

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

**COMMENTS of the INTERACTIVE ADVERTISING BUREAU
FREE ANNUAL FILE DISCLOSURES RULEMAKING, RULE No.
R411005**

December 7, 2009

I. Introduction

The Interactive Advertising Bureau (“IAB”) appreciates the opportunity to submit these comments on the Federal Trade Commission’s (“Commission”) Notice of Proposed Rulemaking (“NPRM”) to implement Section 205 of the Credit Card Accountability, Responsibility and Disclosure Act (“Credit CARD Act” or “Act”) requiring disclosures in advertisements for free credit report offers.¹

Founded in 1996, the IAB (www.iab.net) represents over 375 leading companies that actively engage in and support the sale of interactive advertising, including leading search engines and online publishers. Collectively, our members are responsible for selling over 86% of online advertising in the United States. The IAB educates policymakers, marketers, agencies, media companies and the wider business community about the value of interactive advertising. Working with its member companies, the IAB evaluates and recommends standards and practices and fields critical research on interactive advertising. The IAB is committed to promoting best practices in interactive advertising, and is a core member of the coalition that released cross-industry self-regulatory principles for online behavioral advertising in July 2009.

II. Summary of Comments

Although the proposed rule is limited to advertisements for free credit reports, the IAB is concerned that the proposed rule sets a dangerous precedent for highly intrusive regulation of online advertising. The proposed landing page creates a governmental barrier that impedes a

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).

commercial website's communication with interested consumers who have requested more information. The Commission provides little assurance that its unprecedented proposal is limited to the circumstances of this specific rule, leaving open the possibility that these rigorous requirements will be extended to other areas where notices or disclaimers are required.

The IAB also objects to the Commission's proposal to single out Internet advertisements for more stringent regulation than advertisements in other media. The Commission does not offer any justification for this differential treatment of online advertising. Moreover, as a practical matter, the IAB believes that the separate landing page will frustrate and confuse consumers rather than increasing the effectiveness of the disclosure.

The proposed rule's intrusive and confusing approach to online advertising is a significant concern because it threatens the Internet's prevailing economic model. Consumers value and rely upon the vast quantities of free content published over the Internet. Unlike other types of publishing, the Internet has not lent itself to subscription-based revenue models. As a result, advertising has truly become the lifeblood of the Internet. While the IAB agrees that online advertising should not be false or deceptive, it is also critical for the Commission to regulate with care in this arena in order to preserve the benefits of the Internet for consumers.

Finally, the proposed rule raises significant constitutional issues because the rule would limit truthful commercial speech more than is needed to prevent consumer deception.

III. The Proposed Rule Is Unnecessarily Intrusive, Setting a Dangerous Precedent for Regulation of Online Advertising

The IAB is concerned that the Commission's proposed rule would set a dangerous precedent for aggressive regulation of online advertising. Section 205 of the Credit CARD Act provides that any advertisement for a free credit report in any medium shall disclose where free credit reports are available under federal law, and directs the Commission to issue a rule that sets out specific wording to be used in such advertisements.² For Internet advertisements, Congress further instructed the FTC to determine

² Pub. L. 111-24.

“whether the disclosure required . . . shall appear on the advertisement or the website on which the free credit report is made available.”³

The Commission’s proposed rule establishes three significant requirements for Internet advertisements for free credit reports: (1) the disclosure must appear on a separate landing page that (2) appears before the visitor accesses the page offering the free credit report, and that (3) displays the disclosure in font at least twice the size of the hyperlink to the company’s website. This separate landing page would display only two items: the disclosure text with a link to www.AnnualCreditReport.com and a link to the commercial website that the consumer requested. No other information, material, or graphics are permitted, yet the consumer cannot leave this page unless and until he affirmatively chooses between two websites that he has not yet seen.

While the IAB agrees that advertising should not be false or deceptive, the proposed rule goes too far. We are not aware of any other instance in which the Commission has required an online advertising disclosure to appear on a separate webpage, prior to the advertising claim to which the disclosure refers. Under the proposed rule, the government literally interposes its own message as a barrier to a company’s response to a consumer’s request for information. The Commission does not provide any evidence to show that this unprecedented separate landing page will be more effective than alternative disclosure formats. Indeed, the landing page requirement is a radical departure from the Commission’s longstanding approach to online advertising disclaimers. The IAB therefore believes that the proposed rule’s treatment of Internet advertising far exceeds what is necessary to ensure that the disclosure effectively modifies the advertising claim.

Of particular concern to the IAB is the probability that the separate landing page and larger text will convey to the consumer a message that the disclosure is more important than the commercial message, and that the government-mandated website should be preferred over the commercial website. The NPRM states that the free credit report disclosure should appear prior to the commercial website because the “relevant time” is when “consumers seek to exercise their federal right to obtain free annual file disclosures online.”⁴ It is troubling that the

³ *Id.* at Section 205.

⁴ 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, 52,921 (Oct. 15, 2009).

Commission ignores the likelihood that consumers who request a commercial website are, in fact, seeking to obtain the commercial products that were presented in the initial advertisement and that are not available from the government-mandated website. This basic premise is the foundation of online advertising, yet the Commission appears to substitute its own judgment and expectations in place of consumers' demonstrated intent.

We are concerned that this rule, if finalized, could be used as a basis to impose separate landing page requirements in other areas of advertising where disclosures, notices, or disclaimers are required. Such a regulatory shift would not be desirable for consumers or businesses, nor has the Commission shown that it would be effective.

IV. The Proposed Rule Singles Out Online Advertising for Stricter Regulation

It is especially problematic that the Commission's requirements for online advertising are more stringent than the proposed requirements for advertisements in other media. The Commission's proposed rule singles out online advertising in two respects. First, the separate landing page means that Internet disclosures will be more intrusive, relative to the commercial message, than the disclosures in other media. Second, the rule's type size requirements for online advertisements exceed the requirements for print advertisements.

It is evident that disclosures must be presented differently in various advertising media, simply due to the nature of those media. However, the Commission's proposed rule exploits the unique capabilities of the Internet to require a disclosure that is, in effect, more prominent than the required placement for other media. Under the proposed rule, disclosures in television, radio and print formats would generally be presented along with the advertising claims, not separately and beforehand. Moreover, in no other medium would the consumer be delayed at the disclosure "unless and until the consumer has affirmatively selected" one of the hyperlinks on the disclosure webpage.⁵

In addition, the Commission's proposed rule clearly treats Internet disclosures differently than print advertisements on the specific, and readily comparable, metric of text size. For print advertisements, the required disclosure must be "at minimum, one-half the size of the largest"

⁵ *Id.* at 52,927.

text showing contact information for the commercial source.⁶ In contrast, for multi-media Internet advertising, the disclosure must be at least the same size as the commercial contact information. The landing page required for other Internet advertisements must show the disclosure “in type at least *twice the size*” of the commercial hyperlink.⁷ The Commission bases each of these proposed mandates on the statutory requirement that disclosures be made “prominently” in all media.

The IAB is extremely concerned that the proposed rule implies that advertising disclosures must be more intrusive online than in other media, in order to qualify as “prominent” or to be effective in preventing deception. The IAB is not aware of any evidence that would support such a position, and the Commission provides no explanation to support its differential treatment of online advertising.

V. The Proposed Disclosure Format Will Confuse Consumers

As a practical matter, we do not agree with the Commission that the proposed landing page will enlighten consumers; on the contrary, we believe that it will likely confuse and annoy consumers. Although the landing page may technically be served by the regulated company, the consumer will experience the disclosure page as separate from the destination website. The Commission also does not appear to consider the fact that consumers with an ongoing relationship with a commercial entity are likely to return repeatedly to the commercial website, only to be subjected unnecessarily to the same delay and annoyance.

This problem is heightened by the Commission’s requirement that the landing page must not include any information, graphics, or material besides the two required hyperlinks and the prescribed text. The consumer will not receive any explanation or comparison of the difference between the two websites presented, and will have few or no clues to identify the disclosure page as related to the initial advertisement or belonging to the destination website. At worst, the consumer may fear that she has encountered a scam, and simply abandon her effort to obtain a credit report.

⁶ *Id.*

⁷ *Id.* (emphasis added)

VI. If Extended to Other Online Advertising, the Restrictions in the Proposed Rule Would Threaten the Internet Economic Model

The Commission contends that its unprecedented requirements are justified because the Commission has received consumer complaints and pursued enforcement actions in this arena. This rationale provides little distinction between free credit report offers and other advertising claims. Thus, the IAB is greatly concerned that the intrusive requirements in the proposed rule could be extended to other advertising disclosures. This outcome would transform the world's Internet experience irrevocably, in ways detrimental to businesses and consumers alike.

Advertising is the lifeblood of today's Internet economy. Countless website publishers have found that advertising is the best way to support their production of high-quality content. In turn, consumers have come to expect and depend upon the free content sustained by advertising revenue. The advertising-supported model also protects consumer privacy and streamlines Internet use because there is no need to require registration or collect subscription fees.

While the IAB agrees that deceptive or false advertising is not acceptable, the advent of requirements like the proposed rule would threaten the prevailing Internet economic model of free advertising-supported content. Quite simply, consumers would quickly become frustrated and lose interest if forced to navigate disclosures before viewing a website that they have affirmatively requested. This type of disclosure is an even greater imposition on an existing customer who returns to a commercial website repeatedly, and would be met with the same delay and inconvenience on each occasion.

VII. The Proposed Rule Is Constitutionally Suspect.

Finally, the proposed restrictions on online advertisements raise significant constitutional issues. Commercial speech, including truthful advertising, is protected under the First Amendment to the U.S. Constitution. The government may restrict commercial speech that is not misleading, or that is only potentially misleading, only if "the restriction directly and materially advances a substantial state interest in a manner no

more extensive than necessary to serve that interest.”⁸ The proposed rule exceeds these constitutional limits.

In particular, the proposed rule restricts more truthful speech than is necessary to serve the Commission’s stated governmental interest. As discussed above, the rule places unprecedented limitations on certain advertisers’ ability to communicate with consumers who request information from those companies. The Commission provides no evidence to show that the requirements in the proposed rule are essential to meet the Commission’s policy goals. Of particular concern to the IAB, the Commission has not demonstrated what governmental purpose is served by burdening online speech more than other forms of commercial speech. Indeed, as discussed above, the IAB believes that the unusual online disclosures demanded by the Commission would be more likely to bewilder consumers.

Moreover, the Commission seeks these excessive restraints on speech despite the fact that Congress clearly contemplated, and the Commission has previously approved, an alternative measure that would restrict less speech – namely, requiring disclosures on the commercial website’s homepage.⁹ The Commission’s prior practice in this area demonstrates that the proposed restrictions go beyond what is needed to prevent deception. Although the IAB agrees that advertising should not be deceptive, the Commission may not unconstitutionally burden truthful speech in its quest for this goal.

⁸ *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 566 (1980).

⁹ Stipulated Final Judgment and Order at 9, *FTC v. Consumerinfo.com., Inc.* (C.D. Cal. Aug. 15, 2005) (FTC File No. 022-3263).