Consumer Finance Monitor (Season 3, Episode 42): A Discussion of Recent Developments Involving Credit Reporting; With Special Guest Eric Ellman, Senior Vice President for Public Policy and Legal Affairs, Consumer Data Industry Association

Speakers: Chris Willis, Kim Phan, and Eric Ellman

Chris Willis:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services, and what they mean for your business, your customers, and the industry.

Chris Willis:

I'm your host, Chris Willis. I'm the deputy practice leader of Ballard Spahr's Consumer Financial Services Group and I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those of us in the industry. So, to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. If you like our podcast, let us know. Leave us a review on Apple Podcasts, Google Play, or wherever you get your podcasts.

Chris Willis:

Now, today's episode is all about credit reporting and I'm joined by two very great guests. First, I've got my partner, Kim Phan, who is one of our consumer financial services and privacy and credit reporting lawyers in our Washington DC office. And we have a special guest today, Eric Ellman, who's the Senior Vice President for Public Policy and Legal Affairs at the Consumer Data Industry Association, which if you haven't heard of it is the industry association responsible for the credit reporting resource guide, that is the Metro 2 format. And so, Eric is going to have a lot of great insights to share with us today. So I'm not going to get in the way of this conversation anymore. So Kim, Eric, why don't you guys take it away,

Kim Phan:

Thanks, Chris. Eric, welcome. We're so glad to have you here today. First of all, I just want to make sure that I congratulate you on CDIA's first virtual conference. What a great success during these challenging COVID times.

Eric Ellman:

Yeah. Kim, thank you so much for having me. I deeply appreciate it. Of course, Kim, for the benefit of all of your listeners, Kim was one of our speakers on a panel that I've moderated, which I think was not only the best panel because Kim, you were on and because I moderated on it because I thought we had a lot of great information to offer. So thank you for the invitation. I also hope it will be our last virtual conference, by the way. Who knows what happens next year, but we would all like to be back in person again, I think.

Kim Phan:

It was certainly my pleasure to participate, but I certainly wasn't the biggest name that you had lined up. You had some great speakers, including Tom Pahl, the Deputy Director of the Consumer Financial Protection Bureau, and Andrew Smith, the Director of the Federal Trade Commission's Bureau of Consumer Protection. Let's talk first about Tom Pahl. My understanding is that Tom announced that the CFB will be conducting a study on the accuracy of credit ports. Can you share any details about the CFB's approach to this research?

Eric Ellman:

Yeah, sure, I can share a little bit. First of all, federal agencies and perhaps particularly the CFPB don't always make news, but we are, I guess, grateful that they made news at our law conference a couple of weeks ago when Tom Pahl had announced that the CFPB was going to undertake a new, fresh accuracy study. The last couple of accuracy studies were done in 2010-2011, and the PERC study showed a 97, 98% accuracy rate. An FTC study showed a 95% accuracy rate. So the numbers are really high, but they're also a little bit dated. The CFPB decided that it's gone too long since an empirical, unimpeachable study of accuracy was done. So they are undertaking something that we hope will and we expect to be empirical and scientific and will I think, show and even higher accuracy rate from the 97, 98% rate that we showed a number of years ago.

Kim Phan:

Well CDIA as the trade association for their credit reporting industry will presumably have a lot of involvement in this process. Are there some key points that CDIA will want to make sure gets stressed with the Bureau during their research?

Eric Ellman:

Yeah. Good question. Obviously, it's the CFPB study, so it's going to be independent and they are going to do their own thing. One of the things I hope the CFPB will consider is an outcome-based review, just like the PERC work and the FTC study was pretty similar in that as we know, not all inaccuracies are created equal. For example, if a consumer lives on Main Street, M-A-I-N, but it's listed on the credit report as M-A-I-N-E, Maine Street, that is an error. Sure. But that's not an error that's going to impact somebody's ability to get credit. The beauty of the PERC work that was done a number of years ago, and the beauty of the FTC study is that they were both outcome-based and it looked into was this error resulting in a significant enough change to put somebody in a different/lower credit tier? That's what we're hoping that the CFPB will look at this time around.

Kim Phan:

I'm assuming also that industry will have some opportunity to be involved in the CFPB study. Do you have any recommendations for our audience about how they as furnishers and end users of credit reports could get involved?

Eric Ellman:

Yeah. Good question. I'm not really sure I have advice other than if you have kind of a regular cadence with the CFPB that you might want to reach out to the CFPB. I think one of the great benefits of the CFPB study compared to the FTC study is that because the CFPB has a holistic look at the consumer reporting ecosystem, which the FTC didn't when it did its study, the CFPB can look at kind of the end to end process from how the data is furnished from the furnisher to the CRA and how it's provided by the consumer reporting agency to the data user and then the dispute resolution process along that.

Eric Ellman:

So the CFPB has an opportunity, a unique opportunity to look at the whole life cycle of the consumer reporting system, and also get even closer or get closer than the FTC did to like the sources of inaccuracy and where those inaccuracies are coming from in the hope that even the very high rate of accuracy now can be even higher.

Eric Ellman:

So it's a long answer, Kim, to your short question, but it ultimately boils down to if you have, like I said, regular cadence with the CFPB connections to the CFPB, this may be a good time to reach out to them. They are really just starting the study. I think they recognize that this is an elephant and the only way to eat the elephant is to take it one bite at a time and they are probably on their first nibble or two. I suspect that this will take several years to fully unpack to go from, "Hey, we should do a study," to, "Hey, we have a study." It's a very long road in between.

Eric Ellman:

In fact, you didn't ask, but what happens if there's a change in administration, maybe that was on your list? I don't know, but I would like to think that the CFPB is going to do something. So that's going to be really thoughtful and very empirical and unimpeachable that it will survive any change in Bureau director, any change in presidential administration.

Kim Phan:

Thanks, Eric, that's certainly big news to drop from the CFPB at your conference. Anything else from Tom's remarks that you want to highlight today for our ...

Eric Ellman:

Well, I think it's important to say that we in the consumer reporting community in the credit reporting community are really looking forward to and excited about this particular study. Again, as I said before, the accuracy studies that were done by the FTC and PERC 2010-2011, in that range, showed 95% for the FTC accuracy, 97, 98% for PERC. There's been so many great advances in the credit reporting system since 2010, 2011, 2012 that I have to imagine that when this is studied again, the accuracy rates will be even higher.

Eric Ellman:

So I guess the bottom line is that we're looking forward to it and we think this will ultimately be a net positive, not just for data furnishers and data users, but also for credit bureaus and most importantly, for consumers who none of us could function without. And we are only here because we have consumers as our customers, and hopefully, we work really hard or we work really hard to treat them well and hopefully, they overall see that. So I think ultimately this is probably going to benefit consumers, which is really the alpha and the omega of the whole credit reporting process. As I've said before, accuracy is our North Star and we believe that the CFPB will continue to show.

Kim Phan:

Close that, Eric. So shifting now from the CFPB to the FTC, which you mentioned multiple times has done a lot of work in the FCRA space as well. Andrew Smith spoke, the director again of the FTC's Bureau of Consumer Protection. I know that Andrew spoke on a number of topics that will be of great interest. For example, I know he spoke about the FTC's efforts to combat credit repair. Can you fill us in on some of that?

Eric Ellman:

Yeah, sure. Credit repair is, I guess on a good day, it's an annoyance. On a regular day, it is a royal pain in the behind. Ultimately, what credit reporting, I'm sorry, what credit repair does is detracts significantly from the credit bureau's ability to serve consumers who really need help. Also, it impacts the data users or the data furnishers, the data users who are really just trying to serve real consumers with real disputes. Unfortunately, credit repair outfits by and large exist for the purpose of pounding the credit bureaus, attempting to pound the credit bureaus into submission by not responding in the FCRA statutory time window in the hope that accurate adverse information falls off the credit file.

Eric Ellman:

We hate them. Data users hate them, financial institutions. The FTC is not too fond of them either. The bottom line is one of the things that Andrew said is that they are trying to find ways to build bigger cases against credit repair organizations. They and Andrew essentially issued an open-ended invitation to credit bureaus and to financial institutions that if they are aware of one or more credit repair outfits that are particularly problematic, pose a pattern and practice of abuse of the credit reporting system, then we should share that information with the Federal Trade Commission, and the FTC is open to taking action against these outfits.

Eric Ellman:

Andrew essentially said they're looking for more cases to bring in this area. I hope that they do because our estimates are that about a third to 40% of all disputes by consumers into credit bureaus are as a result of credit repair activity. Meaning that as we know, it's a credit repair company is charging a consumer money to do something for a consumer that they can do themselves for free or often more likely is that they are encouraging consumers to dispute accurate adverse information and to do it repeatedly in the hope that it falls off the file.

Kim Phan:

Sounds like a great opportunity for our listeners to engage with the FTC. Is there an approach that you would recommend for companies that want to call out some of these credit repair organizations or practices?

Eric Ellman:

Yeah. Again, I would suggest that to the extent that the financial institution listeners have, again, a cadence with the FTC or certainly members of trade associations that have regular contact with the FTC, those would be of course, groups like APHSA and the ABA and others. If there's a way that you could figure out internally through your dispute teams, your dispute resolution teams, if you could help find those patterns and practices of credit repair and you could identify the sources, the FTC would be really interested in seeing that.

Eric Ellman:

Now, certainly on the credit bureau side, it's a little easier perhaps for us to spot some of these sort of serial credit repair organizations because they tend to come in primarily by paper and it tends to be the same spelling error that repeats itself in a thousand or 2,000 different consumers. Oftentimes the postmarks are similar, return addresses can sometimes be similar. So there are ways that we can identify to some degree that what's coming from credit repair based upon these patterns. The trickier part, though, for the credit bureaus and the harder part it is for financial institutions is to identify the organization that's driving behind the scenes these credit repair requests.

Kim Phan:

Thanks, Eric. Turning now to another area of FTC focus. I know Andrew spoke about abuses of the FTC's identity theft complaint database. How does the FTC plan to tackle that challenge?

Eric Ellman:

Yeah, that's an interesting question. We have been working with the FTC for, I don't know, a year-ish. Let me give you a little bit of a ... let me back up a little bit. Starting in about October 2016, I think it was, or 2017, the Federal Trade Commission changed their identity theft practices, such that if a consumer was alleging identity theft, they had been previously had to get an FTC affidavit, which requires some hurdles to consumers to essentially verify that the information is true, to sign and swear under penalty of perjury that it's true and to get some law enforcement support as well.

Eric Ellman:

The FTC recognized that it was getting harder and harder for consumers to get police reports to allege identity theft. So they changed their FTC affidavit to what is really more of an FTC report, which comes with a lower standard of barrier and lower standard of proof for consumers.

Eric Ellman:

Now, the intent is noble. The intent is there are consumers out there who are legitimate victims of legitimate identity theft, and we should make it as easy as possible for them to file an identity theft dispute. A hundred percent on board with that concept. In execution though what happened is that the lower the barrier that the FTC made it, the easier it is for consumers to dispute illegitimately. Meaning that there are plenty of consumers who have accurate adverse information on their file, just like in credit repair that want to get that accurate adverse information off of their file.

Eric Ellman:

So what do they do? They go to the ftc.gov, they download a report. They decide which information they want to stop having reported on their file. They complete it. They send it to a financial institution. The way the law is constructed is that the financial institution has I think, four days to remove that from the file, and it makes it much easier to get data off of the file.

Eric Ellman:

We called this to the attention to the FTC. It took a little while, months and months of working with the FTC, but we finally got some really encouraging news. If I could just find some of the quotes that Andrew Smith had mentioned in his presentation, that he had noted their own internal data at the FTC, and he showed a slide which suggests kind of like from October 2016 or October 2017, a hockey stick spike in the use of identity theft reports, which correlates quite elegantly with when the FTC flipped their report, their FTC report system, and he noticed a significant pattern.

Eric Ellman:

This is a quote from him, the FTC analysis of the data shows, "A significant pattern that suggests fraudulent use of identitytheft.gov." He indicated that it, again, quoting, "Not acceptable for the FTC to subsidize identity thieves and it's a very high priority of the Bureau of Consumer Protection at the FTC to reverse this course." Not fully clear what they have in mind to change, to attempt this to prevent the FTC report from being used as a tool for fraud.

Eric Ellman:

Andrew Smith again mentioned some technological changes that they are making like IP analysis. So one IP address per FTC complaint. He mentioned that there may have been some other things that he said were in the works, but without saying what those are. Now, the law is the law, so there are certain things that you can't get around, but I think the FTC can make certain changes on the front end of trying to reduce or mitigate against these ID theft reports from being used to perpetuate identity fraud.

Eric Ellman:

So we're really encouraged by what he said. I'd love to see, I can't wait to see how this actually translates into real world changes. I suspect there will be changes for the better coming, but we'll just have to wait and see and keep working with our colleagues at the Federal Trade Commission and our colleagues elsewhere across government to make sure that there's some real change.

Eric Ellman:

The point here is to separate the wheat from the chaff. So we are working really hard to make sure that credit repair is as low as possible because the higher the credit repair, that means the more resources we all have to devote to take away from dealing with real consumers with real problems. There's a finite amount of resources, as we know, and reducing identity theft, I'm sorry, reducing credit repair will help us focus on consumers who are real victims of identity theft.

Kim Phan:

Yeah, I certainly agree, it's very encouraging that the FTC is mindful of the fact that external factors could be impacting the accuracy of their internal data. So it's great to hear that they're being very mindful about that and the steps that they can take to help mitigate some of those issues. Now, you've mentioned the FTC's focused on looking for cases to pursue credit repair.

Eric Ellman:

Right.

Kim Phan:

I understand that Andrew also mentioned they're actively looking for cases under the FCRA's Red Flags program mandate, have any thoughts for our listeners about how they should be enhancing their own programs to avoid FTC scrutiny?

Eric Ellman:

Yeah. Good question. I was hoping Kim, that you would answer that question because you're the Red Flags expert. I'm only here to report the news. You're here to advise. I really don't have a lot of good guidance here. I suspect that you and Chris and the talented team at Ballard Spahr will be able to provide great counsel in that regard. But one of the things he did mention when he spoke to us about Red Flags, he sort of took us on a grand tour of all of the things that the BCP was working on relative to consumer reporting and one of those was the Red Flags.

Eric Ellman:

He said a couple of things that are I think of interest. One is he noted that a lot of SSNs are leaked, his term, from data breaches, no surprise there probably. He did criticize financial institutions to some degree when he said that he felt like there is not enough underwriting review on the backend for Red Flags violations. He used the term that the Red Flags Rule is kind of a backend of the data breach and the FTC is actively looking into Red Flag violations. But beyond that, Kim, my thinking is that you and your folks would be in the best position to help advise your clients to manage what the FTC is concerned with and where they're actively seeking for violations.

Kim Phan:

Yeah, the FTC of course is very active in bringing data breach cases when those occur. Interesting that they would look at potential Red Flags violations associated with those same breach cases. So it'll be an interesting development to watch.

Eric Ellman:

Yeah, for sure. I guess we'll just have to see in practice what he's talking about.

Kim Phan:

Let's shift away from the regulators for a little bit and take a look at some of the broader credit reporting activity that's happening in the world, especially in the wake of COVID with the CARES Act and the specific information in the CARES Act that address credit reporting. I'm sure that was discussed quite a bit during the conference and how the credit reporting industry is adapting to the required changes. As company's approach, what makes the most sense for their customers during COVID and in the wake of CARES Act, the issue of whether or not to offer customers an accommodation or simply suppress trade lines for customers that are impacted negatively by COVID and many of the recent activity in the world? What do you think about those two approaches and how would you advise financial institutions to move forward?

Eric Ellman:

Yeah. Good question. This is, I think one of the issues of the day, this whole concept of suppression versus reporting with accommodation. It was talked about a lot in Congress leading up to the passage of the CARES Act. It's being talked about right now as part of the Heroes Act, which is being debated in Congress. It will continue to be, I think, a part of our lexicon as we enter the new session of Congress next year, whatever that will look like. I would have to imagine that if the Democrats retake the Senate and the Democrats recapture the White House, the issue of suppression versus reporting with accommodation will continue to feed into the policy debate.

Eric Ellman:

So the issue is there's a couple of things here at play. As a result of the CARES Act, I'm sorry, as a result of the COVID-19 pandemic with which we are still living and will apparently be living with for a little while longer at least, the consumers who have adverse information as a result of COVID because they've lost a job, et cetera, that the concept of suppression is that adverse information should not be reported to the credit bureaus.

Eric Ellman:

That we think, in fact, that we know, is a significantly worse out from consumers. While noble in intention to protect consumers, the outcome is far worse for consumers for a number of reasons. If data reporting is being suppressed there's a few things happening and not happening. Number one, consumers' accounts are not being updated. If they're not being updated for a significant length of time, they will ultimately be dropped off entirely from a credit report.

Eric Ellman:

If a consumer is making positive payments, even if it's smaller than typical, or even if it's under accommodation, that's not going to be reported. So if you'll pardon the pun, a consumer is not getting credit for their good credit behavior. There's a number of other reasons why suppression is bad. For example, it's hard to dispute or perhaps even impossible to dispute a trade line if it's being suppressed from the file, lots of other damage. Of course, there's a significant risk management issue.

Eric Ellman:

A lot of people who are listening to this work for financial institutions and if you are forced to make a lending or credit extending decision based upon a significant lack of information, then how can you possibly make a valid risk management decision? The answer is it's difficult, if not impossible. One of the lessons that we learned from the Great Recession of 2008, is that a lender needs to take a credit extension, a company lending credit, extending, et cetera, has to take a full, complete view of a consumer's credit file.

Eric Ellman:

So the great benefit of the CARES Act which really codifies longstanding industry practices is that when a consumer is in an accommodation that consumer must be reported as current. So it really creates a statutory mandate around what's long been a system established by the credit bureaus in concert with the data furnishers that are providing data to the consumer reporting agencies. So I think this will be part of the public policy debate for a while, but I think sound financial lending, sound economic practices, and good consumer assistance demands that consumers be reported in accommodation as opposed to data suppression.

Kim Phan:

Well, that's certainly an eloquent argument for accommodation over suppression, but of course, many financial institutions, remote workforces that have been pushed out of the office are facing lots of challenges with their obligation on the FCRA to report not only accurate information but complete information to the credit bureaus. The CFPB I know has issued a policy statement that would take into account some of those challenges that financial institutions are facing right now with regard to their FCRA obligations. But the National Consumer Law Center also issued a statement in clear opposition to the CFPB's willingness to consider these challenges faced by financial institutions. What are your thoughts on that? Is the CFPB approach the right one? Is NCLC on the right side on this? Please share.

Eric Ellman:

Yeah, sure. Obviously, when the whole world fell apart in the middle of March or so, and there are plenty of days that feel like March the 283rd at this point, but obviously everybody and I mean, everybody, had to do business in a different way. For credit bureaus and for financial institutions, it meant like for a lot of other people, sending people home, having people work out of their homes.

Eric Ellman:

The extra challenge for credit bureaus and financial institutions is that there's a lot of sensitive financial information that can't be sent home. There's a lot of things that can't happen when consumer assistance people are working out of their living rooms, as opposed to working into their call centers. Call centers is another big problem because obviously, you need to take and respond to consumers in a very timely way and you can't do that as well as was done before.

Eric Ellman:

So the FTC, I'm sorry, the CFPB issued this policy statement towards the beginning of the crisis, which allowed for flexibility on the part of consumer reporting agencies and financial institutions in dealing with consumers. There was some sharp criticism from that by some consumer special interest groups, some sharp criticism by some attorneys general, primarily Democratic attorneys general. Then just recently some consumer special interest groups sent yet another letter to the CFPB, I guess, in the last week or two, calling for a repeal of that policy statement because people are now coming back to work.

Eric Ellman:

I still think flexibility is the order of the day. We are still, and I mean, kind of the collective, "We," here of consumer reporting agencies, data users, data furnishers, that we are still living in deeply uncertain times. I don't have a complete view into consumer assistance centers or into call centers so I don't exactly know, but I have to assume that even if people are coming back in, they're still being spaced further apart, which means that you can't populate a consumer assistance facility with staff like you had before.

Eric Ellman:

So I still think flexibility is the order of the day and I hope that this policy statement sticks around at least for a little while longer until we have a better understanding of where, if, how, when this pandemic ends, when can we get people back to the office, back to the call centers, back to the consumer assistance centers? As we all know, work is probably not going to look the same in next July, September, December, as it did in February, January 2020. So I still think that flexibility is necessary for a little while longer.

Kim Phan:

Sure. In another policy area, there have been proposals, calls for the creation of a new public credit bureau. Former vice president, Joe Biden has spoken in favor of this. What's CDIA's position on that?

Eric Ellman:

Yeah, as you might imagine, we're not terribly enthusiastic with the public credit bureau and it's not because we don't mind the competition, competition is ultimately good for everybody, but what is a public credit bureau trying to solve for? It's really two things that are pretty well covered already. So let's break down the two stated reasons why a public credit bureau some feel is necessary. One, because credit reports are inaccurate and the government could have credit files that are more accurate than the private sector. Two, a public credit bureau will do a better job at expanding the pool of financial inclusion in this country.

Eric Ellman:

So let's break these down into two. Accuracy. We talked a few minutes ago that credit reports are extremely accurate. We say, the PERC study says 97, 98%. The FTC study says 95%. That's pretty good. I think it's even better, as I said before, when they were last measured a decade ago or so. So the accuracy box is checked and a public credit bureau, if you're trying to stand up a credit bureau to make credit reports more accurate, then a public credit bureau is not going to accomplish that objective because credit reports are already highly accurate.

Eric Ellman:

So now let's look at financial inclusion. There are tens of millions of consumers that are not part of the financial mainstream and that is a huge problem. That is a tens of millions of problems. CDIA and our members are deeply passionate about expanding financial inclusion and getting more people into the financial mainstream as possible. That means using alternative data like rental information, rental payment information, utility information, telecommunications, telecom information, things like that.

Eric Ellman:

We are 100% on board in bringing more alternative data into the private credit reporting system to bring more consumers into the financial mainstream. A public credit bureau is not going to magically be able to do that. What has to change to get landlords to report, to get telecoms to report, to get utilities to report, is changes in laws.

Eric Ellman:

It is a huge barrier. The FCRA stands as a huge barrier to get people, particularly alternative data providers to report to the credit bureaus. In the utility context, in fact, there are laws that actively prohibit utilities from reporting data to the credit bureaus. So if in fact, it is a goal of the potential Biden administration, which I believe it is, which they say it is, and it is a goal of ours, a shared goal to expand the pool of financial inclusion, a public credit bureau is not going to solve that. What has to happen is we have to encourage more voluntary reporting. Most importantly is we have to change the laws to reduce the barriers of entry to allow these alternative data providers to provide data to the credit bureaus, to the consumer reporting agencies.

Kim Phan:

Thanks, Eric. I've asked you a lot of questions today, and I want to just make sure that you have the opportunity, is there anything else from the recent conference you want to make sure to highlight today for our audience?

Eric Ellman:

I guess maybe a couple of things. One of the things that we are particularly proud of at CDIA, the Consumer Data Industry Association, is the kind of information and training, is kind of information we provide generally to financial institutions, but more particularly, we provide some really helpful information on the data reporting. As you know, we work with our members to maintain the Metro 2 data reporting format.

Eric Ellman:

So for financial institutions who are listening that want additional information about the Metro 2 format and some webinars and some training that we do around Metro 2 reporting, hop on our website at cdiaonline.org cdiaonline, all one word, .org. I hope I'm allowed to give this commercial, by the way, Kim? I hope you're not going to charge me for this. So from our website you can get information about Metro 2 data reporting, the webinars that we run, the training sessions that we do. Also, we run during the course of any given year, a number of webinars on hot topics in consumer reporting. You can probably find some additional information about that at our website as well.

Kim Phan:

Thanks, Eric. Chris.

Chris Willis:

I want to thank both you, Kim for moderating and you, Eric for being on our program today. Of course thanks most of all to our listeners for tuning in today. Be sure to visit our website @ballardspahr.com, where you can subscribe to our show in Apple Podcasts, Google Play, Spotify, or your favorite podcast platform. Don't forget to check out our blog, consumerfinancemonitor.com for daily insights about the financial services industry and our bi-weekly mortgage banking update. If you have any questions or suggestions for the show, please email us @podcastatballardspahr.com and stay tuned each Thursday for a great new episode. Thank you all for listening.