

**FEDERAL TRADE COMMISSION****16 CFR Part 610**

RIN 3084-AA94

**Free Annual File Disclosures****AGENCY:** Federal Trade Commission.**ACTION:** Final rule.

**SUMMARY:** Section 205 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 requires the Federal Trade Commission to issue a rule to prevent deceptive marketing of free credit reports. To that end, the Commission amends the Free Annual File Disclosures Rule to require certain advertisements for “free credit reports” to include prominent disclosures designed to prevent consumers from confusing these “free” offers with the federally mandated free annual file disclosures available through the single centralized source. In addition, the final amended Rule requires nationwide consumer reporting agencies to delay advertisements for products and services through the centralized source until after consumers receive their free annual file disclosures, and prohibits other practices that may interfere with the free annual file disclosure process. The final amended Rule also implements certain technical changes to the original Rule.

**DATES:** The effective date is April 2, 2010, except for § 610.4(b)(1)(i) and (2), which are effective September 1, 2010.

**ADDRESSES:** Requests for copies of the final amended Rule and this document should be sent to: Public Records Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The public record of this proceeding is also available at that address. Relevant portions of the proceeding, including the final amended Rule and this document, are available at (<http://www.ftc.gov>).

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**SUPPLEMENTARY INFORMATION:****I. Background**

This final Rule amends the Free Annual File Disclosures Rule (“Free Reports Rule” or “original Rule”),<sup>1</sup> which went into effect in 2004. The original Rule set out the procedures that

nationwide consumer reporting agencies (“CRAs”)<sup>2</sup> and nationwide specialty CRAs<sup>3</sup> must follow to comply with section 612 of the Fair Credit Reporting Act (“FCRA”),<sup>4</sup> which gives consumers the right to obtain free annual file disclosures from the nationwide CRAs through a single centralized source. The final amended Rule modifies the original Rule by implementing section 205 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (“Act”), which directs the Federal Trade Commission (“FTC” or “Commission”) to promulgate a rule, within nine months from the date of enactment of the Act, requiring certain disclosures in the advertising for “free credit reports” to reduce consumer confusion.<sup>5</sup> The final amended Rule also addresses certain practices that interfere with or detract from consumers’ ability to obtain their free annual file disclosures and makes certain technical changes to the original Rule described below.

**A. The Free Annual File Disclosures Rule**

The Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) amended the FCRA and directed the Commission to promulgate a rule specifying the procedures for consumers to obtain free annual file disclosures from nationwide CRAs and nationwide specialty CRAs.<sup>6</sup> To carry out this directive, the Commission promulgated the Free Reports Rule, which took effect in a structured roll-out beginning on the West Coast in December 2004 and ending on the East Coast in September 2005.<sup>7</sup> The purpose of the original Rule

<sup>2</sup> Section 603(p) of the FCRA defines a “nationwide consumer reporting agency” as a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. 15 U.S.C. 1681a(p). At this time, there are three nationwide consumer reporting agencies – Equifax Inc. (“Equifax”), Experian Information Solutions, Inc. (“Experian”), and TransUnion LLC (“TransUnion”).

<sup>3</sup> Nationwide specialty consumer reporting agencies are defined in section 603(w) of the FCRA. 15 U.S.C. 1681a(w). Specifically, section 603(w) defines “nationwide specialty consumer reporting agency” as a CRA that compiles and maintains files on consumers on a nationwide basis relating to: (1) medical records or payments; (2) residential or tenant history; (3) check writing history; (4) employment history; or (5) insurance claims.

<sup>4</sup> 15 U.S.C. 1681j.

<sup>5</sup> Pub. L. 111-24, 123 Stat. 1734 (May 22, 2009).

<sup>6</sup> Prior to the FACT Act, consumers could purchase file disclosures from consumer reporting agencies, but could receive a free file disclosure only under limited circumstances. For example, section 615 of the FCRA provides that consumers denied credit or employment based upon information contained in a consumer report may obtain a free file disclosure from the CRA that provided the report. 15 U.S.C. 1681m.

<sup>7</sup> 16 CFR 610.2(h). The Commission staggered implementation of the original Rule across the

was to enable consumers to detect and dispute inaccurate or incomplete information in the files of nationwide CRAs by providing consumers with the opportunity to obtain annual file disclosures free of charge.

The original Rule required that the nationwide CRAs jointly establish and operate a centralized source from which consumers can obtain free annual file disclosures through a single dedicated Internet website (AnnualCreditReport.com),<sup>8</sup> a toll-free telephone number, or a postal address.<sup>9</sup> Consumers may request and obtain their free annual file disclosures from each nationwide CRA at one time or stagger their requests throughout the year.

**B. The Advertising of “Free Credit Reports”**

As discussed in the Notice of Proposed Rulemaking (“NPRM”) in this proceeding,<sup>10</sup> since issuance of the original Rule, there has been a proliferation of confusing advertising regarding where consumers can obtain their free annual file disclosures. Some nationwide CRAs and others have advertised “free credit reports” in connection with the purchase of products and services, such as credit scores and credit monitoring. Although some advertising predated the original Rule, the bulk of the advertising for “free credit reports” now takes advantage of consumers’ general knowledge that free annual file disclosures are available under federal law. These advertisements direct consumers not to AnnualCreditReport.com, the authorized source for free annual file disclosures, but to commercial websites operated by nationwide CRAs or others that sell a variety of products and services. Further, when a consumer uses an Internet search engine to locate the website for free annual file disclosures, the search engine will usually list “sponsored” links – again, selling products and services – such as “FreeCreditReport.com” first.<sup>11</sup>

As a result of this advertising, consumers are often misled and confused about where to obtain the free annual file disclosure mandated by federal law. Indeed, the Commission has received numerous consumer

country to manage requests for free annual file disclosures.

<sup>8</sup> Most requests for free annual file disclosures through the centralized source occur through the AnnualCreditReport.com website. AnnualCreditReport.com is the only federally authorized website for obtaining free annual file disclosures.

<sup>9</sup> 16 CFR 610.2(a).

<sup>10</sup> 74 FR 52915 (Oct. 15, 2009).

<sup>11</sup> “FreeCreditReport.com” is owned and operated by Consumerinfo.com, Inc., an Experian company.

<sup>1</sup> 16 CFR Part 610.

complaints demonstrating confusion and frustration about how and where to obtain a free annual file disclosure. As discussed below, comments received during this proceeding further illustrate both consumer confusion with and frustration in obtaining “free annual file disclosures” and “free credit reports.”<sup>12</sup>

### C. Section 205 of the Act

To dispel this consumer confusion, Congress enacted section 205 of the Act (“section 205”). Section 205 directs the Commission to promulgate a rule, within nine months from the date of enactment of the Act, that would require advertisements for “free credit reports” in any medium to include certain prominent disclosures. For television and radio advertisements, section 205 specifies the language for the required disclosure: “This is not the free credit report provided for by Federal law.” This disclosure must appear in both the audio and visual portion of the advertisement. For all other media, section 205 directs the Commission to issue a rule determining the content and placement of the disclosures. Finally, section 205 requires the following interim advertising disclosure if a rule is not finalized within nine months: “Free credit reports are available under Federal law at: AnnualCreditReport.com.”

## II. Overview of the Proposed Rule and Comments Received

On October 15, 2009, the Commission published an NPRM, setting forth the

<sup>12</sup> As discussed in the NPRM, the Commission has undertaken enforcement and extensive education to address these practices. For example, in 2005, the Commission filed an action against Consumerinfo.com, Inc., a marketer of “free credit reports.” *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal. Aug. 15, 2005). In that action, the Commission alleged that Consumerinfo.com, Inc., which advertised “free credit reports” to consumers on the Internet, through emails, and through television and radio advertisements, engaged in deceptive acts or practices in violation of section 5 of the FTC Act, 15 U.S.C. 45(a). These deceptive practices included failing to disclose or to disclose adequately that the “free” credit reports they were offering were not associated with the federally-mandated annual free credit report program, but rather were part of a commercial promotion. The settlement required Consumerinfo.com, Inc., to pay consumer redress, prohibited it from making deceptive and misleading claims about “free” reports, and required disclosure of the terms and conditions of any “free” offers. The defendant also agreed to forgo \$950,000 in ill-gotten gains. Two years later, the Commission entered a second order with Consumerinfo.com, Inc., settling allegations that it violated the 2005 order. *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal., Jan. 8, 2007) (prohibiting defendant from failing to make required disclosures mandated by the 2005 order and requiring \$300,000 payment for consumer redress).

text of a proposed amended Rule.<sup>13</sup> The NPRM sought to achieve three goals.

First, it implemented section 205 of the Act by proposing a new section 610.4 in the Free Reports Rule that would require prominent disclosures to prevent consumer confusion and deceptive marketing of “free credit reports.”<sup>14</sup> The proposed section 610.4 included general requirements to ensure that the disclosures were sufficiently prominent; it also included media-specific requirements for the disclosures. For example, the NPRM proposed that the required disclosures for Internet websites offering “free credit reports” appear on a separate landing page.

Second, the NPRM proposed amendments to section 610.2 of the original Rule to prohibit practices that interfere with consumers’ ability to obtain free annual file disclosures from the centralized source. Specifically, it required a delay in advertising for products and services through the centralized source until after the consumer obtained his or her free annual file disclosure. It also: (1) prohibited the placement of hyperlinks to the nationwide CRAs’ websites that transported consumers away from the AnnualCreditReport.com website; (2) prohibited the nationwide CRAs from requiring consumers to establish an account to obtain a file disclosure through the centralized source; and (3) prohibited the nationwide CRAs from imposing any “terms and conditions” on consumers’ access to their file disclosures.

Third, the NPRM proposed technical amendments that would eliminate now obsolete roll-out provisions in the original Rule.<sup>15</sup>

In response to the NPRM, the Commission received over 1,080 comments, submitted by consumers; nationwide CRAs; consumer report resellers; businesses and trade organizations; State Attorneys General; consumer advocates; law firms; members of Congress; and academics.<sup>16</sup> Of the comments submitted, over 1,000 came from consumers. Appendix A contains a list of each of the non-consumer commenters, with the abbreviations used to identify them in this document. Some general comments are summarized below. Comments addressing particular issues relating to

the proposed Rule are discussed in greater detail in the Section-by-Section discussion below.

Overall, industry and business groups, as well as Representatives Boozman and Ross, opposed one or more of the NPRM’s proposals, such as the delay in advertising on AnnualCreditReport.com until after the consumer has obtained a free annual file disclosure, the prohibition on hyperlinks on the AnnualCreditReport.com website, and the proposed separate landing page requirement for Internet websites.

In contrast, consumer advocates, NAAG, the States of Florida and Minnesota, and Senators Levin and Schumer either supported the proposed Rule or urged the Commission to strengthen it. For example, some commenters asserted that the Commission should ban all advertising on AnnualCreditReport.com, rather than delaying it as the Commission had proposed.<sup>17</sup> These commenters also generally supported the proposed disclosures for “free credit report” advertisements, as well as the separate landing page proposal for disclosures on Internet websites.

Almost all individual consumers responding to the NPRM urged Commission action in this area.<sup>18</sup> Many consumers explicitly supported the proposed Rule, in many instances relating personal stories of confusion when trying to obtain their free annual file disclosure. Similarly, many consumers said that they unwittingly paid various sums for unwanted services when they attempted to obtain what they thought was their free annual file disclosure.<sup>19</sup> Other consumers stated that the current process for

<sup>17</sup> NCLC at 3; State of Florida at 4; State of Minnesota at 3.

<sup>18</sup> Only a few consumers stated that Commission action is unnecessary. See M. Buckley; K. Hix; P. Johnson.

<sup>19</sup> E.g., C. Thompson (“I signed up for freecreditreport.com, and couldn’t find out [how] to cancel the membership I didn’t want in the first place because I had to join just to get 1 report, and never could get all 3 reports.”); B. Meyer (“Experian automatically signs you up for a \$14.95/month credit report with the provision you have seven days to cancel the subscription . . . . Please end the ability of these companies to sign consumers to a contract/subscription they have no interest in.”); E. Julbar (“I was deceptively led into providing my credit card number (falsely understanding that it was needed to prove identity) and then received multiple billings on my credit card from the ‘service’ provider.”); K. Foster (“I was charged \$14.99. This is NOT FREE, this is a lie, I was deceived . . . .”); L. Falk (“I have a Master’s degree and I got scammed by these people. Free does not mean you pay \$14.95!”); LaRosa (“I consider myself a generally savvy consumer, yet I still fell into their trap and was fraudulently charged over \$100 by them before I realized what happened.”).

<sup>13</sup> 74 FR 52915 (Oct. 15, 2009). The Commission released a version of the NPRM on its website on October 7, 2009.

<sup>14</sup> *Id.* at 52918-22.

<sup>15</sup> *Id.* at 52922.

<sup>16</sup> The comments are available at (<http://www.ftc.gov/os/comments/freeannualfilenprm/index.shtml>).

obtaining a free annual file disclosure is confusing.<sup>20</sup>

Many consumers agreed that there should be no advertising on AnnualCreditReport.com until *after* consumers have received the requested file disclosure.<sup>21</sup> Consumers also agreed with the proposal that hyperlinks from AnnualCreditReport.com to the CRAs' proprietary websites should be eliminated.<sup>22</sup> In addition, several consumers agreed with the proposed Internet website disclosures for free credit reports.<sup>23</sup> In particular, over 170 consumers supported the proposed separate landing page for Internet websites offering free credit reports.<sup>24</sup>

<sup>20</sup> E.g., M. Neal ("The phony 'free' credit report come-ons are confusing and thwart citizens who are trying to exercise their right to obtain an annual credit report."); G. Albelo ("[T]he free credit report site is guaranteed to manipulate one into paying for a service that should be free. The site is a maze of confusing sites, words and suggestions that the average person probably won't get through without paying for something, or falling prey to identity theft.")

<sup>21</sup> E.g., F. Colantuono ("Have you ever tried to get your 'free' credit report online? . . . [Y]ou are bombarded with sales offers to sign up for ALL MANNER of products before you can request your credit report . . . [B]anning all advertising until AFTER you make your request for your free report. This one is a winner!"); J. Ellis ("[A]gencies should be able to ask those requesting reports if they wish to receive additional information or services for a fee . . . only . . . after the fact . . ."); F. Martin ("If advertising is allowed at all, it should be AFTER the consumer obtains the free report.")

<sup>22</sup> E.g., J. Matey ("The link from the main annual report page should NOT LINK to anything except the free report."). Mr. Matey added that he would agree to "a single link [on] the form 'FOR ADDITIONAL SERVICES FOR WHICH YOU WILL BE CHARGED, PRESS THIS BUTTON.'" Otherwise, "[t]here should be absolutely NO INTERWEAVING between the free report and any other service."; S. Ratkowski ("There should be . . . no hyperlinks to commercial sites."); *see also* M. Neal ("The links to the big three credit reporting agencies only serve to distract or confuse consumers in their quest to obtain their credit reports."); J. Nielsen ("It should be criminal to attach links away from the free website.")

<sup>23</sup> M. Neal ("Any website purporting to offer a free credit report should be required to display a disclaimer that it is NOT the official site, and to give user a link to the real site."); *see also* K. Morris ("Requiring ads for sites that are not the centralized free access site to carry prominent notice that they are advertising a for-profit site is a good idea."); C. Thompson ("All advertisements for 'free credit reporting' should be clearly stated that they are private firms and not Government mandated."); D. Enfield ("[T]here should be a clear warning to me that I have landed on a page that is irrelevant to the task of getting my free report."); Young ("I also support that certain blatantly misleading ADS for 'free credit reports' be required to include PROMINENT disclosures about the official source to prevent confusion and/or to stop indicating that the advertised credit reports are in fact free.")

<sup>24</sup> E.g., M. Baldissero; Professor K. Guenther; S. McGechie; B. Miller; C. Peltz; M. Ronsonette; Dr. J. Sitomer ("I support your proposal to require a separate landing page on sites that advertise free reports which explains that the reports are NOT the free reports guaranteed by the federal government.")

In addition to commenting on the proposed changes and additions to the original Rule, many consumers, as well as certain States, urged the Commission to prohibit the advertising of "free" credit reports, unless such reports come with no strings attached.<sup>25</sup> A typical consumer comment is: "These reports should not be marketed as 'free' if they are contingent upon the purchase of a product."<sup>26</sup>

The Commission acknowledges the many comments questioning the use of the word "free" when associated with the offer of "free credit reports" that require the purchase of additional products and services. In response, the Commission notes that it will continue to scrutinize offers for "free credit reports" on a case-by-case basis to determine whether such offers are unfair or deceptive under the FTC Act.<sup>27</sup>

The Commission does not, however, have the authority to ban advertising of "free credit reports" altogether under the Act. Congress was aware of the consumer confusion in the marketplace over use of the phrase "free credit reports."<sup>28</sup> It chose to enact a disclosure

<sup>25</sup> *See, e.g., State of Minnesota at 3. Cf. Professor D. Friedman (attaching Free Offers: A New Look, 38 N.M.L. Rev. 49 (2008), which suggests the Commission reconsider approaches addressing free offers).*

<sup>26</sup> W. Marciniak; *see also* T. Rusch ("I find it personally disgusting and certainly unethical that some company can advertise 'free credit reports' on the backstop of a Dodgers' baseball game when I know that there's not much free about it."); D. Wadsworth ("Websites that use the word 'free' should in fact be free, no charge for any services."); Miller ("Either credit reports are free or they are not free. The current advertising which relates to 'free credit reports' is misleading at best, in truth such ads are disingenuous, false and dishonest on their face."); A. Drew ("I REALLY don't think the credit report companies should try and bamboozle people into paying for their free report!"); M. Kramer ("These services are NOT FREE and extremely DECEPTIVE."). Numerous other consumers complained about deceptive or misleading advertising by credit companies. E.g., H. Bagao ("The hidden trap of a free trial with automatic charges is tantamount to fraud and thievery. In fact, deceiving names such as FreeCreditReport should be prohibited, as it is a clear, blatant form of false advertisement."); K. Noreen ("Getting people to sign up for surprise credit-card charges is predatory lending, pure and simple."); M. Wunderli ("False advertising regarding free financial services that are not free perpetuates mistrust of financial systems.")

<sup>27</sup> *Cf. FTC v. Berkeley Premium Nutraceuticals, Inc.*, No. 1:06-CV-51 (S.D. Ohio Feb. 2, 2006) (alleging that marketers offered consumers "free" samples of dietary supplements only to enroll them in an automatic shipment program and bill them without their authorization); *FTC v. Conversion Marketing, Inc.*, No. SACV 04-1264 (C.D. Cal. Jan 17, 2006) (alleging that advertisers offered "free samples" of weight loss and tooth-whitening products and then debited consumers' accounts and enrolled them in automatic shipment programs without their knowledge or authorization).

<sup>28</sup> *See* 155 Cong. Rec. S6178, S6179 (June 4, 2009) (statement of Sen. Levin) ("Mandatory disclosures will help ensure that consumers are given accurate information about how to obtain a free credit report

law, directing the Commission to prescribe specific disclosures in advertisements for "free credit reports." Congress did not, however, prohibit the advertising of "free credit reports;" nor did it authorize the Commission to prohibit such advertising. Therefore, the Commission declines to do so. In any event, the Commission believes that the prominent disclosure requirements of section 610.4, as described below, will alleviate much of the consumer confusion in connection with the offer of "free credit reports."

### III. Section-by-Section Discussion of Final Amended Rule

#### A. Section 610.2(g): Communications provided through centralized source

Section 610.2 of the original Free Reports Rule permitted the nationwide CRAs to advertise their proprietary products and services through the centralized source. When it promulgated the original Rule, the Commission recognized the potential for confusion from such advertising and marketing, but chose not to forbid it.<sup>29</sup> Instead, to address concerns about confusion from such advertising, the Commission restricted communications on the centralized source to the extent that they "interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source."<sup>30</sup>

Section 610.2(g) of the proposed Rule retained this requirement from the original Rule.<sup>31</sup> It proposed to modify the original Rule, however, by requiring that the nationwide CRAs delay advertising or marketing for products or services through the centralized source until after the consumer has obtained his or her free annual file disclosure. The final amended Rule adopts section 610.2(g) as proposed with certain modifications discussed below.

#### 1. Delay in advertising

The Commission's proposal to amend section 610.2(g)(1) of the original Rule to delay advertising on the centralized source until after the consumer has

with no strings attached. It is an effort to end the deceptive activities of companies that attempt to trick people into buying something that they are entitled by Federal law to receive for free.")

<sup>29</sup> Among other things, the Commission reasoned that the FACT Act required nationwide CRAs to inform consumers of the availability of credit scores when providing file disclosures to them and that there was a benefit to those consumers wishing to purchase a credit score to do so at the same time that they obtain their annual file disclosures. *See Statement of Basis and Purpose for Original Free Reports Rule*, 69 FR 35468, 35486 (June 24, 2004).

<sup>30</sup> 16 CFR 610.2(g)(1).

<sup>31</sup> The original restriction found in section 610.2(g)(1) has been renumbered as section 610.2(g)(2) in the final amended Rule.

obtained his or her free annual file disclosure generated a substantial number of comments. Consumer advocates and many consumers either supported the proposal, or stated that it did not go far enough. For example, NAAG, as well as over 255 consumers, supported the proposal.<sup>32</sup> Others, including NCLC, the States of Florida and Minnesota, as well as over 250 consumers, recommended a complete ban of all advertising on the centralized source. A typical consumer comment stated: "The FTC should remove all advertising and marketing by the credit bureaus before, during and even after the process of getting a free credit report. People should be able to get their reports and exit the Web site without having to go through a gauntlet of sales pitches."<sup>33</sup> Similarly, another consumer stated: "Why aren't the free reports on a commercial-free site where I can go in, give the information I need without worrying who I'm giving it to, without a gauntlet of commercials and confusing links that send me to more places that want to get my money?"<sup>34</sup>

Industry and business groups, in contrast, opposed the proposal. One CRA noted that the centralized source is a springboard for providing consumers with beneficial credit-related products and services.<sup>35</sup> This commenter also argued that the proposed delay of advertising would prevent CRAs from complying with section 609(a)(6) of the FCRA, which requires CRAs to provide a statement that consumers can request a credit score when a consumer requests a credit file.<sup>36</sup> CDIA suggested that a better approach would be to require that advertisements for additional products or services on the centralized source be "no more conspicuous" than the

centralized source's features for obtaining free annual file disclosures.<sup>37</sup>

The Commission has carefully considered these comments and has retained the restriction on advertising until after the consumer has obtained his or her file disclosure. As noted in the NPRM, the general standard contained in the original Rule, that advertising not "interfere with, detract from, contradict, or otherwise undermine" the centralized source, has not been effective in ensuring that consumers have an unfettered, easy-to-use mechanism for obtaining their free annual file disclosure. Consumers have been subjected to substantial amounts of advertising for the nationwide CRAs' proprietary products or services while navigating AnnualCreditReport.com to obtain their free annual file disclosures. Indeed, when consumers access the website, they encounter offers for a variety of add-on goods or services – such as credit scores and credit monitoring services – which they must purchase or decline, one by one, before obtaining their free annual file disclosures. These advertisements make it cumbersome and time consuming for consumers to exercise their right to obtain their free annual file disclosures.<sup>38</sup>

A substantial number of commenters confirmed that existing advertising impedes consumers' ability to obtain their free annual file disclosures on AnnualCreditReport.com. As one consumer noted, "[a]s a user of the annualcreditreport website, I feel it is like tiptoeing through a minefield to try to get past all the paid offers to the actual free credit report guaranteed by Federal law."<sup>39</sup> Another consumer stated that "If you are not extremely careful it is almost impossible to avoid ordering a product that is available only for a fee."<sup>40</sup> The comments confirm the problems the Commission articulated in the NPRM, and thus, the Commission continues to believe that a delay in advertising is necessary to ensure that consumers can exercise their federal right to obtain their free annual file disclosures, without unnecessary obstruction and delay.

The Commission recognizes that prohibiting all advertising on AnnualCreditReport.com would advance the Commission's interest in

restricting aggressive advertising that impedes consumers' ability to obtain free file disclosures. The Commission believes, however, that the less restrictive approach of delaying advertising would achieve its goal of improving "the ease by which consumers should be able to contact consumer reporting agencies with respect to access to such consumer reports."<sup>41</sup> Delaying such advertising or other communications<sup>42</sup> enables consumers to focus first on obtaining their free annual file disclosure and decide thereafter whether to purchase additional products or services, including credit scores pursuant to section 609(a)(6) of the FCRA.<sup>43</sup>

## 2. Definition of "obtained"

Proposed section 610.2(g)(1)(i) clarified when consumers have "obtained" a free annual file disclosure for purposes of the delay in advertising by providing that, for telephone and written requests for free annual file disclosures, the consumer "has obtained" the file disclosure when the file disclosure is mailed to the consumer. Similarly, proposed section 610.2(g)(1)(ii) provided that, for free annual file disclosures requested through the Internet, the consumer "has obtained" the file disclosure when it is delivered to the consumer through the Internet.<sup>44</sup>

<sup>41</sup> 15 U.S.C. 1681j(a)(1)(C)(ii)(III). CDIA asserted that the Commission lacks any statutory authority to implement the proposal to delay advertising. CDIA at 3 ("The FTC lacks the authority to prescribe rules that prohibit the consumer reporting agency's advertising or marketing of products or services after the consumer's request has been received and when the consumer reporting agency is fulfilling that request."). In response, the Commission notes that its authority for amending this provision in the original Rule derives from the rulemaking authority in the FACT Act amendments to the FCRA and the Commission's authority to amend its rules under the Administrative Procedure Act. 15 U.S.C. 1681j; 5 U.S.C. 551(5) and 553. Congress initially authorized the Commission to promulgate the Free Reports Rule to establish the centralized source. In promulgating this Rule, Congress required the Commission to consider "the ease by which consumers should be able to contact consumer reporting agencies . . ." The proliferation of distracting or confusing advertising and marketing on the centralized source affects its "ease" of use, and it is therefore within the Commission's authority to amend the original Rule to address this issue.

<sup>42</sup> As discussed below, the final amended Rule revises proposed section 610.2(g)(1) to restrict any request by a CRA to establish an account until after the consumer has obtained his or her file disclosure.

<sup>43</sup> The Commission will monitor and evaluate the effectiveness of this provision and may take additional action, as necessary.

<sup>44</sup> As stated in the NPRM, a file disclosure is "delivered" for purposes of this section when it is provided in a form that permits the consumer to store, download, print, or otherwise maintain the

<sup>32</sup> See, e.g., NAAG at 2; see also Empire Justice at 4 (urging the Commission to "[r]emove all 'pop-up ads' and any other advertising on the pages that a consumer must use to access his or her credit report.").

<sup>33</sup> N. Guzman.

<sup>34</sup> B. Irwin; see also J. Matey ("There should be NO ADVERTISING on the free report pages."); R. Robinson ("[P]lease make them take all forms of advertising for a paid service completely off the 'free' website."); P. Wilson ("There should be no selling involved with the request for a free credit file review. There is no need to sell anything. Let's make the process transparent and just provide what is requested."); B. Meyer ("AnnualCreditReport.com should be commercial free!"); C. Epley ("Remove all advertisements! This page exists for me, the public, not for the firms who sell credit reports."); Munsch ("Remove all advertising and marketing by credit bureaus entirely before, during and after the process of getting the free credit report. One should be able to obtain the report(s) and exit without enduring sales pitches.").

<sup>35</sup> TransUnion at 3.

<sup>36</sup> *Id.*

<sup>37</sup> CDIA at 5.

<sup>38</sup> 74 FR at 52917. The Commission also noted that consumers reported feeling compelled to purchase the advertised products or services in order to obtain their free annual file disclosure.

<sup>39</sup> See T. Hillegass.

<sup>40</sup> See W. Stuart; see also K. Graham ("This site is currently the best example of 'limiting access by obfuscation' that I have ever seen.").

Some commenters objected to the NPRM's proposed definition of when a consumer has "obtained" his or her free annual file disclosure. Schwartz & Ballen, a law firm, asserted that the CRAs should be prohibited from promoting additional products and services during the same telephone or website session or in the same envelope as the requested file disclosure because consumers may misinterpret the importance of material that accompanies information requested pursuant to a federally mandated right.<sup>45</sup> NCLC asserted that, for Internet requests, consumers should only be shown advertising after they have their "report in hand," 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."<sup>46</sup> In contrast, TransUnion objected to the proposal with respect to mail or telephone requests, asserting that CRAs should be permitted to advertise other products or services after the consumer has requested his or her file disclosure and the CRA has indicated that it will provide the file disclosure through the mail, asserting that it is easier for consumers to request products such as credit scores at the time of their request for their file disclosure.<sup>47</sup>

The final amended Rule adopts section 610.2(g)(1) as proposed. The Commission believes that the final amended Rule strikes the appropriate balance, by minimizing the risk that consumers may be misled before obtaining their free annual file disclosure, while still allowing the CRAs to offer additional products and services. The approach proposed by Schwartz & Ballen – that CRAs be prohibited from advertising during the same "website session" – would essentially ban advertising through the centralized source. As discussed above, the Commission believes a ban is more restrictive than necessary at this time.<sup>48</sup> The approach proposed by NCLC would require a CRA to be sure that the consumer has his or her report "in hand" before delivering advertising to that consumer. The Commission questions the feasibility of this approach, as it is unclear whether a CRA would be able

file disclosure for future reference. 74 FR at 52917-918. Cf. Franchise Rule, 16 CFR 436.6(b) (addressing disclosure in an online environment).

<sup>45</sup> Schwartz & Ballen at 3.

<sup>46</sup> NCLC at 4.

<sup>47</sup> TransUnion at 4.

<sup>48</sup> The Commission will continue to monitor carefully consumers' experiences with the centralized source. If the Commission finds that the delayed advertising permitted by the final amended Rule results in significant consumer confusion, it will revisit the issue of a ban.

to ascertain, in all instances, when the consumer has the report "in hand." With respect to TransUnion's request to modify the proposal for mail and telephone requests to allow advertising before the report is placed in the mail, the Commission believes that, for example, allowing advertising messages to be relayed in the same telephone call during which the free credit report order is placed would cause the same consumer confusion and obfuscation described above. In addition, the Commission notes that the final amended Rule applies a consistent approach regardless of how the consumer obtains his or her report – advertising may be provided at the time the report is delivered or later. Therefore, the final amended Rule adopts section 610.2(g)(1) as proposed, with minor non-substantive changes.<sup>49</sup>

#### *B. Section 610.2(h): Additional prohibited practices*

Proposed section 610.2(h) prohibited three types of conduct on the centralized source: (1) hyperlinks to commercial or proprietary websites on the centralized source Internet website; (2) any request or requirement that consumers establish an account in order to obtain their free annual file disclosures; and (3) any request or requirement that consumers agree to terms and conditions in order to obtain their free annual file disclosures. In the NPRM, the Commission proposed to prohibit these types of conduct because they interfere with and undermine consumers' ability to obtain their free annual file disclosures through the centralized source. The final amended Rule adopts section 610.2(h) with certain modifications discussed below.

##### 1. Section 610.2(h)(1): Prohibition on hyperlinks to commercial websites

In the NPRM, the Commission noted that, currently, the initial page of AnnualCreditReport.com contains hyperlinks to the websites of the three nationwide CRAs. If a consumer clicks on one of the CRA's hyperlinks on the initial page of AnnualCreditReport.com, the consumer is transported to that CRA's commercial website, where the consumer is unable to obtain his or her free annual file disclosure provided by federal law. For these reasons, the Commission proposed to prohibit such

<sup>49</sup> The Commission changed the language of proposed section 610.2(g)(1)(ii) to make it parallel with section 610.2(g)(1)(i). As in the proposed Rule, sections 610.2(g)(2) and (3) of the final amended Rule retain the original Rule requirement that any advertising on the centralized source shall not "interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source."

hyperlinks to reduce the possibility that consumers attempting to obtain their free annual file disclosures will be transferred to commercial websites that do not provide the federally mandated free annual file disclosures but instead sell various products or services.

A number of comments addressed the proposed prohibition of hyperlinks on the centralized source. Several commenters noted that the proposal will better protect consumers and reduce confusion as consumers attempt to access their free annual file disclosures.<sup>50</sup> Industry commenters objected to the proposal, asserting that the hyperlinks do not confuse consumers.<sup>51</sup> CDIA noted that, from a technical standpoint, the centralized source must transfer consumers to each of the CRA's individual websites to facilitate the fulfillment of the free annual file disclosures requests.<sup>52</sup>

In response to the comments, the final amended Rule retains the prohibition of hyperlinks, with two clarifications. First, it permits hyperlinks to a fulfillment web page on which consumers can order their annual file disclosure. Aside from fulfillment, the Commission finds no reason why hyperlinks should appear on the centralized source web site before a consumer orders his or her annual file disclosure, and in view of the potential for confusion, believes that the restriction is necessary. Second, consistent with the provision allowing advertising after the consumer has obtained his or her annual file disclosure, the CRAs may include hyperlinks in such advertising.

##### 2. Section 610.2(h)(2): Prohibition on requiring the establishment of accounts

Proposed section 610.2(h)(2) prohibited nationwide CRAs from requesting or requiring a consumer to establish an account as a prerequisite to obtaining a free annual file disclosure through the centralized source. A number of commenters, including the BBB and NAAG, supported this proposal. The BBB noted that it has received thousands of complaints from consumers who complain about having to set up accounts before obtaining their free annual file disclosure: "Permitting this practice to continue places an

<sup>50</sup> See, e.g., NAAG at 2; see also J. Smallwood ("at every turn there were confusing links, questions, and other chaff tossed in my way all designed to confuse and confound a consumer who simply wanted what was promised: an honest to goodness free credit report.").

<sup>51</sup> TransUnion at 5-6; CDIA at 5-6.

<sup>52</sup> CDIA at 5.

unnecessary barrier between consumers and their free annual credit report.”<sup>53</sup>

In contrast, TransUnion and CDIA noted that the setting up of accounts could be beneficial to consumers. TransUnion stated that, among other things, establishing an account allows consumers to access their free annual file disclosure online for a period of time and makes the authentication process easier when consumers seek to obtain their file disclosures the following year.<sup>54</sup>

The Commission has determined that requiring the establishment of an account as a prerequisite to obtaining a free annual file disclosure interferes with the intent of the original Rule because it imposes a condition on the consumer's ability to obtain free annual file disclosures.<sup>55</sup> Further, because creating an account generally necessitates the collection of additional personally identifiable information, “requiring” such an account runs counter to the prohibition in section 610.2(2)(b)(ii) of the original Rule, which limits the collection of information to that which is reasonably necessary to properly identify the consumer and to process the consumer's transaction(s). Accordingly, the Commission has determined to retain the proposed prohibition against CRAs requiring consumers to set up an account to obtain a free annual file disclosure.

The Commission, however, agrees with TransUnion that consumers may derive a benefit from the establishment of accounts with CRAs when they obtain their free annual file disclosures and does not want to foreclose this option. As a result, the final amended Rule eliminates the NPRM's proposed prohibition on “asking” consumers to set up an account and allows CRAs to give consumers the option to establish an account. The Commission believes that such an option should be provided only *after* the consumer has obtained his or her file disclosure, in order to reduce the potential that a consumer may be confused into believing that an account is required to access his or her free file disclosure. Accordingly, the Commission has amended section

610.2(g)(1) to allow CRAs to provide an option to establish an account, but only after a consumer has obtained his or her file disclosure.

### 3. Section 610.2(h)(3): Prohibition on requiring terms or conditions

Proposed section 610.2(h)(3) prohibited CRAs from requesting or requiring consumers to agree to terms and conditions as a prerequisite to obtaining their free annual file disclosures through the centralized source. NAAG and Schwartz & Ballen supported prohibiting terms and conditions on consumers' access to their file disclosures.<sup>56</sup> CDIA and TransUnion objected to the proposal. TransUnion asserted that the terms and conditions required for consumers requesting their free annual file disclosure via the Internet are intended to deter consumers from accessing someone else's file disclosure.<sup>57</sup>

The Commission believes that a consumer's right to obtain a free annual file disclosure should be unfettered and without any restrictions or conditions, apart from providing appropriate identifying information, as is required under the FCRA.<sup>58</sup> Further, after reviewing the comments, the Commission does not believe that there is any reason to permit CRAs to ask or require consumers, including those who attempt to access their free annual file disclosures through the Internet, to agree to terms and conditions.<sup>59</sup> The Commission has determined, therefore, to retain the proposed Rule's prohibition on requiring or requesting that consumers agree to terms and conditions in connection with obtaining a free annual file disclosure.

The final amended Rule, however, revises the proposed language in two respects. First, consistent with comments received, it eliminates the term “prerequisite” to clarify that *any* request or requirement to agree to terms or conditions in connection with obtaining free annual file disclosures is prohibited, even one made after the consumer obtains his or her file disclosure. The Commission believes that, even if such terms and conditions

are presented after the consumer obtains his or her file disclosure, the consumer might reasonably believe that accepting the terms and conditions is required. Second, the final amended Rule substitutes “terms or conditions” for “terms and conditions.” The Commission believes this revision is necessary to clarify that the prohibition does not extend only to documents or text labeled “terms and conditions.” Rather, it extends to any legal impediment on consumers' access to a free annual file disclosure, regardless of whether that impediment is presented as “terms and conditions,” “notice,” “legal notice,” or another term.

### C. Section 610.4: Prevention of deceptive marketing of “free credit reports”

Section 610.4 implements the Congressional directive in section 205 of the Act to combat the deceptive marketing of “free credit reports” through “prominent” disclosures in advertisements for “free credit reports.” Proposed section 610.4 included general requirements to ensure that the disclosures are sufficiently prominent, such as requiring that all audio disclosures be delivered in a slow and deliberate manner and providing specific guidance to ensure that visual disclosures are prominent. This section also included disclosure requirements specific to each of the various media in which advertising may occur. Where possible, the disclosure standards in the proposed Rule were drawn from comparable FTC or other federal law addressing the prominence of specific required disclosures – in particular the Prescreen Opt Out Notice Rule<sup>60</sup> and the Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (“Pay Per Call Rule”).<sup>61</sup> The standards also were drawn from relevant Commission law enforcement actions and business education materials. Proposed section 610.4 consisted of three sections: definitions, general disclosure requirements, and media-specific requirements. These are discussed below in turn.

#### 1. Definitions

a. Section 610.4(a)(1): The term “AnnualCreditReport.com and 877-322-8228”

Proposed section 610.4 defined the term “AnnualCreditReport.com and 877-322-8228” to mean the Uniform Resource Locator and toll-free telephone number currently used by the

<sup>53</sup> BBB at 3; *see also* NAAG at 2; E-Commerce at 2 (supporting a provision barring sites from requiring consumers to register in order to obtain the annual file disclosure).

<sup>54</sup> TransUnion at 6-7; *see also* CDIA at 6.

<sup>55</sup> Requiring the establishment of an account is contrary to existing Commission commentary on the provision of file disclosures. *See* FTC Commentary on the Fair Credit Reporting Act, 16 CFR 600 Appendix, comment 610-2 (“A consumer reporting agency may not add conditions not set out in the FCRA as a prerequisite to the required disclosure.”).

<sup>56</sup> NAAG at 2; Schwartz & Ballen at 3-4.

<sup>57</sup> TransUnion at 7 (asserting that terms and conditions are justified because consumers are obtaining immediate access to file disclosure).

<sup>58</sup> *See* 15 U.S.C. 1681h(a)(1).

<sup>59</sup> In response to TransUnion's comment, if a consumer is determined to access someone else's file disclosure, it is unclear how requiring that person to agree to terms and conditions will serve as a deterrent. In any event, TransUnion does not require terms and conditions for mail or telephone requests for free credit reports; thus, requiring such terms and conditions does not seem necessary for Internet transactions.

<sup>60</sup> 16 CFR Part 642.

<sup>61</sup> 16 CFR Part 308.

centralized source. Proposed section 610.4 also provided that if the centralized source's website (currently AnnualCreditReport.com) or toll-free telephone number (currently 877-322-8228) were to change, the centralized source must substitute the new website or toll-free telephone number in all disclosures required by this section of the Rule. In response to the NPRM, the Commission received only one comment. CDIA agreed with the proposed definition, but urged the Commission to include a reference to a "reasonable time" in order to provide the centralized source an opportunity to update the disclosures.<sup>62</sup> The Commission believes this modification is appropriate and has revised the proposed Rule accordingly.

b. Section 610.4(a)(2): The term "free credit report"

Proposed section 610.4 set forth the following definition of "free credit report":

*Free credit report.* For the 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 consumer reporting agency (as defined in section 603(p) 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, tied to the purchase of a product or service.

As noted in the NPRM, the term "free credit report" is undefined in section 205 of the Act, the FCRA, or the Free Reports Rule.<sup>63</sup> The Commission defined the phrase in the proposed Rule, however, in order to clarify the scope of the Rule's disclosure requirements. As explained more fully below, based on the comments received, the Commission has revised the proposed definition of "free credit reports" as follows:

*Free credit report* means a file disclosure prepared by or obtained, directly or indirectly, from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act), that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.

<sup>62</sup> CDIA at 9 ("[T]he FTC should clarify in the Rule that covered entities will be provided with a reasonable opportunity to update the information.").

<sup>63</sup> 74 FR at 52918.

i. Scope of the term "free credit report"

Proposed section 610.4 defined "free credit report" to include "a consumer report or file disclosure prepared by or obtained . . . from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act)." NCLC and TransUnion urged the Commission to broaden the definition to include reports offered by nationwide specialty CRAs.<sup>64</sup> In that regard, TransUnion stated: "As a general matter, it is not clear why this provision pertains to Free Reports involving only nationwide CRAs. If an entity is advertising a 'free credit report,' it would seem that the disclosures are appropriate regardless of the provider or source of information."<sup>65</sup> NCLC also observed that the statutory language of the Act is not limited to nationwide CRAs.<sup>66</sup>

On the other hand, several commenters, including CDIA and Experian, urged the Commission to narrow the definition of "free credit report," asserting that section 610.4 should cover only file disclosures of the type that the nationwide CRAs must make available through the centralized source. For example, Experian's comment states:

[The statute] seeks to assure that consumers will be able to distinguish between a free credit report offered by a commercial entity and the free annual file disclosures available at [AnnualCreditReport.com]. The statute does not cover other aspects of the consumer credit system such as credit scores or the many other types of information that can qualify as 'consumer reports' under the FCRA.<sup>67</sup>

The Commission agrees that the NPRM's inclusion of the term "consumer report" in the proposed definition of "free credit report" was too broad, sweeping in the offer of reports that go beyond the requirements of section 205 of the Act, and potentially adding to consumer confusion. Section

<sup>64</sup> NCLC at 4; TransUnion at 8. At the same time, NCLC noted that the disclosures set forth in the Act for nationwide CRAs would have to be modified if applied to nationwide specialty CRAs by omitting references to AnnualCreditReport.com. NCLC at 4.

<sup>65</sup> TransUnion at 8.

<sup>66</sup> NCLC at 4.

<sup>67</sup> Experian at 28-29; see also Schwartz & Ballen at 2 ("CRAs . . . offer their services in connection with their sponsorship of the website AnnualCreditReport.com, which is where consumers may obtain their free credit reports under Federal law."); CDIA at 8 (asserting that the proposed definition would "apply to many products and services that are not in direct competition with the credit file disclosures required to be made available through the centralized source because the Free Annual File Disclosures Rule cannot and does not require similar options.").

205 was intended to address the confusion between the information offered through the centralized source and similar information offered from private or other commercial sources. Indeed, the disclosures contemplated by section 205 of the Act would not be useful, for example, for advertising of offers of consumer reports from nationwide specialty CRAs, as those reports are not available through the centralized source. Similarly, the term "consumer report" would include "credit scores;" thus, under the proposed Rule, an advertisement for a "free credit score" would have triggered the requirement to disclose the existence of AnnualCreditReport.com. Consumers seeing an advertisement for a free credit score might be confused if they are directed to AnnualCreditReport.com, only to find that they could not get a free credit score on that site. Accordingly, section 610.4 of the final amended Rule is limited in scope to reports of the type disseminated through the centralized source.

ii. Applicability of the term "free credit report" to trial offers

The definition of "free credit report" in proposed section 610.4 applied to an offer of free credit reports "that is, in any way, tied to the purchase of a product or service." Several commenters objected to the use of the phrase "in any way, tied to the purchase of a product or service." NAAG suggested that the term "purchase" might be interpreted to exclude negative option offers, where the consumer may cancel the purchase before having paid anything: "If a consumer receives a free credit report and cancels any service within the allotted time without paying anything, some may argue that the report is not technically 'tied to the purchase of a product or service.'"<sup>68</sup>

The Commission agrees and has changed the definition of "free credit report" to better clarify the types of "free credit report" offers intended to be covered by the Rule – those "represented, either expressly or

<sup>68</sup> NAAG at 2-3. Similarly, the States of Florida and Minnesota urged that the definition cover trial offers or trial periods. State of Florida at 6 ("The definition of 'free credit report' should encompass . . . trial subscriptions to make it abundantly clear that trial offers are covered."); State of Minnesota at 3 ("The FTC should adopt a broad definition of 'free credit report' that explicitly covers . . . 'trial periods.'"). Other commenters expressed confusion about the phrase "tied to" the purchase of a product or service. For example, NCLC noted that the term "tied to" could be confused with the antitrust concept of "tying," where a seller conditions the sale of one product or service on the customer's agreement to take a second product or service. NCLC at 5.



impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.” This language clarifies that a “free credit report” offered in connection with a trial offer of another product or service will fall within the scope of the Rule and trigger the disclosure requirement.<sup>69</sup>

iii. Bundled offerings that include credit reports

Several commenters urged the Commission to clarify that section 610.4 does not apply to advertisements for every bundle of products or services that may include a “free credit report.”<sup>70</sup> For example, CDIA contended that “where a company offers a package of services together with a credit report – such as combined credit monitoring, identity theft assistance, or other products or services – the disclosure requirements should not apply if a complimentary credit report is not a dominant part of the offer.”<sup>71</sup> These commenters asserted that there is no confusion between the offering of bundled products and services and the federally mandated dissemination of free annual file disclosures through the centralized source. In that regard, Intersections, a business commenter, stated: “If a consumer were to compare an offer for a free trial of Intersection’s Bundled Products with the annual federally mandated disclosure, it would be clear to the consumer even upon a cursory review that he or she was reviewing separate and wholly unrelated products.”<sup>72</sup> In addition,

<sup>69</sup> Section 610.4(a) of the final amended Rule makes clear that representations made both expressly and impliedly about an offer of a “free credit report” will trigger the Rule’s disclosure obligations. Schwartz & Ballen contended that the word “impliedly” is vague, ambiguous, and “will unnecessarily result in significant uncertainty in its application.” Schwartz & Ballen at 4. The Commission believes that the use of the term “impliedly” is consistent with well-established advertising law under section 5 of the FTC Act. See generally FTC Policy Statement on Deception (“Deception Statement”), Appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) (“In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions. In other situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claims.”).

<sup>70</sup> See Intersections at 1; American Express at 2; Schwartz & Ballen at 4; TransUnion at 8.

<sup>71</sup> CDIA at 9 (“The FTC does not further the goal of preventing consumer confusion between the federally mandated annual disclosure and commercial ‘free credit report’ offers by applying these disclosures to advertisements for these packages.”).

<sup>72</sup> Intersections at 2 and 7.

American Express noted that it offers a complimentary credit score and report once a year as part of a package of Cardmember services and that the disclosure requirement should not apply to this service.<sup>73</sup>

The Commission declines to modify the proposed Rule in response to these comments. The Commission disagrees that the types of bundled products mentioned by commenters do not cause consumer confusion. Indeed, the Commission believes that advertising for bundled products that promote free credit reports, in addition to other products and services, such as credit monitoring, is the very type of advertising that is likely to confuse consumers. Thus, the final amended Rule does not include any type of exemption for bundled products. With respect to the free credit reports offered by American Express as a benefit of membership, the Commission notes that the advertising of a free credit report to a non-member in this instance would fall within the Rule’s definition of “free credit report.” However, once a consumer becomes a member, a statement that a no-strings-attached “free credit report” is a benefit of membership does not fall within the Rule’s definition because such a free credit report is not being advertised “in connection with the purchase of a product or service.”<sup>74</sup>

2. Section 610.4(a)(3): General requirements for disclosures

Section 610.4(a)(3) of the final amended Rule implements the Act’s mandate that the required disclosures for “free credit reports” be “prominent.” It also sets forth general requirements for, among other things, visual, audio, and program-length advertisements.<sup>75</sup> These requirements are designed to ensure that the mandated disclosures can be readily seen and/or heard by consumers.<sup>76</sup> In addition, the final amended Rule clarifies that the

<sup>73</sup> American Express at 1.

<sup>74</sup> An offer of a “free credit report if you extend your membership” would be made “in connection with a purchase” and therefore covered by the Rule.

<sup>75</sup> These general disclosure standards are drawn from several Commission trade regulation rules. See Pay Per Call Rule, 16 CFR Part 308; Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (“Cooling-Off Rule”), 16 CFR Part 429; Franchise Rule, 16 CFR Part 436; Business Opportunity Rule, 16 CFR Part 437; and Regulations under the Fair Packaging and Labeling Act, 16 CFR Part 500.

<sup>76</sup> The Commission also recognizes that States and individuals have the ability to enforce parts of the FCRA. By setting forth these requirements, section 610.4(a)(4) of the final amended Rule is intended to avoid a patchwork of differing interpretations of what constitutes “prominent” disclosures.

disclosures must be limited to the prescribed text with no other content to ensure that the consumer is not distracted from the message contained in the disclosure.

a. Section 610.4(a)(3)(i): Prominent

Section 610.4(a)(3)(i) of the final amended Rule revises the NPRM by adding a new section incorporating the statutory mandate that all disclosures for “free credit reports” be “prominent.” In response to the NPRM, the Commission received numerous comments on how the final Rule should address prominence, including comments on the placement, format, and timing of the required disclosures, as discussed in detail below. Accordingly, the Commission has added in the final amended Rule a general requirement that all disclosures must be “prominent,” consistent with the language of section 205.<sup>77</sup> This general “prominence” requirement applies to all disclosures in any medium.

b. Section 610.4(a)(3)(iii): Language usage

Proposed section 610.4 required that any disclosure mandated by this section be provided in the same language as that principally used in the advertisement. The proposed requirement drew from identical language in section 308.3(a)(1) of the Pay Per Call Rule and the Commission’s belief that a disclosure in a language different from that which is principally used in an advertisement would be deceptive.<sup>78</sup> No comments addressed this issue. Accordingly, the final amended Rule adopts this section, as proposed in the NPRM.

c. Section 610.4(a)(3)(iii): Visual disclosures

Proposed section 610.4(a)(4) provided that visual disclosures “shall be of a color or shade that readily contrasts with the background of the advertisement, in a font easily read by a reasonable consumer, and be parallel to the base of the advertisement.” The proposed section drew from the Pay Per Call Rule, which requires disclosures to be (1) in “a color or shade that readily contrasts with the background of the

<sup>77</sup> Commission precedent establishes that disclosures in fine print or buried in dense blocks of text are not prominent. The mandate that disclosures be “clear and conspicuous” or “clear and prominent” dates back more than 60 years. See, e.g., *Hillman Periodicals v. FTC*, 174 F.2d 122 (2d Cir. 1949) (upholding Commission order that company selling shortened versions of books disclose that its publications are abridged “in immediate connection with the title and in clear, conspicuous type”).

<sup>78</sup> See also 16 CFR 429.1(a) (requiring disclosure of right to cancel door-to-door sales “in the same language, e.g., Spanish, as that principally used in the oral sales presentation”).



advertisement” and (2) “parallel to the base of the advertisement.”<sup>79</sup>

Several commenters offered suggestions on how to add specificity to ensure that the visual disclosures are prominent. For example, the State of Florida recommended that print and Internet disclosures appear within “a border similar to the Surgeon General’s cigarette warning. . . .”<sup>80</sup> NYCPB recommended that print disclosures “be presented in a box and/or in a contrasting color to help ensure its prominence.”<sup>81</sup> The Commission agrees that more specificity is required to ensure that all visual disclosures are prominent.

Thus, the Commission has modified the proposed section to add specific requirements to strengthen the prominence of visual disclosures. First, the Commission has added a general requirement that visual disclosures be easily readable. For example, as noted in the NPRM, a disclosure in an Old English Text font would not be “easily readable,” even if it were sufficiently large. In addition, manipulating the letter width, letter spacing, word spacing, or line height so that the letters of the disclosure appear to be condensed in comparison to the rest of the text on the page or screen would violate the requirement for the disclosure to be “easily readable.”<sup>82</sup> Similarly, a disclosure presented in all italics or underlined would likely be difficult to read; if so, it would not comply with the requirement to be “easily readable.”

Second, instead of merely requiring visual disclosures that “readily contrast with the background” of the disclosure, the final amended Rule requires that there be a “high degree of contrast.” The Commission believes that such a clarification is necessary to ensure prominence. As an example, a disclosure in which the text contrasts slightly with the background (*e.g.*, light gray on dark gray) would not constitute

a sufficiently “high degree of contrast” to satisfy this requirement.<sup>83</sup>

Third, drawing from the Commission’s Prescreen Opt-Out Rule, the final amended Rule requires that visual disclosures be distinct from other text, such as inside a border.<sup>84</sup> Fourth, the final Rule requires that the disclosure be “in a distinct type style, such as bold.”<sup>85</sup> Finally, because the final amended Rule addresses disclosures beyond print, such as television and Internet websites, the Commission has modified the requirement that the disclosure be “parallel to the base of the advertisement” to state that the disclosure must be “parallel to the base of the advertisement or screen.”<sup>86</sup>

d. Section 610.4(a)(3)(iv): Audio disclosures

Proposed section 610.4 required that audio disclosures be delivered in a slow and deliberate manner and in a reasonably understandable volume. In response to the NPRM, a few commenters suggested additional specificity for this section, such as requirements for pitch and a particular volume level.<sup>87</sup> The Commission agrees that adding a requirement that the audio disclosure be at a reasonable pitch will further ensure that audio disclosures can be heard by consumers. The Commission has modified the final amended Rule accordingly. The Commission, however, believes that adding a specific volume level is unnecessary, given that the Rule already requires the disclosure to be made at “a reasonably understandable volume.”

One commenter suggested that the audio disclosure be made each time the triggering term “free credit report” is used.<sup>88</sup> The Commission believes that

<sup>79</sup> See also *In re Swisher Int’l, Inc.*, C-3964 (2000) (requiring warnings on cigar advertisements to appear “parallel . . . to the base of the advertisement”); Regulation under Section 4 of the Fair Packaging and Labeling Act, 16 CFR 500.4 (requiring statement of identity for packaged goods to appear “in lines generally parallel to the base on which the packaging or commodity rests as it is designed to be displayed”). “Parallel to the base” means that a consumer need not turn his or her head in order to read the disclosure. Accordingly, swirling or diagonal text, for example, will not be parallel to the base of the advertisement or screen.

<sup>80</sup> See State of Florida at 7.  
<sup>81</sup> See NYCPB at 2.  
<sup>82</sup> See Final Model Privacy Form Under the Gramm Leach Bliley Act, 74 FR 62889, at 62899-900 (Dec. 1, 2009) (setting forth general guidance for easily readable type).

<sup>83</sup> The Pay Per Call Rule required only that the disclosure “readily contrast” with the background. In this rulemaking, modification of the Pay Per Call Rule standard is warranted in light of changes in technology that have developed since promulgation of that rule. Indeed, as CDIA noted, the Pay Per Call Rule does not address Internet disclosures at all. CDIA at 12-13.

<sup>84</sup> See 16 CFR 642.3(a)(2).  
<sup>85</sup> As noted above, although text in, italics, or underlined may be “in a distinct type style,” if they are difficult to read, they would not satisfy the “easily readable” requirement.

<sup>86</sup> The final amended Rule also eliminates the term “color” in recognition of the fact that certain advertising, such as newspaper advertising, often contains no color.  
<sup>87</sup> See NAAAG at 4 (suggesting that audio disclosure be made “every time the triggering term is used and at the same decibel”); State of Florida at 7 (suggesting that “audio disclosures should parallel the volume and approximate pitch of the primary advertisement or be at least as audible as the primary advertisement”).

<sup>88</sup> See NAAAG at 4 (suggesting that audio disclosure be made “every time the triggering term is used . . .”).

multiple disclosures in a short audio advertisement could make all of the messages in the advertisement (including the disclosure) difficult for consumers to understand; therefore, the Commission declines to make this change. For program-length advertisements, however, section 610.4(a)(3)(v) of the final amended Rule does require multiple audio disclosures, as discussed below.

e. Section 610.4(a)(3)(v): Program-length advertisements

Proposed section 610.4 required that any program-length television, radio, or Internet-hosted multi-media advertisement for “free credit reports” provide the required disclosures at the beginning, near the middle, and at the end of the advertisement. No substantive comments addressed this provision. Accordingly, the final amended Rule adopts this proposal.<sup>89</sup>

f. Section 610.4(a)(3)(vi): Inconsistent and contrary information

Proposed section 610.4 provided that “nothing contrary to, inconsistent with, or in mitigation of the required disclosures shall be used in any advertisement in any medium . . .” The proposed section also prohibited any audio, visual, or print technique that is likely to detract significantly from the communication of any required disclosure. This provision was drawn from section 308.3(a)(5) of the Pay Per Call Rule and was designed to prevent circumvention of the Rule requirements through the conveyance of contrary or inconsistent information, or other actions that undermine the disclosures to consumers.<sup>90</sup>

In its comment, Schwartz & Ballen asserted that the phrase “in mitigation” fails to provide sufficient guidance as to what language is prohibited by this section.<sup>91</sup> The Commission agrees that the term “in mitigation” is vague; thus, the final amended Rule substitutes the

<sup>89</sup> The Commission notes that this provision is identical to section 308.3(a)(6) of the Pay Per Call Rule, and is designed to enable consumers tuning in to the program-length advertisement at different stages of the broadcast to receive the required disclosure. *Cf. In re Synchronal Corp.*, 116 FTC 1189 (1993) (requiring video or commercial advertisements 15 minutes or longer to disclose that program is a paid advertisement within the first 30 seconds and immediately before presentation of ordering instructions).

<sup>90</sup> *Cf.* Franchise Rule, 16 CFR 436.9(a) and Business Opportunity Rule, 16 CFR 437.1(a)(21) (prohibiting the making of any claim or representation, orally or visually, or in writing, that contradicts the information required to be disclosed by the Rule); Guides for Environmental Marketing Claims, 16 CFR 260.6(a) (noting that an absence of contrary claims will help make disclosures clear and prominent).

<sup>91</sup> Schwartz & Ballen at 5.

phrase “that undermines” for the phrase “in mitigation.”<sup>92</sup> Accordingly, the relevant portion of section 610.4(a)(3)(vi) of the final amended Rule reads, “nothing that is contrary to, inconsistent with, or undermines the required disclosures shall be used in any advertisement in any medium . . . .”

### 3. Section 610.4(b): Medium-specific advertising disclosures

Proposed section 610.4(b) set forth the statutory requirements relating to prominence in specific media. The wording and presentation of required disclosures for each medium are described below.

#### a. Section 610.4(b)(1): Disclosures for television advertisements

Section 205 of the Act prescribes the specific wording of the disclosures for television, requires that the disclosures be made in both audio and video formats, and requires the audio and video disclosures to be made at the same time.<sup>93</sup> Accordingly, consistent with the Act, proposed section 610.4(b)(1) required that all advertisements for “free credit reports” broadcast on television include the following disclosure: “This is not the free credit report provided for by Federal law” in the audio and visual parts of the advertisement at the same time. Proposed section 610.4(b)(1) also required that the disclosure be at least four percent of the vertical picture height, and appear for a minimum of four seconds. This requirement is consistent with comparable Federal Election Commission requirements for the disclosure of the funding source of a political advertisement on television.<sup>94</sup>

The Commission received few comments on this proposed section. NAAG suggested that the Commission add the following statement to the disclosure: “This report is only free if you make a purchase.”<sup>95</sup> As noted above, however, the statute specifies the wording of the disclosure for television and radio advertisements, and the Commission’s Rule follows this wording.

<sup>92</sup> Further, the phrase “that undermines” is drawn from and parallel to other sections of the original Rule. See 16 CFR 610.2(g)(1), renumbered as section 610.2(g)(2) in the final amended Rule (prohibiting “communications . . . [that] undermine the purpose of the centralized source”).

<sup>93</sup> Section 205(a)(2): “In the case of an advertisement broadcast by television or radio, the disclosure required under paragraph (1) shall be included in the audio and visual part of such advertisement.”

<sup>94</sup> See 11 CFR 110.11(c)(3)(iii)(B).

<sup>95</sup> NAAG at 3.

One commenter disagreed with the proposed Rule’s use of the Federal Election Commission requirements for the size of the visual disclosure, asserting that the standard is “overly rigid and excessively burdensome.”<sup>96</sup> The commenter did not provide any additional information or support; nor did it offer an alternative standard. The Commission continues to believe that the Federal Election Commission requirements provide a useful standard for prominent disclosures in television advertisements. Accordingly, the Commission retains this standard in the final amended Rule.

In addition, NAAG, the State of Florida, and NYCPB offered several suggestions regarding the timing of the disclosure. For example, the State of Florida suggested that the visual disclosure appear throughout the entire advertisement and that the size of the disclosure be at least as large as the company name.<sup>97</sup> NYCPB suggested that the disclosure “should be provided at the front or beginning of the advertisement” to be consistent with the proposed Internet website disclosure.<sup>98</sup> NAAG suggested that the disclosure be “equally prominent and in close proximity to the triggering claim . . . .”<sup>99</sup>

The Commission agrees that, consistent with long-standing Commission interpretations of prominence, the audio and video disclosure should appear in close proximity to the first mention of a free credit report. Indeed, as FTC staff has stated in its prior business guidance, “[a] disclosure is more effective if it is placed near the claim it qualifies or other relevant information. Proximity increases the likelihood that consumers will see the disclosures and relate it to the relevant claim or product.”<sup>100</sup> In keeping with this principle, section 610.4(b)(1)(i) now reads, “all advertisements for free credit reports broadcast on television shall include the following disclosure in close proximity to the first mention of a free credit report: ‘This is not the free credit report provided for by Federal law.’”<sup>101</sup>

<sup>96</sup> Schwartz & Ballen at 5.

<sup>97</sup> State of Florida at 7.

<sup>98</sup> NYCPB at 2.

<sup>99</sup> NAAG at 3.

<sup>100</sup> See Federal Trade Commission Guidance, Dot Com Disclosures: Information about Online Advertising, at 6, available at (<http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf>) (“Dot Com Disclosures”).

<sup>101</sup> In response to commenters’ additional suggestions to address prominence in television advertising, the Commission notes that, rather than adding specific requirements to this section, it has tried to tighten the prominence requirements for all disclosures, as discussed above.

b. Section 610.4(b)(2): Disclosures for radio advertisements

Proposed section 610.4(b)(2) also incorporated the section 205 disclosure for all advertisements for “free credit reports” broadcast on radio: “This is not the free credit report provided for by Federal law.”

Similar to the television disclosure, NAAG suggested that the Commission add to the disclosure the following statement: “This report is only free if you make a purchase.”<sup>102</sup> As noted above, the statute specifies the wording of the disclosure for television and radio advertisements, and the Commission’s Rule follows this wording.

With respect to the timing of the disclosure, NAAG suggested that it appear “in close proximity to the triggering claim . . . .”<sup>103</sup> Another commenter suggested that the disclosure “should be provided at the front or beginning of the advertisement” to be consistent with the proposed Internet website disclosure.<sup>104</sup> The Commission agrees that a timing requirement would be appropriate. Rather than mandating the disclosure up front, however, the Commission has decided to add a requirement that the disclosure be made in close proximity to the first mention of “free credit report,” consistent with the requirement for television advertising discussed above. Thus, the final amended Rule section 610.4(b)(2) states that “all advertisements for free credit reports broadcast on radio shall include the following disclosure in close proximity to the first mention of free credit report: ‘This is not the free credit report provided for by Federal law.’”

#### c. Section 610.4(b)(3): Disclosures for print advertisements

Proposed section 610.4(b)(3) provided that all print advertisements for “free credit reports” include the following disclosure: “This is not the free credit report provided for by Federal law. To get your free report, visit ([www.AnnualCreditReport.com](http://www.AnnualCreditReport.com)) or call 877-322-8228.” Further, it required that each letter of the disclosure be, at a minimum, one half the size of the largest letter or numeral used in the name of the website or the telephone number to which consumers are referred

<sup>102</sup> NAAG at 3.

<sup>103</sup> *Id.* In addition, NAAG and the State of Florida offered suggestions regarding the placement and/or audibility of the disclosures. These comments are addressed in the discussion of the general requirements for prominent advertising disclosures above.

<sup>104</sup> NYCPB at 2.

to receive what is advertised as a free credit report.<sup>105</sup>

States and consumer advocates generally supported the proposal and offered suggestions to make the disclosure more prominent. For example, NAAG suggested that the disclosure should be equally prominent and in close proximity to the triggering claim of “free” or “free credit report.”<sup>106</sup> The State of Florida and NYCPB suggested that the Rule include formatting requirements, such as the use of a border or contrasting color.<sup>107</sup> NCLC suggested that the Rule include placement requirements for the disclosure, such as near the most prominent listing of the website or telephone number for the commercial entity and, for multi-page advertisements, on the front side of the first page of the principal promotional document.<sup>108</sup> In addition, Schwartz & Ballen suggested that the second sentence of the disclosure should be the same as the language for the interim disclosure specified in the Act because it is more clear than the disclosure proposed in the NPRM.<sup>109</sup>

The Commission agrees that the print disclosures should be made more prominent, and accordingly has modified the proposal in several ways. First, the Commission has added a general prominence requirement and strengthened the general requirements for visual disclosures in the final amended Rule, as discussed above. All of these requirements apply to print advertising.

Second, proposed section 610.4(d)(3) required only that the disclosure text be one-half the size of the largest letter or numeral *used in the website address or telephone number* to which consumers are referred to obtain their “free credit report” listed in the print advertisement. Section 610.4(b)(3) of the final amended Rule provides that each letter of the disclosure text shall be, at minimum,

<sup>105</sup> As noted in the NPRM, this approach is identical to that of the Pay Per Call Rule, section 308.3(b)(v)(2)(i).

<sup>106</sup> NAAG at 4.

<sup>107</sup> State of Florida at 7; NYCPB at 2.

<sup>108</sup> NCLC at 5.

<sup>109</sup> Schwartz & Ballen at 6. Section 205(b)(3) of the Act provides that the interim disclosure shall include “Free credit reports are available under Federal law at: ‘AnnualCreditReport.com’.” In addition, CDIA commented that the proposed disclosure exceeds the Commission’s statutory authority because of the inclusion of the first sentence and suggested that the disclosure should be limited to the second sentence. CDIA at 13. As stated in the NPRM, section 205 of the Act does not specify the wording of the advertising disclosure required in print advertisements. Rather, it only requires that the disclosure be “prominent” and authorizes the Commission to determine the appropriate wording of the advertising disclosure through this rulemaking.

one-half the size of the largest character *used in the advertisement*. Linking the type size of the disclosure to the largest character used in the entire advertisement (as opposed to only the website address or the telephone number), combined with the general requirements of section 610.4(a) of the final amended Rule, will strengthen the prominence of the print disclosure.

Third, the Commission agrees with the comments suggesting inclusion of a requirement that the disclosure be in close proximity to the free report claim. As with the radio and television disclosures, this modification is consistent with longstanding FTC practice requiring disclosures be made in close proximity to the triggering claim. Thus, the final amended Rule provides that the required disclosure appear in close proximity to the first mention of a “free credit report.”<sup>110</sup>

With respect to the comment on the text of the disclosure, the Commission agrees that the text could be clearer. Particularly when the disclosure is made in close proximity to the offer of a free credit report, the consumer might be confused by conflicting messages. For example, a consumer might see an advertisement saying “get a free credit report” and, in close proximity, the consumer would see the disclosure that begins with the phrase “This is not the free credit report . . .” The Commission believes that the juxtaposition of the two messages – particularly when placed in close proximity – would likely cause consumer confusion, and has changed the disclosure text in two respects to address this issue.

First, the Commission has added a requirement that the disclosure include the following header centered on the first line of the disclosure: “THIS NOTICE IS REQUIRED BY LAW.” This header clarifies that the disclosure is coming from a source other than the commercial entity advertising a free credit report. In addition, the requirement to include a header is consistent with numerous other Commission rules that title disclosures to alert consumers to the importance of the message delivered.<sup>111</sup>

Second, rather than starting the disclosure with the sentence “This is not the free credit report provided by

<sup>110</sup> For example, a print advertisement that features a “free credit report” offer at the top of the page, intervening text, and the disclosure at the bottom of the page would not satisfy the close proximity requirement.

<sup>111</sup> See, e.g., Cooling Off Rule, 16 CFR Part 429 (requiring a form captioned either “NOTICE OF RIGHT TO CANCEL” or “NOTICE OF CANCELLATION”); Prescreen Rule, 16 CFR Part 642 (requiring a form captioned “PRESCREEN AND OPT-OUT NOTICE”).

federal law.”, the final amended Rule’s disclosure includes only the affirmative statement: “You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the ONLY authorized source under federal law.” The Commission notes that beginning the disclosure with the phrase “This is not the free credit report” could be confusing in that it may be unclear what the term “this” refers to. Thus, the Commission believes that these changes make the required disclosure clearer for consumers.<sup>112</sup>

d. Section 610.4(b)(4): Disclosures for Internet websites

Proposed section 610.4(b)(4) required any website offering “free credit reports” to first display on a separate landing page the following visual disclosure: “This is not the free credit report provided for by Federal law. To get your free report, visit ([www.AnnualCreditReport.com](http://www.AnnualCreditReport.com)) or call 877-322-8228.” Proposed section 610.4(b)(4) also required that the separate landing page contain no other information aside from the statement: “Go to [hyperlink to company’s website.]” Further, the disclosure was to: (1) be visible to consumers without requiring them to scroll down the webpage; (2) contain an operational hyperlink directing consumers to ([www.AnnualCreditReport.com](http://www.AnnualCreditReport.com)) that appears before the hyperlink to the advertised company’s commercial website; and (3) be in a type at least twice the size as the hyperlink to the company’s website or display of the company’s Uniform Resource Locator. Finally, proposed section 610.4(b)(4) provided that the separate landing page must occupy the full screen and that no other information, graphics, or material could be shown to the consumer unless and until the consumer affirmatively selected one of the two hyperlinks described above.<sup>113</sup>

Consumer advocates such as NCLC, as well as NAAG, the States of Florida and Minnesota, Senator Levin, and many individual consumers generally supported the proposed separate landing page requirement. Some consumer advocates recommended strengthening the proposed separate landing page. For example, NCLC commented that the separate landing page should appear in multiple

<sup>112</sup> The potential for confusion with the disclosure in the proposed Rule text is also discussed in the section on Internet website disclosures below. The text of the disclosure for all media, except for television and radio (for which the text of the disclosure is statutorily mandated), has been modified in a similar way, for consistency.

<sup>113</sup> 74 FR at 52927.

locations, including on the purchase confirmation page, to prevent circumvention.<sup>114</sup>

Businesses and industry groups, as well Representatives Boozman and Ross, opposed the separate landing page.<sup>115</sup> These commenters raised one or more arguments, including that requiring a separate landing page: (1) exceeds the FTC's statutory authority; (2) impermissibly restricts truthful commercial speech, thereby implicating First Amendment concerns; (3) departs from longstanding FTC policy on "prominent" disclosures in close proximity to the relevant advertised claim; and (4) would confuse consumers or may discourage them from seeking their file disclosure. As to this final point, Experian submitted market research that tested consumers' experiences with a separate landing page similar to what was proposed in the NPRM. Experian presented research suggesting a high rate of consumer confusion as evidenced by, among other things, consumers spending a long time on the landing page, few consumers continuing on to AnnualCreditReport.com, and indeed, many consumers abandoning the separate landing page without continuing on either to AnnualCreditReport.com or Experian's commercial website.<sup>116</sup> In addition, some commenters noted that consumers unfamiliar with a separate landing page may believe it is suspect, such as an illegal "phishing site."<sup>117</sup>

The Commission is particularly concerned with the data suggesting that the separate landing page, as proposed, would cause consumer confusion. Indeed, based on the comments submitted, the Commission is persuaded that the separate landing

page, which would not be in close proximity to the relevant claims, has the potential to confuse consumers and create suspicion about the legitimacy of the disclosure in this context.<sup>118</sup> Because the very purpose of section 205 of the Act and the amendments to section 610.2 of the original Rule is to reduce such confusion, the Commission has determined to eliminate the separate landing page in favor of a prominent disclosure on the website page(s) where the free credit report claim appears, as well as on each page of the ordering process.<sup>119</sup>

As described below, the Commission also has added certain specific requirements to ensure the prominence of the Internet website disclosures. Given that the final amended Rule does not require a separate landing page, the disclosure will now compete with additional content on an existing Internet web page, such as eye-catching graphics, banners, buttons, images, colors, and text. Thus, the final amended Rule contains several additional requirements, which are necessary to strengthen prominence. Finally, as with print disclosures, the Commission has modified the text of the disclosure to make it clearer for consumers. Taken together, the Commission believes that the requirements for Internet website disclosures in the final amended Rule provide clearer, more prominent, and, ultimately, a more effective disclosure than that of the proposed Rule.

#### (i) Placement of the disclosure

With respect to placement, section 610.4(b)(4) of the final amended Rule

<sup>118</sup> The Commission notes that the decision to abandon the separate landing page in this rulemaking is based on the existing record at this time. It may revisit the concept of a separate landing page in this or other contexts at a later time.

<sup>119</sup> Although the Act contemplated that the disclosures could appear on Internet advertisements, the Commission believes that a disclosure on the website would be more useful to consumers in this instance. As noted in the NPRM, based on its experience in designing disclosures, the Commission has found that certain disclosures are most effective when given at the moment that a consumer is making a decision regarding a product or service. 74 FR at 52920. In addition, some Internet advertising, such as buttons, "sponsored links," and banner ads, are size restricted. In light of such restrictions, it would be difficult to design a disclosure in this context that would satisfy the statutory "prominence" requirement. The Commission notes, however, that Internet-hosted multi-media advertising will require disclosures under section 610.4(b)(5), as this type of advertising is similar to television advertising because it contains both audio and visual components. Finally, the Commission will monitor and evaluate the effectiveness of disclosures on Internet websites and will consider additional changes as necessary, including requiring disclosures on Internet advertisements, to achieve the purpose of the Act.

requires that any website offering free credit reports make the required disclosure on "each page that mentions a free credit report and on each page of the ordering process." As discussed in the NPRM, based on its experience, the Commission has found that certain disclosures are most effective when given at the moment that a consumer is making a decision regarding a product or service.<sup>120</sup> Here, the disclosure will occur both at the moment that a vendor is making a claim about a "free credit report"<sup>121</sup> and at the moment that a consumer is seeking to place an order for a "free credit report" online<sup>122</sup> – critical times to prevent deception and the possible purchase of unwanted goods and services. The final amended Rule's requirement that the disclosure appear on each page mentioning "free credit reports" also ensures that consumers seeking a "free credit report" will see the disclosure regardless of their point of entry into a website.<sup>123</sup> The requirement to provide the disclosure on each page of the ordering process will further ensure that consumers receive a prominent disclosure. Requiring the disclosure to be displayed to the consumer at multiple locations on the website is similar to the Act's requirement for dual-modality disclosures for television advertisements, which "have been found to achieve much higher levels of message recall than single-modality disclosures."<sup>124</sup> The Commission has determined that the required disclosures for Internet websites must reflect the same clarity and prominence that are the hallmarks of the dual-modality disclosure Congress mandated for television advertisements.<sup>125</sup>

Further, section 610.4(b)(4) requires that the disclosure be visible across the top of each web page where the

<sup>120</sup> See Dot Com Disclosures at 11 (disclosures are more likely to be effective if they are provided when the consumer is considering the purchase).

<sup>121</sup> See generally *FTC v. TALX Corp.*, Civ. No. 4:09-cv-01071 (E.D. Mo. 2009) (requiring "clear and prominent" disclosures on the principal website screen or landing page where the disclosures are most relevant).

<sup>122</sup> The requirement that the disclosure appear on the first page of the ordering process applies to any website, including order fulfillment websites, where a request for a "free credit report" is processed.

<sup>123</sup> See NCLC at 6 ("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. . .").

<sup>124</sup> Michael B. Mazis and Louis A. Morris, *Channel, in Warnings and Risk Communication*, 106 (Michael S. Wogalter, ed., 1999) (citations omitted).

<sup>125</sup> See Dot Com Disclosures at 3 (noting that general advertising law principles apply regardless of the medium used).

<sup>114</sup> NCLC at 6; see also State of Florida at 8.

<sup>115</sup> See, e.g., Experian, CDIA, TransUnion, IAB, ANA, Intersections, Schwartz & Ballen, E-Commerce, and U.S. Chamber of Commerce, Representatives Boozman and Ross.

<sup>116</sup> Experian at 9-12; see also AOL, Microsoft, Yahoo! (jointly) at 2 ("Because the separate landing page is unprecedented and unfamiliar, it will perplex consumers who visit an affected website for the first time."); DMA at 2 ("[R]equiring a separate landing page . . . could actually increase consumer confusion."); Schwartz & Ballen at 6 ("[S]eparate landing page will prove confusing to consumers."); IAB at 5 (asserting that a separate landing page "will likely confuse and annoy consumers."); TransUnion at 9 (asserting that consumers seeing an "unrelated splash page" will be confused).

<sup>117</sup> Representatives Boozman and Ross at 1; CDIA at 11 (asserting that consumers may simply think that they clicked on a faulty link, or even a phishing site, and shut down their browser); U.S. Chamber of Commerce at 3 ("When presented with such a landing page that covers the entire screen, consumers could think they run [sic] into a scam or could be concerned that such a page is malware.").

disclosure is required to appear.<sup>126</sup> “Visible” means that the disclosure must be unavoidable. Thus, it must appear in the viewable portion of the screen when the consumer opens the web page. Similarly, it must not be obscured by other features such as pop-ups or graphics and cannot be a flashing or dissolving image. “Across the top” means that the disclosure shall appear before any content, such as advertisements, other text, images, logos, or navigation links.

#### (ii) Content of the disclosure

In order to ensure that the disclosure is prominent, consumers must be drawn to it and must be able to distinguish the federally mandated free credit report contained in the disclosure from the competing commercial offers on the website. To achieve these goals, the Commission has modified the content of the disclosure, as described below.<sup>127</sup> To assist in designing disclosures that will comply with this section, the Commission has provided examples for Internet website disclosures at ([www.ftc.gov/freereportsdisclosure](http://www.ftc.gov/freereportsdisclosure)).

First, the final amended Rule requires that the disclosure appear inside a box; that the background of the box be a solid color in a high degree of contrast from the background of the web page; and that the color of the box not appear elsewhere on the page. These requirements strengthen prominence of the disclosure. If the disclosure were not in a box, or if the background color of the box were to blend in with other colors on the page, the Commission believes that the disclosure would likely not catch the viewer’s eye. Second, the Rule requires that all text contained in the disclosure be displayed as plain text, not as an image or banner, and be in a sans serif font, such as Arial. This requirement ensures that entities subject to the Rule do not use highly-stylized or highly-condensed fonts that would be difficult to read. Third, the Rule includes specific requirements for line spacing and top, bottom, left, and right margins for the disclosures, to ensure

<sup>126</sup> The Commission has deleted the requirement that the disclosure be “visible to consumers without requiring them to scroll down the webpage.” The Commission believes that the general “prominence” requirement addresses this point; in addition, the Commission understands that, as computer devices get smaller, consumers may have to scroll to view any content on a web page.

<sup>127</sup> See 155 Cong. Rec. S6178, S6179 (June 4, 2009) (statement of Sen. Levin) (“The goal of section 205 is to eliminate consumer confusion and deception by preventing commercial promotions from posing as the Federal free annual report program, and by ensuring that consumers know how to get their truly free annual reports.”).

readability.<sup>128</sup> Finally, all text contained in the box must be in a high degree of contrast with the immediate background on which it is placed, to strengthen prominence and readability.

Beyond these requirements, the disclosure contained in the final amended Rule consists of three elements: a disclosure header, disclosure text, and a disclosure button. This section describes requirements applicable to each in turn.

#### (A) Disclosure Header

As set forth in paragraph 610.4(b)(4)(i), the first element of the disclosure shall consist of the following header: “THIS NOTICE IS REQUIRED BY LAW. Read more at *FTC.GOV*”. The reference to *FTC.GOV* shall be an operational hyperlink to ([www.ftc.gov/freereports](http://www.ftc.gov/freereports)). As discussed in the print disclosures section above, the use of a header: (1) alerts the viewer that the message being delivered is from a source other than the commercial entity offering free credit reports on the page; and (2) is consistent with other Commission rules that title disclosures to alert consumers to the importance of the message delivered.

In addition, for Internet websites, the Commission has added a second sentence to the header informing consumers that they can “Read more at *FTC.GOV*”. The Rule requires that *FTC.GOV* be an operational hyperlink to an FTC web page where consumers can obtain more information about the availability of free credit reports under federal law. The Commission believes that adding a .gov domain name in the header – that consumers can click immediately to reach an official government website – will add to consumer confidence that the disclosure is coming from the federal government. Indeed, in arguing that the centralized source itself should use a .gov domain name, several commenters suggested that the .gov domain name creates legitimacy.<sup>129</sup> Although the centralized source is operated by the nationwide CRAs and is thus not eligible for a .gov domain name,<sup>130</sup> the Commission is persuaded that adding a .gov domain

<sup>128</sup> See Final Model Privacy Form Under the Gramm Leach Bliley Act, 74 FR 62889, at 62898 (stating that “the guidance from communications experts and form designers is that appropriate white space between the text and the margins . . . make a more effective, readable notice”).

<sup>129</sup> See Empire Justice at 4 (urging the Commission to exert oversight of the centralized source and to use a .gov domain name for the centralized source); see also R. Lang (noting generally that a .gov URL “would help people to know for certain that they are on the correct site”).

<sup>130</sup> See 15 U.S.C. 1681j(a)(1)(B).

name to the disclosure will bolster the legitimacy of the message.

The header must be centered on its own line and be one-half the size of the rest of the required disclosure text. These requirements are intended to enhance readability of the disclosure in a medium where there will be a multiplicity of competing text, fonts, content, and images. A smaller header centered on its own line will ensure sufficient negative space around the text to enhance readability of the header, and at the same time, will ensure that the header does not overpower the text of the disclosure.<sup>131</sup> Having most of the text of the header in all capital letters, in contrast with the actual disclosure text, which will be primarily in lower-case, will further enhance readability of the header.

#### (B) Disclosure Text

As set forth in paragraph 610.4(b)(4)(ii), the second element of the disclosure shall contain the following language and appear below the header: “You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law.”<sup>132</sup> The Commission believes that the text of this disclosure – which is identical to the disclosure for print advertisements – is clearer than that of the proposed Rule, for the reasons stated above. In particular, because the Internet website disclosure requirement has moved from a separate landing page to an existing web page, the disclosure will be in close proximity to other mentions of “free” reports; to avoid confusion, the Commission believes the more straightforward, simpler disclosure telling consumers where they can obtain the free annual file disclosures *authorized by law* will be more effective.

The final amended Rule contains two additional requirements applicable specifically to the disclosure text. First, to emphasize the hyperlink to *AnnualCreditReport.com*, the final amended Rule requires it to be underlined and in a color that is in a high degree of contrast to both the color

<sup>131</sup> The size of the disclosure header varies between print advertisements and Internet websites. For print advertisements, the main disclosure text can be half the size of the largest character in the advertisement; for Internet websites, the disclosure is required to be larger, in relation to other characters on the page. Because the main disclosure text on print advertisements can be smaller, the Commission is concerned that the header might not be readable if it were smaller than the main disclosure text.

<sup>132</sup> As in the proposed Rule, the reference to *AnnualCreditReport.com* shall be an operational hyperlink to the centralized source.

of the other disclosure text and background of the box. Second, because the disclosure will now appear with other text and eye-catching graphics on an existing web page, the Commission has determined that the best way to ensure prominence is to require that the text be at least as large as the largest character on the page. For example, if the largest character on the page is 24 point type size, then all of the characters in the disclosure must be at a minimum 24 point type size.<sup>133</sup>

### (C) Disclosure Button

As set forth in paragraph 610.4(b)(4)(v), the third element of the disclosure shall be a distinct button below the disclosure text, which hyperlinks to *AnnualCreditReport.com*. The Commission has added this requirement, recognizing that websites may use distinctive “order” buttons to draw the viewer’s eye. Because the disclosure now must appear on an existing web page, it may compete with these “order” buttons for the viewer’s attention. To compete effectively, the Commission believes that including a button in the disclosure is necessary.

The final amended Rule requires that the button contain the text “Take me to the authorized source”. This text, in conjunction with the disclosure text described above, will inform consumers that they can click to obtain easily the free credit report they are entitled to under federal law. The text’s specific reference to “the authorized source” will also avoid the possibility of having two identical buttons on the page, which might lead a consumer to believe that clicking on either button will take him or her to the same place.

Finally, the final amended Rule includes additional requirements to strengthen prominence of the button, including requirements that: (1) the background of the button must be the same color as the hyperlink to *AnnualCreditReport.com* contained in

<sup>133</sup> A few commenters questioned the different type size requirements for print advertisements and Internet websites. See AOL, Microsoft, Yahoo! at 2; IAB at 4. The Commission reviewed these comments and concludes that the different nature of these media demands different type size requirements for the disclosure. Specifically, an Internet website requires a larger type size for the disclosure because it is the location from which consumers have the ability to place an order for a “free credit report.” In contrast, print advertisements direct consumers to another source, such as a telephone number or Internet website, to order a “free credit report” and consumers will receive another disclosure at that time. In addition, there may be greater space limitations in some print media that do not exist on Internet websites.

The final amended Rule also clarifies that “characters” includes those in an image or graphic banner – not just characters technically coded on the Internet website as text.

the disclosure;<sup>134</sup> (2) the text “Take me to the authorized source” must be in a high degree of contrast to the background of the button; (3) the button must be centered on its own line; and (4) the text of the button must be the same size as the disclosure text (*i.e.*, at least the same size as the largest character on the web page).<sup>135</sup>

In sum, the Commission believes that the placement, content and size requirements of the Internet website disclosure, coupled with the general requirements for visual disclosures, will help ensure prominence.<sup>136</sup> Further, these requirements will make it easier for consumers to distinguish the disclosure from competing messages on a website and will enable consumers to easily access *AnnualCreditReport.com*. The Commission will monitor and evaluate the effectiveness of the disclosure required under the final amended Rule and will consider additional changes, including revisiting the separate landing page concept, as necessary to achieve the statutory purpose and minimize consumer confusion.

e. Section 610.4(b)(5): Disclosures for Internet-hosted multi-media advertising

Proposed section 610.4(b)(5) required Internet-hosted multi-media advertisements for “free credit reports” disseminated in both audio and visual formats to include the same disclosure as proposed for Internet websites. It further required that the disclosure appear simultaneously in the audio and visual part of the advertisement and that the visual disclosure be in a type at least the same size as the largest hyperlink to the company’s website, display of the Uniform Resource Locator of the company’s website, or display of the

<sup>134</sup> The final amended Rule already requires that the hyperlink to *AnnualCreditReport.com* be in a high degree of contrast to the background of the box containing the disclosure; linking the color of the button to the color of the hyperlink will ensure that both elements will appear in high contrast to the background color of the box. In addition, tying the two colors together will create a visual cue that clicking on either link will get the consumer to the authorized source. The Commission notes further that the requirement that the two links be the same color applies to the page as the consumer initially views it. For example, the Rule is not violated if the two links appear initially in the same color, a consumer clicks the hyperlink, returns to the site, and finds that the hyperlink subsequently appears in a different color.

<sup>135</sup> This requirement will ensure the prominence of the button because the button must be large enough to accommodate the required text in the required size.

<sup>136</sup> As discussed in the NPRM, Congress’ use of the word “prominent” must be viewed as an expression of intent that the new disclosures be more noticeable and more effective than those currently required or used in advertising for “free credit reports.”

company’s telephone number. This section was intended to address innovative forms of advertising for “free credit reports” in multi-media platforms, such as smart phone applications, YouTube.com, and comparable visual and audio mechanisms, that may not be captured by other medium-specific provisions of the Rule.

Several commenters offered suggestions regarding placement and format of disclosures for Internet-hosted multi-media. For example, NAAG suggested that the disclosure should be equally prominent and in close proximity to the triggering claim of “free” or “free credit report.”<sup>137</sup> NCLC suggested that the visual disclosures should be displayed for the entire duration of the advertisement due to the wide variation in the duration of advertisements in this medium.<sup>138</sup> In addition, Schwartz & Ballen opposed the type size requirement because it is inconsistent with the requirement for television advertisements.

In response to the comments, the Commission has modified the proposal in a number of ways. Consistent with changes to the other sections, the Commission has added a requirement that the disclosure be made in close proximity to the first mention of a free credit report. In addition, the Commission notes that the strengthened requirements for prominence in section 610.4(a) of the final amended Rule address the comments offering placement, format, and timing suggestions.<sup>139</sup>

Further, the Commission has modified the language of the disclosure to be consistent with the changes to the print and Internet website disclosures discussed in detail above. Accordingly, the Commission has determined that the disclosure must include “THIS NOTICE IS REQUIRED BY LAW” as a header followed by: “You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law.” Finally, the Commission notes that not all Internet-hosted multi-media ads will include text; thus, the final amended Rule clarifies that the specific size requirement for the visual disclosure applies only if there are characters on the advertisement. In other instances,

<sup>137</sup> NAAG at 4-5.

<sup>138</sup> NCLC at 6.

<sup>139</sup> In response to Schwartz & Ballen’s comment about the inconsistencies between the size of the television and multi-media disclosures, the Commission notes that the Internet-hosted multi-media disclosures will likely be on smaller screens; therefore, the differences in the specific type-size requirements are appropriate.

the Rule's general prominence requirement applies.<sup>140</sup>

The Commission will monitor and evaluate the effectiveness of this section and innovations in technology and advertising and will consider additional changes as necessary to achieve the statutory mandate.

f. Section 610.4(b)(6): Disclosures for telephone requests

Proposed section 610.4(b)(6) addressed the content and timing of the disclosures for when consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement for "free credit reports." Proposed section 610.4(b)(6) required that companies offering "free credit reports" via telephone make the disclosure at the beginning of the telephone call and include the introductory sentence: "You have reached [name of company or service]."<sup>141</sup>

One commenter opposed the timing of the disclosure, asserting that a telephone disclosure should be provided not at the beginning of the call, but at the first mention of a "free credit report," which triggers the need for the disclosure.<sup>142</sup> The Commission agrees. In certain circumstances consumers may be making telephone requests about advertisements for bundled products, and may want to ask about an advertised product other than the "free credit report." In this case, a disclosure about "free credit reports" at the outset of the call could be confusing. Instead, the Commission has decided to modify the proposed section to make it consistent with the approach taken throughout section 610.4 of the final amended Rule, which requires the disclosure in close proximity to the triggering claim. Thus, section 610.4(b)(6) now requires the disclosures for inbound telemarketing to be made at the first mention of a "free credit report." In addition, the final amended Rule modifies the language of the disclosure consistent with the changes for print advertisements and Internet websites,

<sup>140</sup> The Commission notes that this section applies to Internet-hosted multi-media advertising, as opposed to Internet websites. Internet websites with audio and visual components must comply with the disclosures for Internet websites.

<sup>141</sup> The timing requirement drew from the Commission's Telemarketing Sales Rule, which, among other things, prohibits telemarketers from failing to disclose that the purpose of the call is to sell goods or services and the nature of the goods or services. 16 CFR 310.3.

<sup>142</sup> Schwartz & Ballen at 7 (asserting that consumers will likely interpret the required disclosure at the beginning of a telephone call to mean that they have dialed an incorrect telephone number and will likely terminate the telephone call).

with one minor change. The required disclosure for inbound telemarketing is: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the only authorized source under federal law." The Internet website and print disclosure text begins with the header "This notice is required by law". Because the disclosure here is an audio one, it would be difficult for the consumer to understand what the "this" in "this notice" is referring to. The "following notice" language will provide a cue for the consumer that he or she is about to hear a message required by law.

g. Section 610.4(b)(7): Telemarketing solicitations

Proposed section 610.4(b)(7) also required outbound telemarketers to include the required disclosures at the beginning of their telemarketing solicitations. Similar to the modifications made to section 610.4(b)(6), the final amended Rule requires that any telemarketing call made to a consumer that offers a "free credit report" include, at the first mention of a "free credit report," the following disclosure: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the only authorized source under federal law."<sup>143</sup>

D. Elimination of Obsolete "Roll-out" Provisions of the Original Rule

As proposed in the NPRM, the final amended Rule eliminates the "roll-out" provisions contained in sections 610.2(i) and 610.3(g) of the original Rule. When the Commission promulgated the original Rule, it provided for a structured "roll-out" of the availability of free annual file disclosures, beginning in the western states on December 1, 2004, and concluding with eastern states on September 1, 2005. This original Rule provision is now obsolete and serves no useful purpose. No comments were submitted on this issue. Accordingly, the final amended Rule deletes sections 610.2(i) and 610.3(g) of the original Rule.<sup>144</sup>

<sup>143</sup> The Commission notes that the word "free" was inadvertently omitted in the proposed Rule. Indeed, the Section-by-Section discussion of the NPRM correctly defined the trigger as "the first mention of 'free credit report.'" 74 FR 52921-22. In addition, as with the language for telephone requests, the language of the disclosure required by this section has been modified consistent with the changes for print advertisements.

<sup>144</sup> In addition to the proposed revisions and additions discussed above, proposed section 610.2(b)(2)(iv)(D) removes an erroneous reference to "national credit reporting agencies."

E. Effective Date and Interim Disclosures

The effective date of the Rule amendments shall be April 1, 2010, except for the wording of the disclosures for television and radio advertisements in sections 610.4(b)(1)(i) and (2), which shall be September 1, 2010.

Section 205(b)(3) of the Act provides for interim disclosures for advertisements in the event that the Rule is not "finalized" before the nine-month deadline specified in the Act:

If an advertisement subject to section 612(g) of the [FCRA], as added by this section, is made public after the 9-month deadline specified in paragraph (1), but before the rule . . . is finalized, such advertisements shall include the disclosure: "Free credit reports are available under Federal law at: 'AnnualCreditReport.com.'"

The Commission has determined that the final amended Rule is "finalized" upon its effective date. The effective date is April 1, 2010, except for the wording of the disclosures for television and radio advertisements. Prior to April 1, 2010, covered entities must make the interim disclosures required by the Act in a prominent manner, as required by the statute.

The Commission believes that a delay in the effective date for the wording of the disclosures in television and radio advertisements is warranted beyond April 2010. As one commenter noted, compliance with the required interim disclosures followed by compliance with the different final disclosures will impose additional costs for television and radio advertisers: "[I]t would require advertisers and advertising agencies to create two sets of commercials: one set to run beginning on February 22, 2010, and the second set to run when the Rule goes into effect. This would substantially and unnecessarily increase the costs to provide television and radio commercials."<sup>145</sup>

In order to reduce the cost burden on television and radio advertisers, the Commission believes flexibility is warranted, and has provided a later effective date for the wording of the disclosures for television and radio advertisements. Accordingly, prior to September 1, 2010, television and radio advertisers must make the interim disclosures required by the Act in a prominent manner, as required by the statute and the final amended Rule. On and after September 1, 2010, all television and radio advertisements

<sup>145</sup> Manatt, Phelps & Phillips at 4-5.



must include only the disclosures set forth in section 610.4(b)(1) and (2) of the final amended Rule. The Commission notes, however, that because the other provisions of the final amended Rule take effect on April 1, 2010, television and radio advertisers must comply with those provisions as of that date.<sup>146</sup>

#### IV. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (“RFA”)<sup>147</sup> requires the Commission to provide an Initial Regulatory Flexibility Analysis (“IRFA”) with a proposed rule, and a Final Regulatory Flexibility Analysis (“FRFA”) with a final rule, unless the Commission certifies that the rule will have no significant economic impact on a substantial number of small entities.<sup>148</sup>

The Commission anticipates that the final amended Rule will have no significant economic impact on a substantial number of small entities. As discussed above, section 610.2 of the amended final Rule will apply exclusively to the nationwide CRAs that currently operate and maintain the centralized source pursuant to section 612(a) of the FCRA, 15 U.S.C. 1681j(a). None of the three nationwide CRAs is a small entity. Further, section 610.4 of the final amended Rule sets forth disclosures concerning the advertising or marketing of “free credit reports,” pursuant to section 205 of the Act. The Commission believes that the universe of entities offering “free credit reports” is likely to be small, comprised mostly of the three nationwide CRAs and their subsidiaries and affiliates. As explained more fully below, the Commission believes the number of small entities offering “free credit reports” is likely to be insubstantial and, therefore, the overall economic impact of the final amended Rule is not likely to have a significant impact on a substantial number of small entities. Accordingly, the Commission certifies that the final amended Rule will have no significant impact on a substantial number of small entities. Nonetheless, to ensure that no such impact, if any, has been overlooked, the Commission had conducted the following FRFA, as follows.

<sup>146</sup> Manatt, Phelps & Phillips urged the Commission to make clear that only the section 610.4(b)(1) and (2) disclosures – drawn from section 205(a)(2) of the Act – should apply during the interim period. The statute, however, sets forth the disclosures required during the interim period. Further, the Commission believes that the delayed effective date will ensure that television and radio advertisers have ample time to come into compliance with the final amended Rule, thus reducing compliance costs.

<sup>147</sup> 5 U.S.C. 601-612.

<sup>148</sup> 5 U.S.C. 603-605.

#### A. Need for and objectives of the final amended Rule

The final amended Rule implements section 205 of the Act, which mandates that advertisements offering “free credit reports” contain prominent disclosures informing consumers that federally mandated free annual file disclosures are available at *AnnualCreditReport.com*. Further, the Free Reports Rule requires, among other things, a centralized source through which consumers may request a free annual file disclosure from each nationwide CRA. Amendments to the Rule eliminate practices that interfere with consumers’ ability to obtain free annual file disclosures through the centralized source, in violation of section 610.2(g) of the original Rule. Finally, the final amended Rule eliminates obsolete provisions from the original Rule that no longer serve any purpose.

#### B. Significant issues raised by public comment, summary of agency’s assessment of these issues, and changes, if any, made in response to such comments

The Commission received over 1,080 comments in response to the NPRM, mostly from consumers who either supported the proposed Rule, or urged the Commission to take additional action to stem the deceptive and confusing marketing of “free credit reports.” In particular, many consumers and consumer advocates supported the proposed delay in advertising of “free credit reports” on the centralized source until after consumers received their free annual file disclosures. Although the Commission considered the view of business interests opposing a delay in advertising on the centralized source, the Commission has adopted this proposal in the final amended Rule because the record reveals that consumers seeking their free credit report are confused by such advertising. The Commission, however, did not ban advertising in connection with the dissemination of free annual file disclosures, a position advocated by some consumers and consumer advocates. As explained in the Statement of Basis and Purpose, delaying advertising is a less restrictive means of addressing consumer confusion. Accordingly, the Commission believes that the delay in advertising on the centralized source strikes the appropriate balance between ensuring consumers’ unfettered right to receive free annual file disclosures and the desire on the part of business to advertise other useful products and

services (such as credit scores) to consumers.

The Commission also received comments both supporting and opposing the proposal that disclosures in connection with Internet advertisements appear on a separate landing page. The arguments for and against such a requirement are discussed in depth above in the Section-by-Section discussion. After considering these comments, the Commission agreed with many of the commenters that the “separate landing page” requirement may be confusing to consumers, some of whom may believe the unexpected appearance of such a page means it is a scam, such as an unauthorized pop-up or, worse, a “phishing” website – one that mimics a true website in order to capture consumers’ information. The Commission has decided that the “separate landing page” requirement is unnecessary to accomplish the goal of reducing deceptive marketing of “free credit reports;” rather, for Internet websites, disclosures on each page on which the triggering claims for “free credit reports” appear, as well as on each page of the ordering process, are sufficient to accomplish that goal.

The Commission also received comments on the scope of the proposed definition of “free credit report,” as well as the language of the specific proposed required disclosures. The Commission has revised both the definition of “free credit report” and the required disclosures in light of these comments. Specifically, the definition of “free credit report” in the final amended Rule makes clear that it pertains only to file disclosures obtained directly or indirectly from a nationwide CRA (as opposed to a specialty CRA, for example) and that the definition covers free credit reports bundled with trial offers of other products. Further, as discussed at length in the Section-by-Section discussion above, the language of the required disclosures has been clarified in several instances, adding greater consistency and precision and tracking more closely Commission precedent in this field.

#### C. Description and estimate of the number of small entities subject to the final amended Rule or explanation why no estimate is available

As noted above, section 610.2 of the final amended Rule limits advertising through the centralized source and prohibits other conduct in connection with the provision of annual file disclosures to consumers. By its terms, amended section 610.2 will apply exclusively to the nationwide CRAs that currently operate and maintain the

centralized source pursuant to section 612(a) of the FCRA, 15 U.S.C. 1681j(a). None of the three nationwide CRAs is a small entity.<sup>149</sup>

In addition, section 610.4 of the final amended Rule sets forth disclosures concerning the advertising or marketing of “free credit reports,” pursuant to section 205 of the Act. The universe of entities offering “free credit reports” is small, comprised mostly of the three nationwide CRAs and their subsidiaries and affiliates. Based upon its knowledge of industry practices and members, Commission staff estimates that there may also be a small number of independently operating CRAs or resellers of consumer reports that, in theory, might offer “free credit reports” subject to the final amended Rule. For example, when the original Rule was first implemented, several resellers of reports appeared, using imposter websites, such as those misspelling AnnualCreditReport.com, or using sound-alike websites names that did not link to AnnualCreditReport.com. In 2005, the Commission staff sent warning letters to the known operators of those suspect sites, totaling 29 operators. This suggests that the total number of independent resellers of reports may be small and that the number of small entities offering “free credit reports” is likely to be insubstantial.

Nonetheless, the Commission specifically sought comment in the NPRM “on the number of entities likely to be affected by the proposed section 610.4 to the Rule and the number of those, if any, that are small entities.”<sup>150</sup> The Commission received no responsive comments. The lack of additional evidence on both the number of small entities offering “free credit reports” and how the proposed Rule might impact small entities, tends to support the

Commission staff’s initial assessment that few, if any, independently operating sellers or resellers of credit reports are likely to be small entities.

*D. Description of the projected reporting, recordkeeping, and other compliance requirements of the final amended Rule, including an estimate of the classes of small entities that will be subject to the final amended Rule and the type of professional skills that will be necessary to comply*

Section 610.2 of the final amended Rule limits advertising by the CRAs on the centralized source until after consumers have obtained their free annual file disclosures, and prohibits practices that interfere with consumers’ ability to obtain free annual file disclosures through the centralized source. As discussed more fully below in connection with the Paperwork Reduction Act, these amendments to the Rule will impose no more than a *de minimis*, one-time burden of 12 hours to be completed by professional technical personnel and/or management personnel.

Further, section 610.4 of the final amended Rule sets forth statutorily-mandated advertising disclosures for offering of “free credit reports” in television and radio advertisements, as well as other media, including print and Internet advertising. The amendments to the original Rule pertain to all advertisements for “free credit reports”: the Act does not distinguish between large and small entities that advertise for “free credit reports,” nor does the Act contemplate any exemptions to the disclosure requirements. Most likely, these disclosures will be prepared by professional and management personnel. At the same time, section 610.4 imposes no reporting or recordkeeping obligations.

*E. Steps the agency has taken to minimize any significant economic impact on small entities, consistent with the stated objectives of the applicable statutes, including the factual, policy, and legal reason(s) for selecting alternative(s) finally adopted, and why each of the significant alternatives, if any, was rejected.*

The Commission believes that the Rule amendments are likely to have an insignificant impact on small entities. Nonetheless, the Commission solicited comment on alternatives that would minimize compliance costs. The Commission received no information or suggestions in response to those questions. As explained in the statement of basis and purpose above, however, the Commission has made certain

changes to the amended Rule that will reduce costs for all covered entities, including any small entities that may be subject to the final amended Rule. These include elimination of the proposed separate landing page requirement for advertisements for free annual file disclosures on Internet websites.

## VI. Paperwork Reduction Act

In conjunction with the NPRM, the Commission submitted the proposed amended Rule and a Supporting Statement for Information Collection Provisions to the Office of Management and Budget (“OMB”) for review under the Paperwork Reduction Act (“PRA”), 44 U.S.C. 3501-3521. The OMB has approved the Rule’s information collection requirements through November 30, 2012 (OMB Control No. 3084-0128).

In the NPRM, the Commission invited comments to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will serve a useful purpose; (2) evaluate the accuracy of the Commission’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques, or other forms of information technology. While commenters questioned the appropriateness of various proposals in the NPRM, no commenters specifically sought to answer the data collection questions posed above.

### A. Original Rule

The original Rule required nationwide CRAs and nationwide specialty CRAs to disclose information to third parties by requiring those consumer reporting agencies to provide to consumers, upon request, one free annual file disclosure. It also required the nationwide CRAs to provide consumers with the ability to request this disclosure through a centralized Internet website, a toll-free telephone number, and a postal address. In addition, the original Rule required the nationwide CRAs to establish a standardized form for Internet and mail requests, and it provided a model standardized form that may be used to comply with that requirement.

<sup>149</sup> Covered entities are classified as small businesses if they satisfy the Small Business Administration’s relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (“NAICS”). The closest NAICS size standard relevant to the final amended Rule is for “credit bureaus,” which is \$7 million maximum in annual receipts. See ([http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_sstd\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf)). See also 69 FR 34568, at 35494-95 (June 24, 2004) (“[T]he Commission is aware of three entities that meet the rule definition . . . of a ‘nationwide consumer reporting agency.’ The Commission has concluded that none of these is a small entity.”). In the original Notice of Proposed Rulemaking for the Free Reports Rule, the Commission specifically asked several questions related to the existence, number and nature of small business entities covered by the proposed Free Reports Rule. The Commission received no comments responsive to those questions. 69 FR 35495. No additional data has been provided in response to the NPRM.

<sup>150</sup> 74 FR at 52923-24.

### B. Section 610.4 of the Final Amended Rule

Section 610.4 of the final amended Rule requires all advertisements for “free credit reports” to contain certain prescribed disclosures tailored to the medium used. As such, these disclosures do not constitute a collection of information, as defined by OMB’s regulations that implement the PRA.<sup>151</sup> Accordingly, implementation of section 205 of the Act presents no associated PRA collection of information burden.

### C. Amended Section 610.2 of the Final Amended Rule

Section 610.2 of the final amended Rule is designed to prevent interference with consumers’ ability to obtain their free annual file disclosures through the centralized source, as permitted by law. Amended section 610.2 does not modify the nationwide CRAs’ original obligation to provide consumers with free annual file disclosures upon request. Nor is amended section 610.2 likely to increase or decrease the estimated number of annual file disclosures made available to consumers, whether through the Internet, telephone, or mail. Rather, the amendments are intended to make it easier for consumers to obtain their free annual file disclosures from the centralized source without distracting advertising, including advertising leading consumers to commercial websites.

Moreover, amended section 610.2 is unlikely to increase significantly the administrative burden on the nationwide CRAs providing consumers with annual file disclosures through the centralized source. As discussed above, amended section 610.2 requires the nationwide CRAs to remove links on the initial page of the centralized source website to their commercial or proprietary websites. Finally, if a nationwide CRA chooses to advertise products and services – such as credit scores or credit monitoring – through the centralized source, it can do so only after the consumer has obtained his or her free annual file disclosure. Accordingly, in order to advertise through the centralized source, the nationwide CRAs must establish a mechanism to verify that consumers have completed their transaction.

<sup>151</sup> See 5 CFR 1320.3(c)(2) (excluding from the definition of “collection of information” the “public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public”).

### 1. Estimated Hours Burden and Associated Labor Cost

The above-noted administrative amendments to section 610.2 will impose no more than a de minimis, one-time burden, as the three nationwide CRAs reconfigure the centralized source and their own proprietary websites. Commission staff estimates that these steps will take approximately 12 hours to complete per CRA.<sup>152</sup>

Commission staff estimates labor costs by applying appropriate estimated hourly cost figures to the burden hours described above. It is difficult to calculate with precision the labor costs associated with the final amended Rule, because they entail varying compensation levels of management (e.g., administrative services, computer and information systems, systems analysts, and network and computer system administrators). Commission staff assumes that professional technical personnel and/or management personnel will implement the amendments, at an hourly rate of \$39.42.<sup>153</sup>

Based upon the above estimates and assumptions, the total labor cost for each of the three nationwide CRAs to comply with the amendments to the Rule is \$473.00 (12 hours x \$39.42) or, cumulatively, \$1,419.

### 2. Estimated Capital/Other Non-Labor Cost Burden

Commission staff believes that the Rule amendments will not impose any capital or other non-labor costs. Commission staff assumes that the nationwide CRAs will continue their current practice of using third-party contractors (instead of their own employees) to fulfill consumer requests for annual file disclosures, pursuant to the Rule. Because of the way these contracts are typically established, these costs will likely be incurred on a continuing basis, and will be calculated based on the number of annual file disclosures requested by consumers. As discussed above, Commission staff believes that the amendments, while making it easier for consumers to obtain their free annual file disclosures from

<sup>152</sup> This figure derives from consultation with FTC staff experienced in web design and operations.

<sup>153</sup> See ([http://www.bls.gov/ncs/ncswage2008.htm#Wage\\_Tables](http://www.bls.gov/ncs/ncswage2008.htm#Wage_Tables)) (National Compensation Survey: Occupational Earnings in the United States 2008, US Department of Labor released August 2009, Bulletin 2720, Table 3) (“Full-time civilian workers,” mean and median hourly wages). The above amount is an average of the mean hourly wages of administrative services managers, computer and information systems managers, computer systems analysts, and network and computer systems administrators.

the centralized source, will not increase the burden on industry to supply such file disclosures, nor affect the overall number of file disclosures provided to consumers annually, because consumers will likely be redirected from websites that require consumers to pay for their “free credit report” to the centralized source.

### Appendix A

#### List of Non-Consumer NPRM Commenters

- American Express Company (“American Express”)
- AOL, Microsoft, Yahoo! (“AOL, Microsoft, Yahoo!”)
- Association of National Advertisers (“ANA”) Representative John Boozman (“Representative Boozman”)
- Chamber of Commerce of the United States of America (“U.S. Chamber of Commerce”)
- Consumer Data Industry Association (“CDIA”)
- Council of Better Business Bureaus (“BBB”)
- Direct Marketing Association (“DMA”)
- Empire Justice Center (“Empire Justice”)
- Evergreen Credit Reporting, Inc. (“Evergreen”)
- Experian Information Solutions, Inc. (“Experian”)
- Bill McCollum, Attorney General, State of Florida (“State of Florida”)
- Professor David A. Friedman (“Friedman”)
- Interactive Advertising Bureau (“IAB”)
- Intersections Inc. (“Intersections”)
- Senator Carl Levin (“Senator Levin”)
- Lori Swanson, Attorney General, State of Minnesota (“State of Minnesota”)
- Mannatt, Phelps & Phillips (“Mannatt, Phelps & Phillips”)
- National Association of Attorneys General (“NAAG”)
- National Business Coalition for E-Commerce and Privacy (“E-Commerce”)
- National Consumer Law Center (“NCLC”)
- Mindy A. Bockstein, Chairperson and Executive Director, State of New York, Consumer Protection Board (“NYCPB”)
- Representative Mike Ross (“Representative Ross”)
- Senator Charles Schumer (“Senator Schumer”)
- Schwartz & Ballen LLP (“Schwartz & Ballen”)
- TransUnion (“TransUnion”)

### FINAL RULE

#### List of Subjects in 16 CFR Part 610

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Trade practices.

#### Authority and Issuance

■ For the reasons discussed in the statement of basis and purpose, the Federal Trade Commission amends title

16, Chapter I, Subchapter F, of the Code of Federal Regulations, part 610, as follows:

**PART 610—FREE ANNUAL FILE DISCLOSURES**

■ 1. The authority citation for part 610 is revised to read as follows:

**Authority:** 15 U.S.C. 1681a, g, and h; sec. 211(a) and (d), Pub. L. 108-159, 117 Stat. 1968 and 1972 (15 U.S.C. 1681j); Pub. L. 111-24.

■ 2. Revise § 610.2 to read as follows:

**§ 610.2 Centralized source for requesting annual file disclosures from nationwide consumer reporting agencies.**

(a) *Purpose.* The purpose of the centralized source is to enable consumers to make a single request to obtain annual file disclosures from all nationwide consumer reporting agencies, as required under section 612(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681j(a).

(b) *Establishment and operation.* All nationwide consumer reporting agencies shall jointly design, fund, implement, maintain, and operate a centralized source for the purpose described in paragraph (a) of this section. The centralized source required by this part shall:

(1) Enable consumers to request annual file disclosures by any of the following request methods, at the consumers' option:

(i) A single, dedicated Internet website,

(ii) A single, dedicated toll-free telephone number; and

(iii) Mail directed to a single address;

(2) Be designed, funded, implemented, maintained, and operated in a manner that:

(i) Has adequate capacity to accept requests from the reasonably anticipated volume of consumers contacting the centralized source through each request method, as determined in accordance with paragraph (c) of this section;

(ii) Collects only as much personally identifiable information as is reasonably necessary to properly identify the consumer as required under the Fair Credit Reporting Act, section 610(a)(1), 15 U.S.C. 1681h(a)(1), and other applicable laws and regulations, and to process the transaction(s) requested by the consumer;

(iii) Provides information through the centralized source website and telephone number regarding how to make a request by all request methods required under § 610.2(b)(1) of this part; and

(iv) Provides clear and easily understandable information and

instructions to consumers, including, but not necessarily limited to:

(A) Providing information on the progress of the consumer's request while the consumer is engaged in the process of requesting a file disclosure;

(B) For a website request method, providing access to a "help" or "frequently asked questions" screen, which includes specific information that consumers might reasonably need to request file disclosures, the answers to questions that consumers might reasonably ask, and instructions whereby a consumer may file a complaint with the centralized source and with the Federal Trade Commission;

(C) In the event that a consumer requesting a file disclosure through the centralized source cannot be properly identified in accordance with the Fair Credit Reporting Act, section 610(a)(1), 15 U.S.C. 1681h(a)(1), and other applicable laws and regulations, providing a statement that the consumers' identity cannot be verified; and directions on how to complete the request, including what additional information or documentation will be required to complete the request, and how to submit such information; and

(D) A statement indicating that the consumer has reached the website or telephone number for ordering free annual credit reports as required by federal law; and

(3) Make available to consumers a standardized form established jointly by the nationwide consumer reporting agencies, which consumers may use to make a request for an annual file disclosure, either by mail or on the Internet website required under § 610.2(b)(1) of this part, from the centralized source required by this part. The form provided at 16 CFR Part 698, Appendix D, may be used to comply with this section.

(c) *Requirement to anticipate.* The nationwide consumer reporting agencies shall implement reasonable procedures to anticipate, and to respond to, the volume of consumers who will contact the centralized source through each request method, to request, or attempt to request, a file disclosure, including developing and implementing contingency plans to address circumstances that are reasonably likely to occur and that may materially and adversely impact the operation of the nationwide consumer reporting agency, a centralized source request method, or the centralized source.

(1) The contingency plans required by this section shall include reasonable measures to minimize the impact of such circumstances on the operation of

the centralized source and on consumers contacting, or attempting to contact, the centralized source.

(i) Such reasonable measures to minimize impact shall include, but are not necessarily limited to:

(A) The extent reasonably practicable under the circumstances, providing information to consumers on how to use another available request method;

(B) The extent reasonably practicable under the circumstances, communicating, to a consumer who attempts but is unable to make a request, the fact that a condition exists that has precluded the centralized source from accepting all requests, and the period of time after which the centralized source is reasonably anticipated to be able to accept the consumers' request for an annual file disclosure; and

(C) Taking all reasonable steps to restore the centralized source to normal operating status as quickly as reasonably practicable under the circumstances.

(ii) Reasonable measures to minimize impact may also include, as appropriate, collecting request information but declining to accept the request for processing until a reasonable later time, provided that the consumer is clearly and prominently informed, to the extent reasonably practicable under the circumstances, of when the request will be accepted for processing.

(2) A nationwide consumer reporting agency shall not be deemed in violation of § 610.2(b)(2)(i) of this part if a centralized source request method is unavailable to accept requests for a reasonable period of time for purposes of conducting maintenance on the request method, provided that the other required request methods remain available during such time.

(d) *Disclosures required.* If a nationwide consumer reporting agency has the ability to provide a consumer report to a third party relating to a consumer, regardless of whether the consumer report is owned by that nationwide consumer reporting agency or by an associated consumer reporting agency, that nationwide consumer reporting agency shall, upon proper identification in compliance with section 610(a)(1) of the Fair Credit Reporting Act, 15 U.S.C. 1681h(a)(1), provide an annual file disclosure to such consumer if the consumer makes a request through the centralized source.

(e) *High request volume and extraordinary request volume* – (1) *High request volume.* Provided that a nationwide consumer reporting agency has implemented reasonable procedures developed in accordance with paragraph (c) of this section, entitled

“requirement to anticipate,” the nationwide consumer reporting agency shall not be deemed in violation of paragraph (b)(2)(i) of this section for any period of time in which a centralized source request method, the centralized source, or the nationwide consumer reporting agency experiences high request volume, if the nationwide consumer reporting agency:

(i) Collects all consumer request information and delays accepting the request for processing until a reasonable later time; and

(ii) Clearly and prominently informs the consumer of when the request will be accepted for processing.

(2) *Extraordinary request volume.* Provided that the nationwide consumer reporting agency has implemented reasonable procedures developed in compliance with paragraph (c) of this section, entitled “requirement to anticipate,” the nationwide consumer reporting agency shall not be deemed in violation of paragraph (b)(2)(i) of this section for any period of time during which a particular centralized source request method, the centralized source, or the nationwide consumer reporting agency experiences extraordinary request volume.

(f) *Information use and disclosure.* Any personally identifiable information collected from consumers as a result of a request for annual file disclosure, or other disclosure required by the Fair Credit Reporting Act, made through the centralized source, may be used or disclosed by the centralized source or a nationwide consumer reporting agency only:

(1) To provide the annual file disclosure or other disclosure required under the FCRA requested by the consumer;

(2) To process a transaction requested by the consumer at the same time as a request for annual file disclosure or other disclosure;

(3) To comply with applicable legal requirements, including those imposed by the Fair Credit Reporting Act and this part; and

(4) To update personally identifiable information already maintained by the nationwide consumer reporting agency for the purpose of providing consumer reports, provided that the nationwide consumer reporting agency uses and discloses the updated personally identifiable information subject to the same restrictions that would apply, under any applicable provision of law or regulation, to the information updated or replaced.

(g) *Communications provided through centralized source.*

(1) Any advertising or marketing for products or services, any communications or instructions that advertise or market any products or services, or any request to establish an account through the centralized source must be delayed until after the consumer has obtained his or her annual file disclosure.

(i) In the case of requests made by mail or telephone, the consumer “has obtained his or her annual file disclosure” when the file disclosure is mailed, and the nationwide consumer reporting agency may include advertising for other products or services with the file disclosure.

(ii) In the case of requests made through the centralized source Internet website, the consumer “has obtained his or her annual file disclosure” when the file disclosure is delivered to the consumer through the Internet, and the nationwide consumer reporting agency may include advertising for other products or services with the file disclosure.

(2) Any communications, instructions, or permitted advertising or marketing shall not interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source stated in paragraph (a) of this section.

(3) Examples of interfering, detracting, inconsistent, and/or undermining communications include:

(i) Centralized source materials that represent, expressly or by implication, that a consumer must purchase a paid product or service in order to receive or to understand the annual file disclosure;

(ii) Centralized source materials that represent, expressly or by implication, that annual file disclosures are not free, or that obtaining an annual file disclosure will have a negative impact on the consumers’ credit standing; and

(iii) 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.

(h) *Other practices prohibited through the centralized source.* The centralized source shall not:

(1) Contain hyperlinks to commercial or proprietary websites until after the consumer has obtained his or her annual file disclosure, except for technical transfers to a web page on which consumers can request their free annual file disclosure; provided,

however, that no hyperlinks to commercial websites shall appear on the initial page of the centralized source.

(2) Require consumers to set up an account in connection with obtaining an annual file disclosure; or

(3) Ask or require consumers to agree to terms or conditions in connection with obtaining an annual file disclosure.

#### § 610.3 [Amended]

■ 3. In § 610.3, remove paragraph (g).

■ 4. Add § 610.4 to read as follows:

#### § 610.4 Prevention of deceptive marketing of free credit reports.

(a) For purposes of this section:

(1) *AnnualCreditReport.com and 877-322-8228* means the Uniform Resource Locator address

“AnnualCreditReport.com” and toll-free telephone number, 877-322-8228. These are the locator address and toll-free telephone number currently used by the centralized source. If the locator address or toll-free telephone number changes in the future, the new address or telephone number shall be substituted within a reasonable time.

(2) *Free credit report* means a file disclosure prepared by or obtained from, directly or indirectly, a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act), that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.

(3) *General requirements for disclosures.* The disclosures covered by paragraph (b) of this section shall contain only the prescribed content and comply with the following requirements:

(i) All disclosures shall be prominent;

(ii) All disclosures shall be made in the same language as that principally used in the advertisement;

(iii) Visual disclosures shall be easily readable; in a high degree of contrast from the immediate background on which it appears; in a format so that the disclosure is distinct from other text, such as inside a border; in a distinct type style, such as bold; and parallel to the base of the advertisement or screen;

(iv) Audio disclosures shall be delivered in a slow and deliberate manner and in a reasonably understandable volume and pitch;

(v) Program-length television, radio, or Internet-hosted multi-media advertisement disclosures shall be made at the beginning, near the middle, and at the end of the advertisement; and

(vi) Nothing contrary to, inconsistent with, or that undermines the required disclosures shall be used in any advertisement in any medium, nor shall any audio, visual, or print technique be used that is likely to detract significantly from the communication of any disclosure.

(b) *Medium-specific disclosures.* All offers of free credit reports shall prominently include the disclosures required by this section.

(1) *Television advertisements.*

(i) All advertisements for free credit reports broadcast on television shall include the following disclosure in close proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

(ii) The disclosure shall appear at the same time in the audio and visual part of the advertisement. The visual disclosure shall be at least four percent of the vertical picture height and appear for a minimum of four seconds.

(2) *Radio advertisements.* All advertisements for free credit reports broadcast on radio shall include the following disclosure in close proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

(3) *Print advertisements.* All advertisements for free credit reports in print shall include the following disclosure in the form specified below and in close proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW". Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law." Each letter of the disclosure text shall be, at minimum, one-half the size of the largest character used in the advertisement.

(4) *Internet websites.* Any website offering free credit reports must display the disclosure set forth in paragraphs 610.4(b)(4)(i), (ii), and (v) of this section on each page that mentions a free credit report and on each page of the ordering process. This disclosure shall be visible across the top of each page where the disclosure is required to appear; shall appear inside a box; and shall appear in the form specified below:

(i) The first element of the disclosure shall be a header that is centered and shall consist of the following text: "THIS

NOTICE IS REQUIRED BY LAW. Read more at *FTC.GOV*". Each letter of the header shall be one-half the size of the largest character of the disclosure text required by 610.4(b)(4)(ii). The reference to *FTC.GOV* shall be an operational hyperlink to (*www.ftc.gov/freereports*), underlined, and in a color that is a high degree of contrast from the color of the other disclosure text and background color of the box;

(ii) The second element of the disclosure shall appear below the header required by paragraph 610.4(b)(4)(i) and shall consist of the following text: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law." The reference to *AnnualCreditReport.com* shall be an operational hyperlink to the centralized source, underlined, and in the same color as the hyperlink to *FTC.GOV* required in paragraph 610.4(b)(4)(i);

(iii) The color of the text required by paragraphs 610.4(b)(4)(i) and (ii) shall be in a high degree of contrast with the background color of the box;

(iv) The background of the box shall be a solid color in a high degree of contrast from the background of the page and the color shall not appear elsewhere on the page;

(v) The third element of the disclosure shall appear below the text required by paragraph 610.4(b)(4)(ii) and shall be an operational hyperlink to *AnnualCreditReport.com* that appears as a centered button containing the following language: "Take me to the authorized source". The background of this button shall be the same color as the hyperlinks required by paragraphs 610.4(b)(4)(i) and (ii) and the text shall be in a high degree of contrast to the background of the button;

(vi) Each character of the text in paragraphs 610.4(b)(4)(ii) and (v) shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner;

(vii) Each character of the disclosure shall be displayed as plain text and in a sans serif font, such as Arial; and

(viii) The space between each element of the disclosure required in paragraphs 610.4(b)(i), (ii), and (v) shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner. The space between the boundaries of the box and the text or button required in paragraphs 610.4(b)(i), (ii), and (v) shall be, at

minimum, twice the size of the vertical height of the largest character on the page, including characters in an image or graphic banner.

(5) *Internet-hosted multi-media advertising.* All advertisements for free credit reports disseminated through Internet-hosted multi-media in both audio and visual formats shall include the following disclosure in the form specified below and in close proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW.". Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law." The disclosure shall appear at the same time in the audio and visual part of the advertisement. If the advertisement contains characters, the visual disclosure shall be, at minimum, the same size as the largest character on the advertisement.

(6) *Telephone requests.* When consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement that represents free credit reports are available at the number, consumers must receive the following audio disclosure at the first mention of a free credit report: "The following notice is required by law. You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the only authorized source under federal law."

(7) *Telemarketing solicitations.* When telemarketing sales calls are made that include offers of free credit reports, the call must include at the first mention of a free credit report the following disclosure: "The following notice is required by law. You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the only authorized source under federal law."

(c) *Effective date.* This section is effective April 2, 2010, except for the wording of the disclosures for television and radio advertisements (paragraphs 610.4(b)(1)(i) and (2)), which are effective on September 1, 2010.

By direction of the Commission.

**Donald S. Clark**

*Secretary*

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