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FTC and CFPB Focus on Business Credit Reporting

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In 1970, Congress was concerned that largely unknown consumer reporting agencies ("CRAs") were creating and sharing dossiers of personal information on individuals. At the same time, Congress recognized the importance of the industry—it is how most Americans can own a home or car—and sought to strike a balance that preserved both "the needs of commerce"[1] and consumers' privacy. The result was the Fair Credit Reporting Act ("FCRA"),[2] and for over five decades it has required CRAs to adopt procedures to ensure the accuracy and integrity of information in its files, share consumer reports only in limited circumstances, and provide consumers with access to their files and the ability to dispute incorrect information. The FCRA only covers consumer reports on individuals for credit to be used primarily for personal, family, or household purposes and is enforced by the Federal Trade Commission ("FTC" or "Commission") and the Consumer Financial Protection Bureau ("CFPB").

The FCRA is often considered to be the original privacy statute, and its coverage is understandably limited to reports about individual consumers and not business credit reports, since those do not raise the same individual privacy concerns. While business credit reports are outside the scope of the FCRA, in recent years the FTC and CFPB have focused on the business credit reporting industry and its potential to harm small businesses. Specifically, the regulators are concerned that inaccurate reports can result in small businesses' being unable to obtain loans at favorable rates, or being denied loans or lines of credit altogether.

In 2022, the FTC brought a case against a leading business data provider, alleging, among other things, that the company deceptively marketed products to small- and medium-sized businesses to help them provide additional payment history information that could help improve their reports and business credit scores.[3] According to the FTC's complaint, most of the additional payment history submitted by these small

[1] Id. at § 1681(b).

[2] 15 USC §§ 1681-1681x.

[3] In the matter of a leading business data provider., Case No. 1723196 (Jan. 2022), www.ftc.gov/legal-library/browse/cases-proceedings/172-3196

businesses was not accepted by this leading business data provider and were not included in business credit reports. In addition, the Commission alleged that the business data provider's failure to provide small businesses with a reasonable process to report inaccurate information in their reports was an unfair practice. As part of the settlement order, the leading business data provider agreed to implement a process through which small businesses can dispute information on their credit reports.[4] The case is yet another example of the Commission's focus on protecting not just individual consumers, but small businesses as well.

The Commission's interest in the business credit reporting industry is not limited to a single enforcement action. In March, the FTC announced a study of business credit reports.[5] Using its authority under Section 6(b) of the FTC Act,[6] the Commission sent compulsory process to five business credit reporting agencies requesting information about their methods of collecting, using, sharing, analyzing, and verifying information in their reports. The orders contain 65 questions and include requests for information on how companies market their business credit reports. In addition, the orders seek information about the companies' use of algorithms, and steps the companies take to ensure that the algorithms are explainable. In announcing this 6(b) study, FTC Chair Lina Khan said the Commission intends to use the information it obtains "to shine some much-needed light on the credit reporting industry and the related challenges small businesses face."[7] Typically, the Commission concludes a 6(b) study by releasing a report summarizing its findings.[8] Sometimes these reports contain best practices guidance.[9]

Also in March, the CFPB finalized its rule for lenders to collect and report information about applications for credit by small businesses.[10] The business credit reporting industry is clearly a priority for both regulators, and they expect to "work together to

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[4] The CFPB filed a comment letter in support of the settlement (Feb. 17, 2022), www.files.consumerfinance.gov/f/documents/cfpb_proposed-settlement-agreement_commet-letter_2022-02.pdf.

[5] FTC Press Release, FTC Launches Inquiry into Small Business Credit Reports (Mar. 16, 2022), www.ftc.gov/news-events/news/press-releases/2023/03/ftc-business-inquiry-small-business-credit-report.

[6] 15 USC § 46(b).

[7] FTC Press Release, FTC Launches Inquiry into Small Business Credit Reports.

[8] *See* A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers (Oct. 2021), www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

[9] *See* Data Brokers: A Call for Transparency and Accountability (May 2014), www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

[10] CFPB Press Release, CFPB Finalizes Rule to Create a New Data Set on Small Business Lending America (Mar. 30, 2023), www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-create-a-new-data-set-on-small-business-lending-in-america/.

ensure that small businesses are treated fairly when it comes to accessing loans."[11] The agencies have been frank that they are keen to bring increased transparency to the space, but have not indicated if they are contemplating potential action such as rulemaking or industry guidance.

For companies in the business credit reporting space, there are some clear takeaways from these latest efforts. First, companies need to be sure that their representations to customers about their products and services are not misleading. Second, companies should provide small businesses with a mechanism for reporting incorrect information. Finally, companies should take steps to ensure maximum possible accuracy of the information contained in their reports. By following the FCRA's model and implementing reasonable procedures to ensure the accuracy of their reports and providing a dispute process for small businesses, companies can reduce the risk that the FTC or CFPB will find their practices to be deceptive or unfair.

About the author:

Former Federal Trade Commission (FTC) attorney Katherine White has deep experience in consumer protection law, with a particular focus on privacy, information security, and financial services regulations. She brings unique insights from her time in the government to help clients navigate a rapidly-evolving regulatory environment and evaluate the most strategic path forward when faced with regulatory scrutiny. Kate spent more than 14 years at the FTC. Prior to joining the FTC, she spent four years as a privacy and information law attorney at the Transportation Security Administration where she spent time covering a wide range of privacy matters, including considerations regarding biometric data.

[11] Alan Ellison and Kyle Thetford, Inaccurate small business credit reports can block access to loans, CFPB Blog (Feb. 18, 2022), www.consumerfinance.gov/about-us/blog/inaccurate-small-business-credit-reports-can-block-access-to-loans.