



February 28, 2020

CFPB TO FINISH THE SMALL BUSINESS DATA COLLECTION RULE

On February 26th, the Consumer Financial Protection Bureau (“CFPB”) filed a stipulated settlement agreement in a California federal district court to end a lawsuit by a nonprofit organization seeking to compel the CFPB to issue a regulation implementing Section 1070 of the Dodd-Frank Act. Section 1070 requires that financial institutions (defined broadly) collect and report certain information regarding credit application for women-owned, minority-owned or small businesses.

The stipulated settlement agreement outlines a timeline for the Small Business Advocacy Review (“SBAR”) panel, issuance of a proposed rule and issuance of a final rule. Specifically, the settlement agreement requires the CFPB to publish an outline of proposals under consideration no later than September 15, 2020. The SBAR panel must convene no later than October 15, 2020 or as soon as practicable thereafter. The panel must complete its report within 60 days after the panel convenes.

After the SBAR report is released, the CFPB will meet with the plaintiffs in the lawsuit to negotiate a deadline for the issuance of a Notice of Proposed Rulemaking. If the parties cannot agree to a deadline by 31 days after the completion of the report, then the plaintiffs may ask the court any time thereafter to set an appropriate deadline for issuance of the Notice of Proposed Rulemaking. The plaintiffs have agreed not to ask the court to set a deadline that is less than 6 months after the date of the SBAR report is completed. This process may be repeated except that the plaintiffs may ask the court to set an appropriate deadline for issuance of the final rule no earlier than 76 days after conclusion of the comment period for the proposed rule. The stipulated settlement is subject to court approval.

Section 1070

Effective in 2011, Section 1070 amended the federal Equal Credit Opportunity Act and requires financial institutions to ask whether a business credit applicant is a women-owned, minority-owned or small business and to maintain a record of the responses. In addition to the responses, a financial institution must compile and maintain certain information regarding business loan applications and submit that information to the CFPB annually. Section 1070 is intended to be analogous to the data collection and reporting scheme under the Home Mortgage Disclosure Act.

Section 1070 requires the CFPB to prescribe rules and issue guidance as may be necessary to carry out, enforce and compile data pursuant to Section 1070. Nine years after Section 1070’s enactment, the CFPB has yet to issue a proposed rule, although the small business data collection rule appeared on the CFPB’s spring 2019 rulemaking agenda. In April 2011, the CFPB stated that Section 1070 does not go into effect until the CFPB issues necessary implementing regulations

If approved by the court, the stipulated settlement agreement will create a court-supervised timeline for rulemaking that ensures that the small business data collection rule will be forthcoming. Industry has argued that mandatory data collection requirements could create friction in business credit application experiences and increase compliance costs for small business lenders significantly. The CFPB has said that it is very sensitive to the potential compliance burdens and implications of the rule. □

✧ *Mike Tomkies and Susan Seaman*

FTC PUBLISHES STAFF PERSPECTIVE ON SMALL BUSINESS FINANCING FORUM

The Federal Trade Commission (“FTC”) hosted a public “Strictly Business” forum (“Forum”) on May 8, 2019. See our prior ALERT dated May 8, 2019. On February 26, 2020, the FTC issued a staff perspective that highlights key issues in small business financing that were discussed at the Forum, as well as other information gathered through law enforcement and from existing research.

The majority of the staff perspective focuses on concerns regarding the products being offered in the evolving small business financing market. Because a wide variety of products are being offered, inconsistent information is being provided to business owners. Many of the Forum participants expressed concern that finance providers use widely differing methods for calculating and describing key features of their products, impeding small business owners’ ability to make apples-to-apples comparisons and understand the central features of different financing products.

The staff observed that small business borrowers likely would benefit from more uniform and understandable financing disclosures to help them compare the costs and other features of products in the marketplace, although Forum panelists disagreed about which methods for calculating costs would be most relevant and

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understandable.

The staff noted that the FTC Act's prohibition against misleading claims applies to small business financing products and observed that because the overwhelming majority of small businesses are sole proprietorships or very small employers, finance companies and their marketers should be aware that these businesses' understanding of small business financing products may often be more similar to that of individual consumers in *personal* credit transactions than other commercial transactions. Thus, small business finance providers should avoid the sorts of practices that the FTC has alleged to be deceptive in enforcement actions involving small businesses or individual consumers.

Although the general consumer protection concerns noted in the staff perspective apply to all small business financing providers, the staff highlighted concerns with merchant cash advance ("MCA") products with particular detail. First, the staff noted that MCAs have very high costs and as a result, many business owners who obtain MCAs struggle with successful repayment leading to a phenomenon known as "stacking," using subsequent MCAs to repay prior MCAs. Second, the staff noted that some MCA providers and their marketers may engage in aggressive and potentially misleading marketing practices that violate the FTC Act. Third, MCA providers may be engaging in unlawful and deceptive actions during the repayment if providers fail to conduct promised "true-ups" or "reconciliations" to lower merchants' daily payment amounts to reflect drops in sales.

Finally, the staff noted that some MCA providers and their agents use potentially abusive collective tactics against business owners, such as confessions of judgment, a tactic the FTC's Credit Practices Rules prohibits in the consumer context.

The staff acknowledged the potential benefits of online financing for small businesses and their owners, including (i) simpler, automated financing applications and faster approvals for funding than traditional loans, (ii) increased access to credit for small business owners who might not qualify for more traditional loans and (iii) a wider array of products that give small business owners greater latitude in finding specific financing arrangements that more closely meet their needs.

The FTC has also created a direct complaint link for small businesses to submit lending- or financing-related complaints.

Small business financing is clearly on the FTC's radar as well as that of other federal agencies. See, e.g., our Alert on the CFPB and DFA Section 1070 in this issue, our Alert of October 3, 2018 (California business financing disclosures) and our Alert of May 11, 2016 (U.S. Treasury White Paper on online lending). Further increased scrutiny can be expected. Our Firm has extensive experience with a wide variety of business funding programs. Let us help you with your compliance needs too.

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