



STATE OF FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

December 7, 2009

VIA OVERNIGHT DELIVERY

The Honorable Donald S. Clark, Secretary
Federal Trade Commission
Room H-135 (Annex Q)
600 Pennsylvania Ave, NW
Washington, DC 20580

RE: "Free Annual File Disclosures, Rule No. R411005"
AMENDMENTS TO RULE TO PREVENT DECEPTIVE MARKETING
OF CREDIT REPORTS AND TO ENSURE ACCESS TO FREE
ANNUAL FILE DISCLOSURES

Dear Secretary Clark:

Attached are comments I am submitting in response to the FTC's Notice of Proposed Rulemaking; Request for Comment On Amendments To The Commission's Free Annual File Disclosures Rule 16 CFR Part 610, as published in Federal Register on October 15, 2009 at 74 Fed. Reg. 52915. As the chief law enforcement officer in this state, I have the primary responsibility of enforcing the laws of Florida designed to protect consumers from unfair or deceptive business practices. *See* Chapter 501, Part II, Florida Statutes (2009). I believe Floridians will benefit greatly from an amendment tightening the requirements of the Rule to reduce the occurrences of deceptive advertising of "free" credit reports. I appreciate the FTC's consideration of this matter and the opportunity to provide these comments. Please feel free to contact me if you need any further information.

Sincerely,

A white rectangular box redacting the signature of Bill McCollum.

Bill McCollum

Enclosure

Introduction:

The Florida Attorney General ("Attorney General") submits these comments in response to Notice of Proposed Rulemaking; Request for Comment On Amendments To The Commission's Free Annual File Disclosures Rule 16 CFR Part 610, as published in Federal Register on October 15, 2009 at 74 Fed. Reg. 52915. The Attorney General has the primary responsibility to enforce the laws of Florida designed to protect consumers from unfair or deceptive business practices, *See* Chapter 501, Part II, Florida Statutes (2009), and believes that the issues raised in this Notice involve matters affecting the public interest of Floridians.

Section 612 of the Fair Credit Reporting Act ("FCRA") gives consumers the right to obtain free annual credit reports from the nationwide consumer reporting agencies ("CRAs") through a single centralized source. The FCRA was amended in 2003 by the Fair and Accurate Credit Transactions Act ("FACT Act") which directed the FTC to promulgate a rule to implement the requirements of FCRA. To that end, FTC adopted the Free Annual File Disclosures Rule ("Free Reports Rule") in 2004. The Free Reports Rule requires the CRA's to establish and operate a single dedicated Internet website at AnnualCreditReport.com and provide a toll-free telephone number or postal address through which consumers may request and obtain their annual free credit report. In May of 2009, pursuant to the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act"), the Commission was directed to promulgate a rule requiring certain disclosures in the advertising of "free credit reports" to reduce consumer confusion of these products with the free report provided under the FCRA.

The Commission notes in the Supplementary Information to the Notice and Request for Comments that there has been a proliferation of confusing advertising regarding where consumers can obtain their free annual report. These advertisements often direct consumers to commercial websites operated by the CRAs and others that sell a variety of products and may mislead consumers to believe they are obtaining their free credit report when in fact they are being enrolled in a product or service for a fee. The Attorney General's Office has been investigating these practices for over 3 years and has reviewed in excess of 500 complaints and inquiries from Florida consumers relating to confusion regarding access to their free credit reports. We are also aware of approximately 10,000 complaints filed with the BBB from consumers nationwide from 2007 to 2009.

The Attorney General supports the directive from Congress which requires actions to address these misleading advertising practices and the FTC's response to this mandate. In this day of increasingly pervasive and sophisticated identity thefts and the limitations on consumers' ability to obtain credit, it is ever important for consumers to have ready access to their credit reports so that they may track the activity on their report and ensure the integrity and accuracy of information in the CRA files. Credit reports containing inaccurate accounts or derogatory information reported from fraudulent accounts can have drastic consequences for consumers, such as limiting a consumer's access to credit, insurance, and even employment. For these and other salient reasons,

the laws must ensure that consumers have ready access to their credit reports as allowed by law, without having to navigate confusing and deceptive offers that induce consumers to sign up for fee-based products in connection with their attempt to secure their free report.

With this rulemaking mandate, the FTC has a tremendous opportunity to reign in advertising abuses and to ensure that the benefit conferred by Congress is meaningful to consumers. The Attorney General, therefore, supports the FTC's efforts to utilize its rule-making authority to implement significant protections for consumers. To that end, the Attorney General submits the following comments in response to the specific amendments proposed by the FTC.

Responses to Specific Questions Posed in the Notice:

- A. The extent to which the advertising or marketing of credit products and services through the centralized source interferes with or undermines consumers' ability to obtain their free annual file disclosures, and whether the proposed limitation on delaying advertising would address this concern.

RESPONSE:

The Internet website that serves as the centralized source for consumers to request their free credit report via the Internet is annualcreditreport.com. Currently this website provides links to the nationwide CRA's: Equifax, Experian, and TransUnion. Consumers who click on the links are redirected from annualcreditreport.com to a specific CRA website. On its website, the CRA may offer the consumer access to the annual report at no cost but they also offer, during the ordering path for the free report, proprietary products and services for a fee (e.g., credit score information, identity theft protection, credit monitoring and the like) It has been reported that CRAs may require consumers to set up accounts to obtain their free reports. Many of the additional products are offered as "free trials" with a negative option obligation. Oftentimes, these offers are confused with the free credit report allowable by law. As a result, many consumers end up with paid products in lieu of or in addition to their desired "free" credit report.

The FTC's proposal to delay advertising through the centralized source, annualcreditreport.com, until after consumers receive their free reports is a marked improvement over current practices and will likely aid in providing consumers unfettered access to their free reports allowed by law. However, this fix may not resolve the problem of consumer confusion and enrollment in unwanted products. Consumers may continue to be confused by advertising which accompanies or immediately follows the transmission of the free credit report, inasmuch as the disclosures provided are often ineffective, and the advertisements are couched in potentially misleading terms of "free" trials and "no obligation" offers. By merely delaying advertising through the central source, consumers may also likely be inundated with (1) advertising for CRA products; and (2) advertising from the many entities with whom the CRAs are affiliated, including several entities that have been or are targets of enforcement actions by the states or the

FTC. Permitting advertising through the centralized source creates opportunities for the advertiser to profit from consumers' federally mandated free report, and the integrity of the centralized source would be better protected by restricting advertising on the site altogether.

- B. Whether the FTC should adopt a ban on all advertising through the centralized source, and what the benefits and costs of such a ban would be.

RESPONSE:

In the current practice, consumers have been unfairly burdened by distracting offers presented by the CRAs while attempting to order their free reports. Consumers have ended up with paid products in lieu of or in addition to their desired "free" credit report allowed by law, in many cases without intending to enroll or purchase these products. A ban on all advertising through the centralized source would offer greater protection against potential marketing abuses. This would also further the purpose of the centralized source of providing consumers with the opportunity to obtain the free credit report allowed by law. Consumers receiving free reports are advised on those reports of how to contact the CRA. Consumers can then review the websites of the CRA which provided their report and peruse available products online at their option or seek information as they see fit.

- C. Are there effective methods other than those proposed by the FTC to reduce confusing and deceptive advertising regarding "free credit reports"? How do the costs and benefits of these methods compare with those proposed by the FTC?

RESPONSE:

The FTC's proposed rule fails to consider fully the inherent confusion and potential deception which accompanies Internet domain names and fictitious names such as freecreditreport.com and hundreds of similar domain names using the words free credit report in consecutive order.¹

In addition to the FTC's proposals, the rule should also prohibit advertising "free credit reports" through business or domain names beginning with or containing the words "free credit report" to eliminate that component of consumer confusion and opportunity for deceptive advertising, which is well-documented in consumer complaints. The FTC, as explained in the Notice, and the Florida Attorney General's office in its investigation of these matters, have experienced a lengthy history of consumer confusion and harm resulting from deceptive advertising on a website with the domain name that includes

¹ A search for the search string "freecreditreport" in domain names reveals nearly 1200 active domains, without hyphens; a search for active domains, without hyphens, beginning with "freecreditreport" reveals 580 domains; Search results from domaintools.com on 10/23/09 at 6:00 p.m.

“free credit report.” Because the ability of consumers to obtain their free report is mandated by law, a prohibition on the use of these names for advertising would comport with the intent of the law.

Furthermore, the rule should be enhanced to protect consumers from deceptive advertising of free credit reports which is prolific over the Internet, including social networking websites and youtube.com. The rule stops short of addressing disclosures of price and other material terms for purported “free” reports.

Requiring the CRAs to use a landing page separate from the centralized source would aid in reducing the potential confusion that may surround the CRA’s offer to provide “free” credit reports, but the Rule should provide additional protection. In current practice, consumers who use the CRA website are still likely to be deceived or confused by offers for a free report. For example, the Experian.com website offers a purported “free” report but the offer includes a negative option obligation to enroll in an Experian product and the price term and negative option “disclosure” has not historically been clearly, prominently, or adequately disclosed before consumers begin the order process. Accordingly, to the extent that a CRA offers a “free” report as a component of a paid product, a short form price disclosure such as “\$19.95 per month” should be required to appear clearly and prominently on the homepage immediately above and superadjacent to the “click here” or “order” button. If a trial offer or negative option is offered, the price that consumers are required to pay at the expiration of the trial should be disclosed clearly and prominently on the homepage immediately above and super adjacent to the “click here” or “order” button, such as, for example: “\$19.95 per month, unless you cancel in 7 days.”

Internet search results abound with listings for purported free credit reports, that are actually provided in conjunction with a paid product, without any price disclosure in the search results or other banner ads. Requiring a price disclosure to accompany an offer for a paid product is essential to curb potentially deceptive and misleading practices that seek to capitalize unfairly on the consumer’s right to obtain a free report.

- D. Whether there are additional examples of communications or instructions that may “interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source” that the FTC should consider adding to the list of examples in proposed section 610.2(g)(3).

RESPONSE:

As an example of a proposed interfering, detracting, inconsistent, and/or undermining communications, proposed section 610.2(g)(3)(iii) provides:

Centralized source materials that falsely represent, expressly or by implication, that a product or service offered ancillary to receipt of a file disclosure, such as a credit score or credit monitoring service, is free, or

fail to clearly and prominently disclose that consumers must cancel a service, advertised as free for an initial period of time, to avoid being charged, if such is the case.

The Attorney General suggests that additional consideration should be given to this provision and the possibility for unintended consequences or interpretations. To that end, more detailed disclosure requirements beyond the cancellation requirement would clarify what is specifically expected of advertisers. FTC should consider adding disclosure requirements relating to the terms material to consumers' decision to purchase or to accept a negative option offer, including: (1) amount the consumer will be charged if they do not cancel; (2) amount and timing of recurring charges for any product or service if consumer does not cancel; (3) specific billing device that will be charged or be used in any way; (4) imposition of any preauthorization to consumers' billing device (credit or debit card) and the dollar amount of such preauthorization; (5) website through which consumer can cancel if the order is by Internet in addition to telephone, e-mail, fax or mail; and (6) date by which consumer must cancel.

- E. Whether the proposed definitions of "free credit report" and "www.AnnualCreditReport.com and 877-322-8228" are complete and accurate, and whether there are alternative definitions the FTC should consider.

RESPONSE:

The definition of "free credit report" should encompass reports tied to the purchase of a product or service as proposed, but should also specifically include trial subscriptions to make it abundantly clear that trial offers are covered.

- F. Whether the FTC's proposal for Internet-hosted multi-media advertising is sufficient to ensure that the rule would continue to cover advertising for "free credit reports" in the evolving technology marketplace.

RESPONSE:

Several video advertisements offering "free credit reports" are available on the Internet on youtube.com or other social networking websites, among other examples. Numerous advertisements are specifically designed as viral marketing to minimize the costs of advertising. Viral marketing and viral advertising refer to marketing techniques that use pre-existing social networks to send advertisements. The unique limitations on viewability of these types of advertisements, such as videos and pop-up ads and the like, and any accompanying disclosures should be considered, as these limitations can obscure disclosures or render them meaningless.

- G. When should the amendments to the Free Reports Rule go into effect, in light of the requirement for interim advertising disclosures in section 205 of the Act? Are

there particular sections of the proposed rule amendments that require more time for covered entities to comply with the proposed rule's requirements?

RESPONSE:

The rule should be effective as soon as possible and not later than the February 22, 2010, date established under the CARD Act. Any delay in requiring the affected entities to modify their advertising will require modifications at two dates and create additional expense.

General Comments:

Media-Specific Disclosures

The general requirements for advertising disclosures, specifically visual disclosures, should be clarified, if not through this rule, through other guidance materials. Readability and prominence have been a continuing problem with Internet offers for free credit reports and Congress specifically referenced the issue. The proposed rule should address color contrast of the disclosure text with the background against which the text is presented, as well as the background of the advertisement as a whole.

Television advertisements: In addition to the simultaneous audio and visual disclosure as proposed, the visual disclosure should appear throughout an entire advertisement. In many television advertisements for free credit reports, the company name with the word "free" appears throughout the entire advertisement and in noticeably larger text than any disclosure. Consideration of visual disclosure size is relevant and should be at least as large as any visual representation of the company name. Visual disclosure, as proposed, for only 4 seconds is insufficient. Audio disclosures should parallel the volume and approximate pitch of the primary advertisement or be at least as audible as the primary advertisement to constitute a prominent and more effective disclosure.

Radio advertisements: The rule should also provide that audio disclosures should parallel the volume and approximate pitch of the primary advertisement or be at least as audible as the primary advertisement.

Print and Internet: A border similar to the Surgeon General's cigarette warning could assist in enhancing prominence.

Internet websites: The rule should clarify that any website offering free credit reports, specifically including the three CRAs which publish an offer fulfilled by a subsidiary or another entity, are subjected to the requirement of a separate landing page. Consumers visiting the site of CRAs encounter offers for free credit reports and are in some instances, redirected to a related entity's website with limited disclosures in the

ordering process. The rule should consider which entities must display the separate landing page or if all entities should display the separate page.

Telemarketing solicitations: Require that failure to make the required disclosure constitutes a deceptive or abusive practice in violation of the Telemarketing Sales Rule.

Negative Options:

Many websites, including CRA websites, which offer credit reports in conjunction with “free trial” of the sale of a product or service, do not disclose clearly and prominently the terms of any free trial, the obligations to cancel attendant with the negative option, the fact that a consumers’ card will be used immediately to preauthorize an amount regardless of whether they cancel immediately or within the trial period, and many other issues.

The Attorney General incorporates by reference comments filed with the FTC in response to the Advance Notice of Proposed Rulemaking, 74 Fed. Reg. 2270 (May 14, 2009), on the Federal Trade Commission (“FTC”) rule concerning the Use of Prenotification Negative Option Plans, 16 C.F.R. Part 425.²

In these comments, the Attorney General supports the retention of the existing PNOR but with some important changes to: (1) expand coverage of the rule to other variations of negative options, notably free-to-pay conversions and automatic renewals; (2) require express, informed consent of the offer; (3) require clear and conspicuous disclosure of the material terms at the point of sale and in confirmation notices following the sale; (4) tighten the requirements for cancellation rights and expand the right to cancel; (5) tighten regulation of third-party billing mechanisms; and, (6) ensure that negative option contracts are not marketed to minors. These same considerations would apply to free trial negative option offers made in conjunction with the free credit report.

Conclusion:

The Attorney General appreciates the opportunity to provide comments on the proposed amendments to the Free Annual File Disclosures Rule to prevent deceptive marketing of “free credit reports.”

² <http://www.ftc.gov/os/comments/negoprulereopen/543809-00099.htm>