Consumer Financial Protection Bureau

Taskforce on Federal Consumer Financial Law Listening Session

September 1, 2020
2:00pm to 3:00pm Eastern

Organization: Federal Trade Commission (FTC)

CFPB Participants: Todd Zywicki, Bill MacLeod, Howard Beales, Jean Noonan, Thomas Durkin, Nat Weber, Ashlie Tarpley, Jeff Magliato, Raynell Lazier

FTC Participants: Lisa Rothfarb, Andrew Smith, Bilal Sayyed, Sarah Mackey

Purpose: On Tuesday, September 1, 2020, Taskforce Chair, Todd Zywicki, and Taskforce Members, Bill MacLeod, Howard Beales, Jean Noonan, and Thomas Durkin met remotely via WebEx with Andrew Smith, Bilal Sayyed, Lisa Rothfarb, Raynell Lazier, and Sarah Mackey as part of the Taskforce's commitment to engage with external stakeholders to gain insights regarding the financial service industry and financial consumer protection laws. The group discussed opportunities to improve, strengthen, and modernize consumer financial protection laws.

Discussion:

1) **Introductions**
   a) Andrew Smith is Director of the Bureau of Consumer Protection.
   b) Lisa Rothfarb is Counselor to the Director in the Bureau of Consumer Protection.
   c) Bilal Sayyed is the Director of the Office of Policy and Planning.
   d) Sarah Mackey is Deputy Director of the Office of Policy and Planning.

2) **On competition and innovation (*see discussion prompts*)**
   a) Some firms do not compete on consumer services and consumers have no choice as to whether they do business with them (e.g. credit reporting or debt collection). These firms compete on lowest cost or most accurate data. Some believe this area of the financial market does not create a beneficial outcome for consumers, and there's something to this argument. This idea belies the FDCPA's exemption for those collecting their own debts. The law is perhaps intended to address third parties that do not compete on services to consumers and perhaps it's right for laws to address this issue.
   b) With respect to legal barriers to competition in the financial services market, the group noted that the bank/non-bank distinction is a barrier. Banks have lower cost of capital

but also access to payment systems (which is critically important for any company providing financial services). Banks can also offer financial programs in all 50 states (which you cannot do if you're not a bank). These are enormous barriers to non-banks and big commercial firms that want to enter the space.

c) The group discussed the requirement that an entity be a federal reserve member (or have a relationship with a federal reserve member) to participate in federal reserve board types of services (e.g. non-banks participating in the payment system). Certain credit card networks also have similar rules that require members to be banks. The rule allows the networks to mitigate risks by piggybacking on the federal reserve safety and soundness, examination, and compliance requirements, which is a considerable benefit.

d) About three or four years ago, banks raised services concerns about risks data aggregators posed to consumer privacy. Banks also wanted to maintain possession of their own consumer data. This was because data aggregators were acquiring credentials from consumers to access bank accounts. If they did not have a relationship with the bank at issue, the aggregators were tricking the bank's security systems to access the account information. It is not a good situation when a firm is circumventing security controls at a bank. Now, data aggregators have API agreements with banks. The Bank lets the data aggregator access the systems with proper security in place. At this time, it's unclear whether banks have any remaining concerns about the risks posed by data aggregators. The relationship between the two is mutually beneficial because consumers demand it and it may benefit the bank overall.

3) On the application of the FCRA to data aggregators

a) The group noted that FCRA issues with respect to data aggregators have not been resolved. Important consumer protections are not being extended to consumers. There's a concern that different standards are applied to different entities (fintech favorites are given a pass on important regulatory obligations that others must adhere to). Some data aggregators agree they are subject to the FCRA, some don't, and others comply with the FCRA and avoid admitting they are subject to it. This does not create a great situation especially when these companies are in direct competition with consumer reporting agencies that are required to comply with the law. These companies are providing data to third parties (sometimes raw data and other times analyzed/evaluated data), and these third parties are making decisions on this information without providing notice to the consumer or giving them an opportunity to correct the information.

b) Although there has been talk at the Bureau of giving data aggregators a pass on complying with certain standards given the benefits provided to consumers, data aggregators should be subject to the same consumer protection standards as other regulated entities. This idea should not fall by the wayside. Just because an entity is innovative does not mean they should be exempt.

c) With respect to the FCRA, you might be able to draw a line regarding who is subject to the law based on what the data aggregator is doing with the data. If they're not assembling or evaluating the data, they may not be consumer reporting agencies. But if they're in the consumer reporting agency box, there's currently a dearth of guidance on whether the FCRA applies. The Bureau needs to provide commentary on laws like the FCRA and may need to fix it and not just say data aggregators are good and should be exempt.

d) The group discussed how differences in the way data aggregators use information may mitigate their risk profile. For example, if a data aggregator is acquiring, analyzing and transferring your account information to a lender when you apply for credit, then the data aggregator may be serving a consumer reporting function. On the other hand, if a data aggregator is simply obtaining your account statements for that month and providing that information to a lender and you at the same time, there's a different risk profile. FCRA is a kind of hearsay rule; the business is learning something about a consumer from a third party and the consumer should have an opportunity to know what that information is and be able to dispute it if it's wrong.
e) The group discussed what a dispute might look like in a situation where a data aggregator is doing an analysis of a consumer's account. There are number of different ways an error could come into the system. If a consumer has multiple accounts, the consumer might dispute the idea that the activity on one account is representative of all. A consumer might quarrel with the analytics used to draw conclusions. There's also the concept of garbage in, garbage out. If the bank statements or account transactions on the account are incorrect, this might affect the analysis as well. The bank or data aggregator might match the data to the wrong person. The risk to the consumer might be higher depending on the business model employed by the bank and data aggregators.
f) There would be great concern if nonfinancial information (e.g. behavioral information like social media and browsing behavior) were being used for credit evaluation purposes. Regulators would be interested in reviewing this kind of data use and the lenders would probably be worried about fair lending risk.
g) The FTC does not review second-look credit programs (i.e. a consumer is declined under the standard program but defined as credit worthy based on an alternative model). Typically, the FTC would defer to the Bureau on these issues. Augmenting thin files with other data coming from a third party would be an FTC regulated issue and subject to ECOA. The 2012 or 2016 FTC Big Data report discusses the issue of non-credit related data being used for credit decisioning in the way FCRA data is used.

4) **Legal framework of consumer protection (see discussion prompts)**
a) The group discussed how the ideas about preemption formulated in the National Banking Act, OCC charters, Marquette cases, etc. are constantly under assault. The issue was most recently discussed in Colorado cases involving WebBank and Cross River.
b) The group noted that there is a dramatic difference in penalties that the Bureau can assess relative to the FTC. Some have expressed concern that the difference in penalties could result in dramatically different punishments simply because action is handled by one agency rather than the other.
c) With respect to coordination between the Bureau and FTC, the group noted that the Memorandum of Understanding in place is working well. The FTC has routine discussions with the Bureau's enforcement division and might also consult RMR and supervision and policy. Privacy division and financial practices division have the most routine back and forth. Also, the organizations consult with one another a bit for marketing practices issues because of prior Bureau actions in this area going after the same kind of people.

d) The Bureau and FTC cooperated on a case against a credit reporting agency concerning a large data breach. Although a number of stakeholders were involved in the case, the FTC/Bureau relationship was good.
e) With respect to how the FTC and Bureau determine which cases will be handled by which organization, the OMB spreadsheet lists companies the FTC is investigating and whichever organization gets there first usually gets the case or there may be a reason why one or the other may not want the case.
f) There has been some discussion of referring matters to the Bureau given the enhanced penalty structure. The penalty structure does not appear to negatively affect/restrict the FTC's ability to enact the fines it believes are appropriate. So, the alleged issue with the differing penalty structure is more of a hypothetical problem. If the Bureau can enact larger fines, perhaps it should be the one to handle certain cases.
g) The group noted that the FTC might benefit from a civil penalty fund like the Bureau's that could provide redress to victims in other cases.
h) The FTC/Bureau relationship might benefit from the two organizations staying in their respective lanes. For example, the FTC has stayed away from nationwide credit bureaus and credit reporting. The FTC has also devoted a lot of time to small business finance issues, which are outside the Bureau's jurisdiction. The FTC has been heavily involved in background screening cases (for employment and tenant purposes). It would create a bad result for the consumer and business if the Bureau takes on these cases given it may hinder the ability to provide a clear, consistent message to consumers and businesses alike. These are all data accuracy cases. The FTC/Bureau should have some division of labor for efficiency purposes.
i) The group discussed the FTC's investigation/enforcement activities regarding for-profit institutions and noted there is not a lot of coordination between the FTC and Bureau on these cases.
j) The differing penalties issue has cropped up in cases where the FTC and DOJ anti-trust division has shared jurisdiction. There's been support to create similar standards and processes that each agency has to follow when bringing these cases. There may be something there that the FTC and Bureau can draw from to ease any potential tension regarding how cases are allocated between the two.
k) The Taskforce should contact individuals who have been active in the federal consumer financial regulation space since its inception to get a rundown of the history of consumer finance.

5) On the Dodd-Frank Act's data collection requirement for minority, women-owned, and small businesses

a) The group noted a desire for a rule around the collection of information from small, minority and women owned businesses. The Dodd-Frank Act directs the Bureau to issue a rule, but there hasn't been a rulemaking on the subject yet.
b) There is a question as to whether the collection of this kind of data would be useful. The cost-benefit analysis may be difficult to assess. But collection would benefit law enforcement. Currently, there is no way to analyze fair lending issues in this space. A regulation regarding data collection would allow regulators to obtain data from a third-

party that is housing relevant data (similar to a current CID). It is possible that the costs of collecting this information may exceed the benefits, but there is a statutory duty to do it and law enforcement may benefit. The Bureau could potentially exempt Community Development Financial Institutions (CDFIs) to address this issue, but if, for example, CDFIs are charging women owned businesses more, this doesn't seem like a good outcome.

c) One of the things the FTC has seen in small business finance cases is that the industry is fragmented and high-touch; there is not a lot of analysis of the data and a lot of potential for fair lending issues. With respect to small business lending, it's highly specialized, and most of the banks that operate in this space are not well-known names and/or are fintechs.

6) On car dealership jurisdictional questions

a) The group assessed that it may be beneficial for the Bureau to have jurisdiction over car dealerships in addition to the FTC.

b) The FTC has had some challenges making an impact in this space through enforcement actions. Many of the car dealerships are local with few branches, so it's hard to have a national impact. So, there isn't a strong interest in these cases. There has been an interest in taking action against companies that provide services to dealerships (e.g. marketing companies) since they may be national companies.

c) Although making a rule to address bad conduct would be meaningful in the car dealership space, it would be difficult to create a rule that would broadly help consumers. The rules would likely be issue-based (e.g. a rule to address yo-yo financing).

d) Additional information regarding FTC's position with respect to bringing car dealership cases can be provided.

7) On regulatory modernization (see discussion prompts)

a) The group noted it would be beneficial to revise the e-sign/consent laws given they are cumbersome and don't help consumers. In particular, the consumer consent and reasonable demonstration provisions are a source of a lot of frustration.

b) Rulemaking should lead with the concept that anything you do on paper, you should be able to do electronically. We want people to understand that clicking a box constitutes a signature. As long as a business has a basis to determine the consumer can see, read, view the disclosure, this should be enough. A business shouldn't have to get additional consent when the technical standards change to access document. Businesses should not have checklist they have to satisfy to give an effective written disclosure.

c) There is some concern about a reasonable demonstration when a disclosure is made on a seller's device. Some have discussed the idea of whether these kinds of transactions are online transactions which may be subject to different laws than face-to-face transactions. An ideal e-sign/consent rule would have to address the issue of disclosures made on point-of-sale devices. It can't be enough to disclose information on a tablet at the point of sale and not email the information to the person as well. The information should be readable and retrievable in order for it to be a good disclosure.

d) A just-in-time notice may be more effective than a notice delivered on the front end along with a stack of other notices. Targeted notices are harder to implement, but folks have figured out how to do it (e.g. adverse action notices under FCRA). While considering a rule on autorenewals, the FTC has discussed whether a just-in-time or front-end notice makes the most sense. There is an argument that the FTC does not have jurisdiction to require a just-in-time notice.

e) The Bureau should provide more rule commentary. There was a time when commentary was quite common. Currently, there does not appear to be any meaningful review of existing regulatory commentary under Reg B or TILA.
f) The Bureau should revert back to having open relationships with consumer advocates, the industry and government alike to assist with issuing effective interpretative guidance. Notice of proposed rulemakings are not adequate substitutes.
g) The Bureau should adopt a requirement that rules must be reviewed every so often. It would be a lot of work, but it would mean there would be a steady flow of interpretative guidance.
h) Giving the Bureau data security authority might interfere with the OCC/FFIEC apparatus. It is odd that the protection of consumer information is not part of the Bureau's mandate. On the other hand, the FTC has jurisdiction over the GLBA safeguards rule, which it is revising.
i) The FTC has spoken in favor of a national data breach standard since 2005. But complying with multiple state notice requirements may not be that cumbersome. The state with the most sweeping law becomes the floor with respect to breaching actions. In 2005, California enacted its data breach law, and people thought other states would enact their own laws. Fifteen years later, everyone has enacted their own laws and it hasn't been a problem. It mostly requires companies to stay abreast of changing laws and differences in the laws. The real expense may be in the mitigation services provided to consumers (e.g. credit monitoring). The cost of compliance may be an issue with respective to substantive data security laws.

Potential recommendations:

1) The Bureau should determine the extent to which entities such as debt collection agencies and credit bureaus differ from other actors in the financial services market and determine whether additional regulation is needed to protect consumers (REF: 1a).
2) Regulators should address the anti-competitive effects caused by the bank/non-bank distinction for payment service providers (REF: 1b).
3) The Bureau should clarify the FCRA requirements and their application to data aggregators that are assembling and evaluating consumer data for credit purposes (REF:3).
4) The Bureau should issue a rule regarding the Dodd-Frank Act's data collection requirement for minority, women-owned, and small businesses (REF: 5a).
5) The Bureau should have jurisdiction over car dealerships (REF: 6a).
6) The Bureau should research what rules would assist consumers in the car dealership space (REF: 6c)
7) The e-sign/consent laws should be amended (REF: 7a).
8) The Bureau should provide more rule commentary/interpretative guidance (REF: 7e).
9) The Bureau should adopt a requirement that rules be reviewed every so often to account for changes in the financial market (REF: 7g).

Potential Action Items:

1) Review the 2012 or 2016 FTC Big Data report discussion regarding non-credit related data used for credit decisioning similar to FCRA data.

2) Additional information regarding FTC's position with respect to bringing car dealership cases can be provided.