December 7, 2009

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

Re: CARD Act Proposed Amendments to Free Annual File Disclosures Rule, Matter No. R411004

Dear Mr. Clark:

The Consumer Data Industry Association ("CDIA") appreciates the opportunity to comment on the Federal Trade Commission's ("FTC" or "Commission") proposed amendments to the Free Annual File Disclosures Rule ("Rule"), 16 C.F.R. Part 310.[1]

CDIA is an international trade association representing the consumer reporting industry. CDIA's members include the nationwide consumer reporting agencies as described in section 603(p) of the Fair Credit Reporting Act ("FCRA"). These agencies are Equifax Information Services LLC, Experian Information Solutions, Inc., and Trans Union, LLC. CDIA's membership also includes the nationwide specialty consumer reporting agencies as described in FCRA section 603(w). The nationwide consumer reporting agencies and nationwide specialty consumer reporting agencies are the only entities covered by the Free Annual File Disclosures Rule.[2] They have committed substantial resources to comply with the Rule, and the Rule has worked effectively for more than five years, resulting in the delivery of about 150 million free consumer report file disclosures to consumers. These free annual disclosures provide consumers with vital information about their financial profiles, and the participating consumer reporting agencies have worked with consumers to ensure that consumers understand the information in their consumer report files and that any material errors are corrected.

In addition, CDIA's members and their affiliates provide credit file monitoring subscriptions and related products and services to consumers. Credit file monitoring is

[1] 74 FR 52915 (Oct. 15, 2009).
[2] 16 CFR § 610.2.

widely recognized as an important consumer protection tool. The FTC has publicly recognized its value in helping consumers maintain an accurate credit file and combating identity theft.[3] Businesses, employers, and government agencies often procure credit file monitoring services for their customers or employees free of charge following a data security breach, and bipartisan Congressional bills have included them as a means of protecting consumers in such an event. Credit file monitoring services and similar useful consumer products and services may be advertised in conjunction with free credit reports and free credit scores.

The Commission proposes to amend the Free Annual File Disclosures Rule promulgated pursuant to Section 211(d) of the Fair and Accurate Credit Transactions Act ("FACTA") amendments to the FCRA and to add provisions to implement section 205 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"). Both sets of proposed amendments would adversely affect CDIA's members.

General Comments

CDIA worked closely with the FTC throughout the Free Annual File Disclosures rulemaking proceeding. CDIA believes that the centralized source developed through this rulemaking has proven to be an effective means through which millions of consumers request their free annual consumer report file disclosures. The FTC has not informed CDIA of any systemic problems in the operation of the centralized source or of any failure by consumer reporting agencies to respond to consumers' requests for the free file disclosures. Nonetheless, the FTC proposes to add new restrictions not supported by any statutory provision.[4] These restrictions would impede consumer reporting agencies' ability to engage in truthful advertising and to compete in the provision of products and services that compliment the free file disclosures available through the centralized source.

CDIA does not object to the basic mission of section 205 of the CARD Act – to prevent deceptive marketing of credit reports – or to the requirement for disclosures consistent with that goal. The CARD Act requires the Commission to adopt disclosures to prevent deceptive marketing of credit reports and to require prominent disclosure of specific information in advertisements for free credit reports. CDIA believes that the FTC should direct its attention to these concerns and should also address the problem of third parties that are unrelated to consumer reporting agencies and abuse the consumer's right to a free annual file disclosure by charging a fee to obtain that disclosure. The FTC's proposed rule does not focus on these kinds of abuses, but instead exceed the Commission's statutory mandate and seek to establish standards that Congress did not authorize.

The FTC's Notice of Proposed Rulemaking ("NPRM") fails to provide adequate evidentiary support for its proposals. Unsubstantiated references to "consumer complaints" and media stories are insufficient support for the FTC's aggressive measures. As a result, the Commission's proposal is arbitrary and capricious.

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[3] *See* FTC Letter to The Honorable Edward R. Royce, U.S. House of Representatives, July 1, 2005.
[4] *See* FACTA § 211(d).

The proposed rule would unduly restrict the disclosure of truthful, accurate, and non-misleading information about consumer products and services that relate to free credit reports. As such, the proposal seeks to prohibit the free expression that is protected by the First Amendment to the U.S. Constitution. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 773 (1976). The proposed rule's restrictions fail the fundamental tests established by federal and state courts for measuring government-imposed speech restrictions. *See, Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980). The *Central Hudson* test asks: (i) whether the expression concerns lawful activity and is not misleading; and (ii) whether the asserted governmental interest is substantial. If the answer to each of these questions is "yes," then the following questions must be considered: (iii) whether the regulation directly advances the governmental interest asserted; and (iv) whether the regulation is more extensive than is necessary to serve the asserted interest.[5] *See, Central Hudson*, 447 U.S. at 566; *Equifax Services, Inc. v. Cohen*, 420 A.2d 189, 198 (Me. 1980).

There are a myriad of ways in which the FTC could amend its proposal in order to satisfy basic principles of constitutional law and regulatory requirements and strike a proper balance between consumer protection and consumer access to the market.

Proposed Section 610.2: Operation of Centralized Source

One of the FTC's proposed amendments to section 610.2 would prohibit the advertising or marketing for products or services through the centralized source until after the consumer has obtained his or her annual file disclosure. This restriction on the timing of advertising is not in consumers' best interest, and it is inconsistent with the FCRA's regulation of a consumer reporting agency's file disclosures to consumers.

It is important to understand the scope of the FCRA's provision requiring the creation of the centralized source and the rule developed in accordance with that provision. Congress directed the Commission to require the establishment of a centralized source through which consumers can request their free annual file disclosures from the consumer reporting agencies, and the rule is limited to achieving that purpose.[6] The rule's coverage ends once a consumer requests the free file disclosure; it does not extend beyond that point. Each consumer reporting agency must comply with its statutory obligation to provide the file disclosure upon receipt of the request. 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.

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[5] In particular, the government should heed the Court's further pronouncements to demonstrate a "careful calculation" of the speech interests involved. *See, Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562-64 (2003) (noting that calculations need to be case specific and include analysis of alternate means of receiving information as there is an understood importance of adult consumers receiving information about legally permissible products).

[6] FACTA § 211(d).

It is also important to understand that FCRA Section 609(a)(6) ***requires*** consumer reporting agencies to clearly and accurately disclose that a consumer may request and obtain a credit score if the consumer requests his or her credit file and not his or her credit score. Therefore, when a consumer reporting agency provides this disclosure, it is not "advertising or marketing for products and services"; rather it is meeting its requirements under the FCRA. Moreover, the FCRA clearly anticipates that this disclosure will be made at the time of the consumer's request and not at some later time, such as subsequent to delivery of a credit report.[7] Thus, the Commission's proposed prohibition on this disclosure at the time of the consumer's file request contradicts the FCRA's specific disclosure requirements and exceeds the FTC's authority to regulate the provision of this information to consumers.

Credit score information is most useful to consumers when it is provided contemporaneously with disclosure of the credit file upon which the score is based. Consumers make maximum use of the information when they read the two pieces of information together. Consumer reporting agencies do not retain copies of the file disclosures that they provide to consumers and cannot automatically score consumers' files based on past file disclosures. Because credit report files are dynamic, a credit report file can quickly become obsolete as a reference for a consumer's credit score. If consumer reporting agencies are forced to delay information about a credit score disclosure until after consumers have received their free file disclosures, many consumers will be unable to compare the information in the report with the score, including the credit report file information upon which the score was based. As a result, fewer consumers will receive the significant benefit of learning how information in their credit report files affects their credit score.

Separating the credit file disclosure from offers to provide the related credit score will also create unnecessary consumer confusion. Many consumers expect that their credit score will be included with their free annual file disclosure via the centralized source. As a result, offering the credit score as consumers submit their free file request is a matter of good customer service because it responds to consumers' expectations. If consumer reporting agencies are barred from offering credit scores contemporaneously with consumers' free credit file requests, consumers will become frustrated and will likely complain to the consumer reporting agencies. This result is not in consumers' best interests and will drive up compliance costs in connection with the Free Annual File Disclosures Rule.

Additionally, the FTC's NPRM provides no basis for the assumption that the additional products and services offered by the nationwide consumer reporting agencies interfere with the free annual file disclosures required by the Rule. Consumers who

[7] *See also*, NPRM, 74 FR at 52917, n. 18: "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." This FACT Act requirement and this consumer benefit are still in place today and should not be disrupted.

request a free credit report packaged with additional products and services are simply electing a more robust offering from the consumer reporting agencies. Moreover, the FTC's proposed total prohibition of truthful speech does not represent a "careful calculation" of the speech interests involved.

The FTC may wish to promote annual free file disclosures through the centralized source over varying packages of products and services that include the free disclosures; however, the right response is not to *ban* those competing offers until after the consumer has chosen the FTC's preferred offering. The prevailing constitutional decisions protect not only a commercial speaker's right to give truthful information, but also a consumer's interest in hearing truthful product information.[8] Therefore, the better approach would be for the FTC to require that advertisements for additional products or services be no more conspicuous than the centralized source's offer. The FTC's Prescreen Opt-Out Notice Rule provides a model for this approach. It regulates the size of one disclosure in comparison to other disclosures on the same page. That approach would work equally well here and would constitute a less restrictive means to the same end, thereby demonstrating that the FTC has made a "careful calculation" of the speech interests involved, including the consumers' interest in hearing truthful information about all product offerings.

The FTC's proposal would also prohibit three specific practices in connection with the centralized source: (1) inclusion of hyperlinks to commercial or proprietary websites on the centralized source's website; (2) asking or requiring consumers to set up an account as a prerequisite for obtaining an annual file disclosure; and (3) asking or requiring consumers to agree to terms and conditions as a prerequisite for obtaining an annual file disclosure online. Each of these proposals is problematic.

There are hyperlinks to the nationwide consumer reporting agencies' websites on the homepage of the website for the centralized source and elsewhere throughout that site.[9] It should be beyond dispute that, on the homepage, the link to the centralized source mechanism is significantly more clear and conspicuous than the links to the three nationwide consumer reporting agencies. The hyperlinks elsewhere on the annualcreditreport.com website are similarly inconspicuous. They are incorporated into the centralized source's Frequently Asked Questions resource and pages providing contact information and "About Us" information. These links enable consumers to obtain additional information about various aspects of credit reporting in general. These hyperlinks also protect consumers against bogus websites that could be used for phishing and can provide comfort to consumers that they are at the official website.

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[8] *See*, Lorillard at 564.

[9] CDIA notes that, from a technical standpoint, the centralized source mechanism transfers consumers from the page where they provide their identifying information to the "tower," or website, of each of the consumer reporting agencies from which consumers request the free file disclosures. CDIA understands that the FTC does not intend to include these technical transfers within the scope of the proposed rule's coverage of hyperlinks, and asks the final rule make clear that it dos not apply to them.

The FTC's sole support for its proposal to ban these modest links is that "the Commission believes they interfere with and undermine consumers' ability to obtain their free annual file disclosures through the centralized source."[10] It is inappropriate for the FTC to attempt to ban truthful commercial speech based on such an unsupported "belief." Moreover, this belief contradicts basic FTC advertising standards. The FTC Policy Statement on Deception provides that advertisements are judged on the basis of their "net general impression."[11] The FTC's Dot Com Disclosure Guide requires disclosures to be "clear and conspicuous" to overcome an argument that an online advertisement may be deceptive. The extent to which a disclosure is deemed clear and conspicuous is assessed according to its placement and prominence, among other things.[12]

By the FTC's own standards, it is highly unlikely that any reasonable consumer could be misled by the annualcreditreport.com website. On the homepage, the centralized source disclosure is clearly more prominent than the consumer reporting agencies' hyperlinks. Elsewhere on the site, the links to the nationwide consumer reporting agencies' websites facilitate consumers' ability to get additional information about credit reporting. The First Amendment's free speech protections and the FTC's standards demand that the Commission provide fuller support for this proposal than it offers in the NPRM.

The FTC's proposed prohibition on asking or requiring consumers to set up an account in connection with the free file disclosure is also problematic. The account set-up process adds value for consumers by enhancing the privacy of consumers' credit file information online. It also ensures that consumers may repeatedly access their free file disclosure online for up to 30 days. These are significant upgrades from the centralized source, which provides for only a single-time access, rather than an extended access period. At a minimum, the FTC should narrow its proposal so that only *requiring* account set-up is banned. The FTC has no basis to prohibit *asking* a consumer to set up an account in connection with the free file disclosure as long as the consumer's choices in that regard are disclosed clearly and conspicuously. Moreover, online fulfillment offered by the consumer reporting agencies provides consumers with a substantial benefit that the rule does not require. The FTC lacks authority to regulate this voluntary consumer benefit.

The FTC should also delete or revise its proposed ban on asking or requiring consumers to agree to a consumer reporting agency's terms and conditions before receiving a free file disclosure through the centralized source. The terms and conditions presented in the course of online fulfillment do no more than educate consumers about their rights and the consumer reporting agencies' responsibilities. There is no risk of any consumer harm related to this practice. Consumers who take advantage of online fulfillment offered by the consumer reporting agencies and review the terms and conditions learn about the credit file dispute process and when information may or may

[10] 74 FR at 52918.
[11] FTC Policy Statement on Deception, *appended to* Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984).
[12] FTC Dot Com Disclosure Guide, p. 5, available at:
http://www ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf.

not be removed from a file. Consumers who review this information are better off than consumers who do not. Again, at a minimum, the FTC should narrow its proposal so that only *requiring* acceptance of terms and conditions is banned. There is no basis to prohibit *asking* a consumer to accept a set of terms and conditions in connection with the online fulfillment of a free file disclosure as long as the consumer's choices in that regard are disclosed clearly and conspicuously. This is especially true where, as here, the terms and conditions do no more than educate consumers.

Proposed Section 610.4: Prevention of Deceptive Marketing of Free Credit Reports

General Comments Regarding Proposed Section 610.4

Proposed section 610.4 responds to Congress's directive to the FTC to adopt standards to prevent deceptive marketing of credit reports. The FTC's proposal defines "free credit report," adds general disclosure requirements, and introduces medium-specific disclosure standards. This proposal, especially with respect to Internet websites, is fundamentally flawed as an exercise of the FTC's regulatory authority. The proposal must be substantially revised before the Commission issues its final amended Rule.

Recognizing the Value of Consumer Choice. As an initial matter, CDIA is troubled by the FTC's apparent assumption that reasonable consumers would never choose a fee-based package of products and services related to their credit histories over the free annual file disclosures available through the centralized source. The FTC cites to no factual basis for that assumption, and the assumption is refuted by the fact that millions of consumers continue to subscribe to these products and services on a monthly basis, even though they could cancel at any time.

Applying Long-Standing Interpretation of "Prominent". The FTC's proposal prompts concern because it goes far beyond the Congressional intent for this proceeding. Nothing in the CARD Act or the background to Section 205 indicates that Congress intended the FTC to adopt an unprecedented interpretation of "prominent." The plain meaning of "prominent" is conspicuous.[13] It does not mean "prior to statements concerning advertised information."

The Commission's proposal deviates from its own well-established interpretations of the term "prominent" as applied to advertising. As compared to this proposal, more balanced approaches to implementing the FTC's statutory mandate are readily apparent. The fact that the FTC has elected to release a proposal that rejects its prior guidance and enforcement history shows that the FTC has assumed that new products and services that expand on the centralized source's offering should be hidden from public view. Because the proposal unduly restricts the dissemination of truthful information based solely on the nature of the content and imposes restrictions that are more extensive than necessary to prevent deceptive marketing of credit reports, the proposed rule risks violating the First Amendment.

[13] *See, e.g.*, Webster's II New College Dictionary (2005), defining "prominent" as "conspicuous."

Acknowledging Less Restrictive Alternatives. Moreover, the FTC has failed to demonstrate that less restrictive disclosure requirements would be ineffective. For example, the current disclosure regime under the *Consumerinfo.com* settlements imposes less restrictive disclosure requirements and has worked effectively to prevent the deceptive marketing of credit reports. Consistent with longstanding FTC policy, these settlements require simultaneous disclosure of a representation and a prominent clarifying disclosure in the same place. There is no need for the FTC to discard this approach and replace it with one that restricts and suppresses truthful commercial speech. The disclosure standard mandated by the *Consumerinfo.com* settlements works to ensure that consumers are aware of their right to obtain free annual file disclosures through the centralized source. The FTC has offered no evidence that consumers have been deceived by the disclosure standard required by the *Consumerinfo.com* settlements.

Nevertheless, the FTC proposes in the NPRM substantial changes to this approach that are excessively restrictive: (1) consumers' ability to access editorial content of commercial websites would be delayed; (2) consumers desiring to access commercial websites would be frustrated by the intervening landing page; (3) landing page disclosures would not be proximate to the representations that they modify; and (4) new font size requirements are unnecessary. In all, the FTC proposes to replace a functioning standard under the *Consumerinfo.com* settlements with one that is needlessly restrictive.

The FTC bears the burden to show that a less restrictive alternative, such as the current disclosure regime, is ineffective. *See, Central Hudson*, 447 U.S. at 571. The FTC has failed to satisfy this burden. In the NPRM, the FTC suggests that the disclosures required under the *Consumerinfo.com* settlements are insufficient, but the FTC fails to provide support for its position. The Commission's references to "consumer complaints" and a media reports are insufficient support for the FTC's aggressive measures. By failing to make an affirmative showing that the current disclosure regime is ineffective, the FTC faces a substantial risk that the proposal violates the First Amendment.

Comments Regarding Specific Elements of Proposed Section 610.4

"Free Credit Report" Definition. Contrary to the name of the defined term in section 610.4(a), the FTC's proposed definition of "free credit report" would regulate much more than just credit reports that are akin to the centralized source's free file disclosures. This proposed definition would also 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. For example, credit scores and credit monitoring services could be covered by this proposed definition. Advertising for these products and services would be obligated to include the FTC's proposed warning labels about the federal law even though there is no risk that consumers would confuse these products with the free annual file disclosures. This definition must be narrowed so that it applies only to credit reports similar to the free annual file disclosures. There is no risk

of deception or trickery with respect to products or services that are not available for free via the centralized source.

Where a company offers a package of services together with a credit report, such as combined credit monitoring, identity theft assistance response services, or other products and services, the disclosure requirements proposed by Section 610.4(d) should not apply if a complimentary credit report is not a dominant part of the offer. If a consumer were to compare these types of package offers with the annual federally mandated disclosure, even based solely on the initial advertising of the package, it would be clear to the consumer that he or she is not reviewing an offer for the free mandated disclosure or solely a credit report for free. 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.

Indeed, applying the proposed disclosures to advertisements for such packages of services will cause more confusion for consumers. If a company must redirect consumers seeking its package of services to a landing page containing information on the free annual file disclosure, a consumer could easily be confused into believing that the free annual file disclosure provides all the features of the packaged products. The confusion caused by the disclosures is likely to make consumers abort the enrollment process rather than continue. As a result, a consumer will not have all of the tools he or she may desire to help aggressively combat identity theft. Consumers should be able to subscribe to these types of packages without encountering disclosures and intervening landing pages that will confuse and dissuade them from enrolling in products designed to decrease their vulnerability to identity theft and increase the likelihood that they will be alerted to identity theft. Requiring that the disclosures contained in proposed Section 610.4(d) be included on advertisements for these types of packages may ultimately hurt consumers by preventing them from subscribing to these types of services, which have been demonstrated to alert consumers to suspicious activity.

Future Changes to Address or Telephone Number. CDIA agrees in principle that the nationwide consumer reporting agencies must update the address and telephone number of the centralized source if that information changes in the future. However, the FTC should clarify in the Rule that covered entities will be provided with a reasonable opportunity to update this information. As proposed, it is not clear that the FTC will recognize a reasonable time period for entities to make necessary changes to account for new information.

Medium-Specific Advertising Disclosures. CDIA's objections to the FTC's proposed medium-specific advertising disclosures can be clearly illustrated by focusing on the Internet website proposal, where the problems with the FTC's approach are most apparent. Section 610.4(d)(4) proposes a unique, and uniquely restrictive, standard for the advertising of "free credit reports" online. Not only does this proposal stand apart from the Commission's other medium-specific proposals, it also disregards the FTC's well-established history of interpreting the term "prominent," its guidance for online advertising, its enforcement history, and its statutory instruction.

There are two significant flaws in the FTC's proposal with respect to online advertising. First, the proposal is outside the Commission's grant of statutory authority. Section 205 of the CARD Act directs the FTC to issue standards for specific wording of required disclosures and to establish whether regulated online advertisements should provide required disclosures "on the advertisement or the website." This narrow grant of authority does not permit the FTC to ban truthful speech. Additionally, the FTC's proposed "landing page" requirement does not satisfy the CARD Act's limitation that requires online disclosures to be on the advertisement or the website. The FTC's proposed landing page is neither part of the advertisement nor part of the website on which the free credit reports would be made available. In its efforts to shield consumers from offers competing with the free annual file disclosure, the FTC has disregarded Congress's limits on its rulemaking authority.

The FTC has also misconstrued Congressional intent with respect to this rulemaking by focusing in the NPRM on "consumer confusion" instead of the statute's standard to prevent deception. In several places in the NPRM, the Commission states that the purpose of the CARD Act free annual disclosures rulemaking is to "reduce consumer confusion."[14] Section 205 of the CARD Act does not refer to "consumer confusion," and the FTC decision to introduce it to justify its proposal obfuscates the limited scope of the FTC's authority. The key terms used in the statute are "deceptive marketing" and "prominent." As discussed below, the Commission has a well-established record interpreting these terms. If the Commission had relied on that record in this proposal, it likely would have issued a more appropriate set of standards. However, the NPRM never applies the FTC's own "deception" standard to the proposals and ignores the FTC's own enforcement history and guidance regarding the term "prominent." In jettisoning the statutory standards in favor of the vague "consumer confusion" test, the Commission has failed to respect its limited rulemaking authority. The proposal must be revised so that it is grounded in legal precedent.

Second, when one considers the FTC's interpretation of relevant standards, the proposal is arbitrary and capricious. Most importantly, the FTC abandons its prior interpretations of the term "prominent" and proposes an interpretation of this term that has no basis. The FTC's application of its rulemaking authority in this proceeding should begin with its 1983 Policy Statement on Deception. That Statement, among other things, establishes the position that advertising is judged by reviewing an advertisement as a whole and determining its net impression.[15] It also establishes the principle that fine-print disclosures cannot cure misrepresentations created elsewhere in an advertisement.[16] In enforcement actions applying the deception standard, the FTC and courts have concluded that disclosures must be clear and conspicuous to be effective.[17]

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[14] See 74 FR at 52915, 52916, 52920.
[15] Deception Policy Statement, 103 F.T.C. at 179 and n. 32.
[16] *Id.* at 180-81.
[17] See, e.g., Thompson Medical Co., 104 F.T.C. 648, 842-43 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

This "clear and conspicuous" standard is informed by the more concrete concepts of prominence, presentation, placement and proximity.[18] Prior FTC enforcement actions have established that the "clear and conspicuous" standard calls for sufficiently prominent disclosures that are readily noticeable and readable.[19] The FTC's Dot Com Disclosure Guide states that the phrases "clearly and conspicuously" and "clearly and prominently" are "synonymous," suggesting that the FTC has determined that "conspicuous" and "prominent" mean the same thing.[20] The Dot Com Disclosure Guide indicates that "prominence" means that consumers' attention is drawn to a disclosure.[21] The FTC's Advertising Enforcement document equates "prominent" with "noticeable."[22] These FTC interpretations of "prominence" and "clear and conspicuous" are never as restrictive as what the Commission has proposed in this NPRM; the FTC has always granted advertisers flexibility to design advertising that complies with the FTC's standards. The Commission's proposal that "prominence" can be satisfied only by its "landing page" standard abandons decades of FTC guidance.

The FTC has also disregarded the very real threat to consumers resulting from its proposal. By prohibiting any information other than the two disclosures on the landing page, the Commission's proposal would subject consumers to a significant risk of illegal phishing.

Moreover, the Commission has not adequately explained why the approach to online advertising taken in its settlements with TALX and Consumerinfo.com is not sufficient. The NPRM cites the *TALX* settlement to support its "landing page" proposal.[23] However, the *TALX* settlement does not impose a single acceptable design standard. In that matter, the FTC alleged that TALX failed to provide disclosures required by the FCRA.[24] In settling this case, TALX agreed to provide these disclosures as required by law. The settlement permits TALX to provide the disclosures electronically if they are "clear and prominent," which the settlement defines to mean that a disclosure is presented on the principal screen or landing page where the disclosure is relevant.[25] Additionally, the *TALX* settlement does not provide a useful model for this rulemaking proceeding because the formats of the disclosures at issue are so different. The *TALX* case involved the FCRA's required notices to furnishers and users. These are lengthy, detailed notices whose content is prescribed by the FTC. Such long disclosures may not lend themselves to the degree of flexibility that is appropriate for the Free

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[18] FTC Advertising Enforcement document, pp. 25-26 (last revised, L. Fair, March, 1, 2008), available at: http://www ftc.gov/oia/assistance/consumerprotection/advertising/enforcement.pdf.
[19] In the Matter of RBR Productions, Inc., 122 F.T.C. 444, 464 (1996); In the Matter of Mobile Oil Corp., 116 F.T.C. 113, 122 (1993); In the Matter of Creative Aerosol Corp., 119 F.T.C. 13, 23 (1995).
[20] FTC Dot Com Disclosure Guide at 21, n. 18.
[21] *Id.* at 12.
[22] FTC Advertising Enforcement document at 26.
[23] 74 FR at 52921, n. 38.
[24] FTC v. TALX Corp., Civ. No. 4:09-cv-01071 (E.D. Mo. 2009), Complaint at 4-5 , available at: http://www ftc.gov/os/caselist/0723173/090707talxcmplt.pdf.
[25] FTC v. TALX Corp., Civ. No. 4:09-cv-01071 (E.D. Mo. 2009), Stipulated Final Judgment at 3, available at: http://www ftc.gov/os/caselist/0723173/090707talxstipjdmt.pdf.

Annual File Disclosures Rule, under which the statutorily mandated disclosure is a single sentence.

Contrary to the FTC's suggestion in the NPRM, the *TALX* case does not support the proposal to require a landing page in this proceeding. To the extent that the FTC wants to provide for disclosures at the time a consumer makes a material decision, the proper place for the disclosure is the advertiser's homepage. The FTC's proposal, on the other hand, will improperly interfere with consumers' self-driven efforts to find products and services that complement and compete with the centralized source.

Similarly, the FTC's settlement with Consumerinfo.com did not impose a single design standard. In order to meet the Commission's "clear and conspicuous" standard, this settlement provided for some flexibility. The *Consumerinfo.com* settlement includes a definition of "clear and conspicuous" that is consistent with the FTC's long-standing interpretation of that term. The definition calls for disclosures that are sufficiently noticeable without imposing a rigid design standard such as the "landing page" proposal.[26] If such flexibility were acceptable in cases of alleged wrongdoing, it must be acceptable here, where there are no such allegations. Because the FTC's proposal disregards past interpretations of "prominence" that allowed for flexibility in favor of a rigid standard that has no basis in FTC guidance, the proposal is arbitrary and capricious and must be revised.

The FTC's proposal is also problematic because it responds to a statutory directive to prevent deception, but the NPRM makes no attempt to establish that the proposal can satisfy the FTC's deception standard. The Commission's approach in this rulemaking contrasts starkly with the approach taken in the recent NPRM to amend the Telemarketing Sales Rule ("TSR") to regulate debt relief services.[27] The TSR proposal included a ban on advance fees under the FTC's statutory authority to regulate abusive telemarketing acts and practices. Because the FTC had previously held that it would subject its "abusive" authority to its unfairness standard, the NPRM applies that standard to its proposal in support of its approach.[28] The FTC makes no such attempt in this proposal. As a result, although Congress clearly intended for the Commission to be guided by its deception standard in establishing a standard for "prominent" disclosures, the Commission has failed to explain why only its aggressive "landing page" approach can suffice. Without that explanation, the NPRM's proposal might not survive scrutiny as an exercise of the Commission's regulatory authority.

Similarly, the FTC's use of the Pay Per Call Rule to support its approach to the "prominence" standard is improper.[29] The Pay Per Call Rule has not been revised since it was issued in 1993. The words "online" and "Internet" do not appear anywhere in that

[26] FTC v. Consumerinfo.com, Inc., SACV05-801 AHS (MLGx) (C.D. Cal., Aug. 15, 2005).Stipulated Final Judgment and Order at 3-4, available at:
http://www ftc.gov/os/caselist/0223263/050816stipfnl0223263.pdf.
[27] Notice of Proposed Rulemaking, 74 FR 41988 (Aug. 19, 2009)
[28] 74 FR at 42005-09.
[29] 74 FR at 52917.

Rule or its Statement of Basis and Purpose.[30] Where the Pay Per Call Rule does refer to "prominence," that term is used to refer to disclosures that are readily noticeable, readable, and comprehensible.[31] Therefore, it is specious for the FTC to assert that the Pay Per Call Rule's "prominence" standard informs the approach taken in this NPRM. The weakness of the FTC's reliance on the Pay Per Call Rule is especially clear because there are more recent and relevant interpretations available. The FTC's Dot Com Disclosure Guide, report of advertising enforcement, and recent settlements in the credit reporting context all point to a "prominence" standard that allows for flexibility as long as material information is provided clearly and conspicuously.

The FTC's other proposed medium-specific standards are also troubling. The proposed disclosure for print ads and Internet-based multi-media advertising calls for a disclosure of what the advertised offer is not, and not just for information about the free file disclosures available through the centralized source. Requiring these ads to state that they are not the free annual disclosure is outside the scope of the FTC's authority. In addition, the FTC's proposals for telephone requests and telemarketing solicitations are improperly heavy-handed. These proposals, which demand an immediate disclosure that the offer is not associated with the free annual disclosure, reflect the FTC's apparent assumption that any product or service other than the free annual file disclosure is harmful to consumers. The FTC's proposal aims to talk consumers out of any competing offer, no matter its merits, before the consumer even has the chance to weigh the fee-based offer against the free annual disclosure. The FTC's "clear and conspicuous" jurisprudence does not support this stifling approach. Consumers should have the right to comparison shop, but the FTC's proposal supports a world where there is no competition.

Conclusion

CDIA is not blind to the FTC's concerns regarding consumer confusion. However, the FTC's proposal is strikingly inconsistent with its statutory mandate, its own standards, and the operation of a legitimate marketplace for credit file products and services. The FTC proposes to impose excessively burdensome requirements that are unsupported by any evidentiary record. First, the FTC should allow for modest links to the nationwide consumer reporting agencies on the centralized source website, on the homepage and elsewhere throughout the site, such as in the Frequently Asked Questions content. The FTC's proposal would eliminate ease of access to the nationwide consumer reporting agencies, while requiring them to devote resources to the centralized source. The FTC should allow the nationwide consumer reporting agencies to offer complementary products and services that consumers can use with their free annual file disclosures. The FTC's proposal would impede consumers' ability to learn about additional resources.

Second, the FTC must revisit its proposed new section 610.4 regarding prevention of deceptive marketing of free credit reports. In response to statutory limits on its rulemaking authority in this proceeding, the FTC must narrow its definition of "free

[30] 58 FR 42364 (Aug. 9, 1993).
[31] 16 C.F.R. § 308.3.

credit report," replace its "landing page" proposal with a required disclosure on the advertisement or website, and pare back required disclosures across all media. In recognition of well-established precedents and guidance regarding the "prominent" and "clear and conspicuous" standards, the FTC must revise its format requirements in this rulemaking to adopt a standard that will preserve competition to consumers' benefit.

As explained above, CDIA worked closely with the FTC in the development of the Free Annual File Disclosures rulemaking. CDIA believes that the dialogue in that proceeding enabled CDIA to provide empirical information and constructive suggestions as to how the rule could best serve consumers when requesting their free annual file disclosures through the centralized source. CDIA hopes that the FTC staff will provide the opportunity for similar interaction as the FTC revises the proposed rule.

Respectfully submitted,

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