They address the Federal Trade Commission's October 15, 2009 Notice of Proposed Rulemaking implementing Section 612 of the Fair Credit Reporting Act, as added by the Credit Card Accountability Responsibility and Disclosure (CARD) Act. 74 Fed. Reg. 52,915 (October 15, 2009). The proposed rule also amends Free Annual File Disclosures Rule, 16 C.F.R. Part 610.

We commend the FTC for issuing the proposed rule, much of which we strongly support. We also appreciate that the FTC is proposing to amend the Free Annual File Disclosures Rule to minimize confusion and exploitation of consumers attempting to access to their free annual credit report. We also commend the FTC for recognizing that consumer reporting agencies (CRAs) use deceptive and confusing advertising to trick consumers into purchasing goods or services – such as credit monitoring services – that the consumers were not intending to buy. The proposed amendments are a good first cut at restricting abusive advertising practices and we generally support them. We offer the following comments.

I. OPERATION OF THE CENTRALIZED SOURCE (16 C.F.R. § 610.2)

The proposed rule amends section 610.2, which concerns operation of the centralized source. We generally support the FTC's proposed amendments and make the following suggestions.

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[3] **Consumer Federation of America** (CFA) is a nonprofit association of some 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through research, advocacy, and education.

[4] **Consumers Union** of United States, Inc., publisher of *Consumer Reports*, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications have a combined paid circulation of approximately 7.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and services, fees, and noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[5] The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[6] The **National Community Reinvestment Coalition** is an association of more than 600 community-based organizations that promote access to basic banking services including credit and savings, to create and sustain affordable housing, job development and vibrant communities for America's working families.

[7] The **Sargent Shriver National Center on Poverty Law** is a national law and policy center that provides national leadership in identifying, developing and supporting innovative and collaborative approaches to achieve social and economic justice for low-income people.

[8] **U.S. PIRG** serves as the federation of state Public Interest Research Groups, which are non-profit, non-partisan public interest advocacy organizations.

A. The FTC Should Adopt a Complete Ban on Advertising on the Centralized Source.

Proposed section 610.2(g)(1) adds a new restriction that prohibits advertising on the centralized source until after the consumer has obtained his or her free consumer report. This prohibition is in addition to the pre-existing restriction on advertising that interferes or detracts from the purpose of the centralized source. Instead of the proposed amendment, however, the rule should ban advertising and marketing on the centralized source altogether.

The FTC chose not to restrict marketing on the centralized source when it first promulgated section 610.2(g), believing that the goal of preventing advertising that misleads or confuses consumers could be served by a less restrictive means than an absolute ban. 69 Fed. Reg. 35,467, 35,486 (June 24, 2004). Unfortunately, this has not proven to be true. We urge the FTC to reconsider this decision and amend section 610.2(g) to completely prohibit marketing and advertising on the centralized source.

The purpose of the centralized source is to provide consumers with free consumer reports, not to provide a means for CRAs to send a barrage of advertising and marketing. As the FTC itself admits, permitting CRAs to advertise on the centralized source has confused and frustrated consumers, who have felt compelled to purchase products and services as a condition of obtaining their consumer reports. 74 Fed. Reg. at 52,917, n. 20. Thus, the experience of the past five years has shown that consumers are being mislead and distracted by advertising on the centralized source, and that such advertising has pressured them to purchase additional products they neither need nor want.

With the exception of credit scores,[9] there is no statutory mandate that CRAs be permitted to market products and services on the centralized source. CRAs can rely on other advertising and marketing channels to sell their products, and should not be entitled to aggressively market to consumers trying to obtain a *free* credit report as mandated by federal law. Furthermore, since proposed section 610.2(h)(i) would forbid direct hyperlinks to commercial sites in any event, a ban on advertising and marketing would not unfairly prejudice the CRAs. They may instead rely on other marketing and advertising tools.

B. The FTC Should Clarify the Definition of "Obtained" in Proposed Section 610.2(g)(1).

In the alternative, we support the FTC's proposal to prohibit advertising until after the consumer has received his or her consumer report. However, proposed 610.2(g)(1)(ii) should be revised so that advertising is only permitted after the consumer actually has the report in hand.

[9] 15 U.S.C. § 1681g(a)(6)(requiring CRAs inform consumers about the availability of credit scores at the time consumer reports are provided).

As proposed, section 610.2(g)(1) equates "obtained" with "mailed" for telephone and mail requests, and "delivered " for Internet requests. We have no problem with the provision for mailed consumer reports. However, for Internet requests, section 610.2(g)(1)(ii) should be revised so that "obtained" means "received." Thus, the proposed rule should not permit marketing or advertising until the consumer has actually received the consumer report in his or her email inbox or has downloaded the report.

If "obtained" is instead defined to mean "sent," the following situation could easily arise: the consumer clicks on a confirmation button, the consumer report is sent or made available for download, and the centralized source immediately displays a confirmation page filled with high-pressure advertising that urges the consumer to purchase additional products and services. In reality, the consumer has not yet obtained the consumer report – it merely resides in an email in-box, or is waiting to be downloaded. It would be better to permit the marketing of additional products only after *receipt* by the consumer, so that there is a clear separation in time and activity that gives the consumer adequate chance to reflect on whether he or she really wants to purchase other products.

II. PREVENTION OF DECEPTIVE MARKETING OF "FREE" CREDIT REPORTS (16 C.F.R. § 610.4)

Proposed Section 610.4 implements Section 612(g) of the FCRA, as added by Credit CARD Act. We support many aspects of the proposed rule, including the proposed wording of the disclosures for Internet and print advertisements. We especially support the requirement for a separate "landing page" for Internet websites that offer a free credit report. However, we have several suggestions for improvement.

A. The Definition of "Free Credit Report" Should Not Be Limited to the Nationwide CRAs (16 C.F.R. § 610.4(a)).

Proposed Section 610.4(a) defines the term "free credit report" to mean any consumer report or file disclosure prepared by or obtained, directly or indirectly, from a nationwide CRA, as defined in Section 603(p), that is represented to be free of charge, and that is in any way tied to the purchase of a product or service. This definition is far too restrictive in two respects.

First, the proposed definition should not be limited to consumer reports from a nationwide CRA as defined by Section 603(p) of the FCRA. The statutory language at Section 612(g) is not limited to nationwide CRAs under Section 603(p), nor is there any good policy reason to limit the definition in that manner. One can easily imagine a nationwide specialty CRA, such as Choicepoint/LexisNexis or First American Registry, offering "free background" or "free tenant screening" reports as a hook for their paid products, and confusing consumers into believing this is the free report they are entitled to under Section 612(a)(1)(C) of the FCRA. While the disclosure for "free reports" from a nationwide specialty CRA would not include the mention of

www.annualcreditreport.com, it should inform consumers that "This is not the free [background or tenant screening or other] report provided by Federal law."

Second, the proposed definition should be revised to apply to any consumer report that is represented to be free of charge, and is offered "in connection" with the purchase of a product or service. The term "tied" should not be used, because it is too closely associated with the antitrust concept of "tying." As of course the FTC well-knows, the practice of tying occurs when the seller conditions the sale of one product or service on the customer's agreement to take a second product or service.[10] A CRA's scheme of luring consumers with "free" credit reports to sell them credit monitoring services should not be required to meet the formal definition of "tying" before it is covered by the protections of Section 610.4. For one thing, the two products are not technically being "sold" together, because one is free. In addition, CRAs often permit the consumer to cancel the credit monitoring service without charge and keep the free credit report, which might take the CRAs' practices outside the realm of "tying".

Thus we proposed that the definition of "free credit report" be changed to:

> For purposes of this section, "free credit report" means a consumer report or file disclosure that is prepared by or obtained, directly or indirectly, from a nationwide or nationwide specialty consumer reporting agency (as defined in section 603(p) or 603(w) of the Fair Credit Reporting Act); that is represented, either expressly or impliedly, to be available to the consumer free of charge; and that is, in any way, offered in connection to the purchase of a product or service.

B. There Should be Location Requirements for Disclosures for Printed Advertisements (16 C.F.R. § 61o.4(d)(3)).

Proposed section 610.4(d)(3) requires a disclosure for printed advertisements that is, at a minimum, one-half the size of the largest letter or numeral used in the name of the website or telephone number where consumers are referred to receive the advertised "free" credit report. However, the proposed rule does not require *where* the disclosure must be placed.

For single page advertisements, such as those in a newspaper or magazine, the disclosure should be placed near the most prominent listing of the website or telephone number. For multi-page advertisements, such as those often found in mailed solicitations, it is absolutely critical that a location be specified. Otherwise, the CRA could bury the disclosure on the back of page 3 in a 4 page solicitation. Using the example of disclosures required in credit card solicitations, we recommend that the disclosure be placed near the most prominent listing of the website or telephone number on the front side of the first page of the principal promotional document. *See, e.g.*, Official Staff Commentary Regulation Z, 12 C.F.R. § 226.16(g)-4.

[10] *See* Federal Trade Commission, *Exclusionary or Predatory Acts: Tying the Sale of Two Products*, at http://www.ftc.gov/bc/antitrust/tying_sale.shtm.

C. Disclosures for Internet Websites (16 C.F.R. § 610.4(d)(4))

Proposed section 610.4(d)(4) requires that a website offering "free credit reports" feature a prominent visual disclosure on a separate landing page. We strongly support this proposed disclosure and believe that it is an effective measure to inform consumers that they may obtain their free report under federal law from the centralized source. In fact, this disclosure is so effective, the FTC should require that it be displayed on the page where the consumer actually confirms his or her purchase of a CRA's proprietary goods and services.

For many Internet transactions, the process of purchasing goods and services consists of several individual Webpages that collect different types of information – *e.g.* Page 1 collects personal information, Page 2 collects credit card information, Page 3 contains the terms and conditions, etc. There is usually a final page, where the consumer is required to click a button labeled "I Agree" or "Purchase" or "Confirm" to complete the purchase.

The disclosure required by Section 610.4(d)(4) should be displayed immediately prior to this final page, at the point where the consumer actually purchases a CRA's proprietary goods or services. Requiring this disclosure will ensure that the consumer has a chance to actually switch to the centralized source to obtain a free credit report. Otherwise, the impact of an initial disclosure on a separate landing page could easily be diluted by virtue of the fact that the consumer is forced to navigate through several more pages of advertising, information collection, and other content after seeing the required disclosure.

The proposed rule should have a goal of placing the disclosure in multiple locations so as to prevent concealment of the consumer's right to obtain a free consumer report from the centralized source by resorting to clever hyperlinking or other manipulation of the Internet's decentralized structure. This serves a similar purpose as requiring multiple disclosures for program-length advertisements.

D. Disclosures for Internet-hosted Multi-media Advertising (16 C.F.R. § 610.4(d)(5))

We generally support the required disclosure at proposed section 610.4(d)(5) for Internet-hosted multi-media advertisements. However, we urge the FTC to require that the visual component of the disclosure be displayed for the entire duration of the advertisement. This will ensure that a disclosure is not simply flashed upon the screen for a fraction of a second or otherwise manipulated. Such a requirement is necessary because Internet-hosted multi-media advertising encompasses formats with widely varying durations.

Proposed section 610.4(d)(5) should be contrasted with proposed section 610.4(d)(1), which governs disclosures for television advertisements. The latter subsection imposes a minimum duration of four seconds for visual disclosures. A minimum of four seconds is sensible for television, where advertisements typically run

for thirty seconds or more. However, Internet-hosted multi-media advertising is more varied: some advertisements are static pictures, while others contain moving images and a variety of hyperlinks, and others contain video. The duration can be very long or extremely short.

It is thus important that the visual component of the disclosure be displayed for the duration of the advertisement. For example, consider an embedded video advertisement located on the bottom of an Internet page. If the advertisement displays the disclosure for four seconds after the page is loaded, but the consumer only later scrolls down, the consumer will not see the disclosure.

As another example, consider a lengthy advertisement hosted on a site such as youtube.com. If the disclosure is displayed only at one point during the video, *e.g.*, only at the end, there is a good chance that the consumer will not see it. While proposed section 610.4(c)(4) would require that a "program-length" Internet-hosted multi-media advertisement provide the disclosure at the beginning, middle, and end, it is unclear what constitutes a "program-length" advertisement. Is a 5 minute Youtube video considered "program-length"? Thus, an Internet-hosted multi-media advertisement could be long, but not qualify as "program-length," and thus not be covered by the requirement for multiple disclosures.

For this reason, proposed section 610.4(d)(5) should be revised to require that the visual component of the disclosure for Internet-hosted multi-media advertisements must be displayed for the entirety of the advertisement.