



David A. Paterson
Governor

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
CONSUMER PROTECTION BOARD

Mindy A. Bockstein
Chairperson and Executive Director

December 7, 2009

BY E-MAIL AND U.S. MAIL

*Federal Trade Commission
Office of the Secretary
Room H-135 (Annex T)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580*

**Re: Proposed Amendments to the Free Annual File Disclosures Rule
(Also known as “The Free Credit Report Rule”)**

Dear Commissioners:

As New York State’s top consumer watchdog and think tank in the Executive Branch, the New York State Consumer Protection Board (“CPB”) is involved in a wide array of consumer issues. The CPB conducts consumer investigations, research and analysis; develops legislation, consumer education programs and materials; responds to individual marketplace complaints by working with the parties to settle disputes through voluntary agreements; and, represents the interests of consumers before the Public Service Commission and before other State and federal agencies. A focus of the CPB is the identification and correction of deceptive marketing practices, including those related to the promotion of financial products and services.

In 2008 and through the first ten months of 2009, the CPB handled nearly 1,100 Internet-related complaints. Since January 2009, the Agency has significantly expanded its portfolio of responsibility with the introduction of its Identity Theft Prevention and Mitigation Program. Under Governor David A. Paterson, identity theft protection, consumer access and use of free credit reports, and understanding and control over the online collection and use of personal information have become critical issues for the Agency. Through various educational materials and outreach opportunities, the CPB informs the public about these issues and learns of consumer concerns and insights with respect to information privacy and identity theft mitigation.

The CPB applauds the amendments proposed by the Federal Trade Commission (FTC) to the Free Annual Disclosures File Rule (also known as “The Free Credit Report Rule”) to help streamline the consumer experience on the website AnnualCreditReport.com. With these modifications, the consumer will be able to access his/her federally-mandated free credit report without first needing to establish an



account with the credit reporting agency, and the consumer will be assured of obtaining the report before being exposed to other related, commercial offers and products from the credit reporting agency.

With regard to the broader issue of deceptive marketing of credit reports, the CPB acknowledges the past efforts of the FTC to improve the communication of “free credit report” offers in commercial advertisements as well as the new requirement in the proposed amendments that such ads consistently carry the following notice: “This is not the free credit report provided for by Federal law. To get your free report, visit www.AnnualCreditReport.com or call 877-322-8228” (hereinafter “the Notice”). However, even with these improvements, the CPB believes that there is still a significant risk that consumers will be deceived by these commercial advertisements and will not understand the difference between the commercial offers and the “free credit reports” mandated by federal law. Therefore, the CPB suggests that the proposed amendments be further developed to address the concerns explained in greater detail below.

Suggested Changes to the Medium-Specific Notice Provisions (Section 610.4(d))

Under Section 610.4(d)(1),(2) & (3), the amendments provide for specific Notice copy but do not include placement instructions to help ensure prominence. In the case of radio and television ads, to be consistent with proposed website usage, the Notice should be provided at the front or beginning of the advertisement. In the case of print ads, the Notice should be presented in a box and/or in a contrasting color to help ensure its prominence.

Section 610.4(d)(4)(i) states that “(a)ny website offering free credit reports must first display a separate landing page (showing only Notice copy) to consumers before the consumer **may obtain the report from that website.**” (Emphasis added). It is unclear whether this language refers to placement prior to clicking through to the registration page or prior to downloading the report (but after providing substantial personal information for the purpose of obtaining the report). In the latter case, the Notice would come too late in the process to be meaningful to the consumer who has already made a substantial commitment toward obtaining the report from the commercial entity. The CPB believes that language should be added to clarify that the Notice must be provided prior to or at the moment of click through to the registration page.¹

¹ This proposed subsection also specifies that the full text of the Notice must be visible to consumers without scrolling. As evidenced by the screenshots attached to this letter, the current example of freecreditreport.com (discussed in greater detail below) violates both the landing page requirement and the no-scrolling requirement of this proposed subsection.



Section 610.4(d)(6) requires that the Notice be provided only “(w)hen consumers call any telephone number...appearing in an advertisement that represents free credit reports are available at the number.” We believe that the Notice should also be provided in telephone upsell scenarios, e.g., where a consumer calls to place a fraud alert and receives an upsell for company services that include “free credit report” offers.

Suggested Addition to the Amendments

The stated purpose of the amendments is, in part, “to prevent deceptive marketing of credit reports”. However, more is needed to prevent the deceptive marketing of credit reports than simply making consumers aware of their right to free credit reports through AnnualCreditReport.com. Consumers also risk deception in the manner in which commercial entities present their “free credit report” offers.

The FTC has established a standard for the non-deceptive use of the word “Free” in commercial advertisements in its “Guidance Concerning Use of the Word ‘Free’ and Other Representations” (“Free Offer Rule”)(16 C.F.R. 251.1). According to the Guidance, “(w)hen making “Free” or similar offers all the terms conditions and obligations upon which receipt and retention of the “Free” item are contingent should be set clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.” To assess whether the current disclosure practice in “free credit report” ads along with the new Notice requirement mentioned above are sufficient to bring such ads into compliance with the Free Offer Rule, the CPB reviewed the current home page of freecreditreport.com. Screenshots of this page as it appeared to the CPB on December 3, 2009 are attached as exhibits to these comments.

What the Consumer Sees: Across the top of the page is a banner headline that instructs the consumer to “Get Your Free Credit & Score!” After reviewing the banner message, the consumer’s eye is pulled down to the brightest object on the page, a large gold button that directs the consumer to “Click here to get your free credit report and score!” Between the presentation of the offer and its acceptance, the consumer is not informed that the “free” offer requires agreement to a free trial subscription to a credit monitoring service, that the free nature of the service converts to a monthly charge automatically after a very brief period unless the consumer opts-out, nor is the consumer provided any details about how to opt-out. Therefore, this presentation fails to satisfy the Free Offer Rule standard that “all the terms conditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be set clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.”

In the lower left hand corner of the page, in smaller type and lighter font, is a paragraph informing the consumer that he/she is also signing up for a “membership” in



“TripleAdvantage.” There is no explanation that the “membership” is actually an open-ended subscription and “TripleAdvantage” refers to a credit monitoring service unless the consumer travels even further to a footnote at the bottom of the page.

Over the past 36 months, the Better Business Bureau has received nearly 11,000 complaints about ConsumerInfo.com, owner of the site freecreditreport.com (<http://www.la.bbb.org/Business-Report/ConsumerInfocom-13062929>). Clearly, there is substantial consumer concern that should be addressed in the amended Rule if it is intended to prevent the deceptive marketing of credit reports. We urge the FTC to consider further additions to its proposed amendments consistent with the Free Offer Rule that would address the broader risk of deception in how commercial entities present their “free credit report” offers.

Conclusion

Consumer complaints about deceptive credit report marketing remain a serious concern. While the proposed amendments to the Free Credit Report Rule represent a significant step in reducing the risk of deceptiveness, we believe that more can and should be done. A more comprehensive amended Rule will provide clearer guidance for businesses and more effective education and protection for consumers. We offer the above suggestions based on the CPB’s direct experience with consumers to assist in further strengthening these amendments.

Thank you for your consideration of our comments.

Sincerely,



Mindy A. Bockstein
Chairperson and Executive Director

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