I write to urge the FTC (1) to use its accuracy study to establish a baseline of accuracy by which FCRA entities may be evaluated in the future and (2) to urge the FTC to revise its currently myopic and naïve definition of "small inaccuracy" and "material error that is likely to affect a credit score."

Baseline

In its obligation to assure that FCRA entities achieve "maximum possible accuracy," the FTC has authority in current law to require FCRA entities to make periodic reports on their accuracy rates. ("FCRA entities" are credit bureaus, information brokers, consumer reporting agencies, and any other entities covered by the FCRA.) The FTC has authority in current law to publish periodically its newly developed baseline and the FCRA entities' submitted information so that consumers may compare the progress of the entities, especially the big three national credit bureaus, towards achieving "maximum possible accuracy" over future years.

The prototype for this proposal is data on airlines' on-time performance published by the Bureau of Transportation Statistics in the Department of Transportation. http://www.bts.gov/programs/airline_information/airline_ontime_tables/. The FTC should consult with the BTS to determine whether publishing this data has been useful to consumers of airline services and whether the methodology could be improved.

Definition of Inaccuracy

Much of the language in the Federal Register notice of October 16, 2006, sounds like an unpleasant hangover from language used by the FTC staff in the 1970s. That was an era when the FTC consumer division, to an alarming degree, parroted the jargon and perspectives of the industry it regulates. Consumers in 2009 have been led to believe that those days are over.

(It is revealing that in its October 16 notice and throughout this process the FTC has not concerned itself with errors that adversely affect the interests of credit grantors, as distinguished from consumers, nor with inaccuracies in 'investigative consumer reports," as distinguished from "credit reports.")

In the 1980s, in the vacuum created by the credit bureaus' refusal to publish data on inaccuracies, consumer groups (including Privacy Journal) created their own primitive measures to evaluate the accuracy of credit reports. This challenged the industry to insist on defining "accuracy" in its quaint way, i.e., a misstatement of information that significantly affects a credit report. In its October 16 notice, the FTC staff has adopted that definition. It fact, it has narrowed it further by seeking to measure in its forthcoming study "a material error that is likely to affect a credit score."

Many, many uses of credit reports, according to my understanding, do not involve uses of credit scores at all. Credit reports are used for employment, housing decisions, and insurance underwriting (not to mention illicit uses of credit reports by lawyers, journalists, investigators and others). The FTC must recognize these other uses of the data in credit reports. This means that a seemingly "small inaccuracy" can result in loss of employment, housing, favorable insurance rates, or insurance coverage itself. It may result in an arrest or an inaccurate news report.

For example, an employer with legitimate access to a credit report can take a name with an erroneous middle name, Google it, and stumble across all sorts of personal data, perhaps simply news reports, referring to individual different than the one under consideration. A landlord may make adverse assumptions on a residential address with a street number one or two digits off, or on an erroneous Zip code (especially). Imagine an inaccurate entry in a credit report that a customer has an account with a retailer that the landlord happens to abhor. Even if the entry

involving the retailer is highly favorable so that it does not affect a credit score adversely, the inaccuracy will adversely affect a housing decision.

Besides, the new ethic of the FTC seems to be that non-tangible, non-financial harms, as well as financial harms, have importance to individuals. [David Vladeck interview in ***The New York Times*** August 5, 2009; briefing by Christopher Olsen at Electronic Privacy Information Center October 30, 2009]. The FTC should protect the interests of an individual who is affronted by the mere misspelling of his or her name, an erroneous middle initial, or a persistent incorrect street address. At some future time, the individual will expend time and energy to correct the information when it appears in a new context. This is the kind of time and energy that the FTC staff and at least one federal court has said is compensable. ***In re Hannaford Bros., Co. Customer Data Security***, 2:08-MD-1954 (D. Me. Oct. 5, 2009.

In other words, in the world of identity theft, frenetic scurrying of "information" over the Internet, and notoriously inaccurate credit bureaus, there are no "small inaccuracies."

Developing a Meaningful Definition

I suggest, as an alternative, that the FTC create an accurate definition of "inaccuracy." One way is simply to go to page two of The New York Times any day of the week. There you will find corrections that professional journalists consider "material" enough to take up space in a major newspaper – middle initials, maiden names of mothers-in-law, spellings of last names, page numbers in a book. Even, on Nov. 10, 2009, "the make of the sports utility vehicle she owns. It is a Chevrolet Tahoe; there is no Ford Tahoe." Even, on Nov. 7, 1982, the occupations of the bridegroom's parents, in a wedding notice concerning David Vladeck. Can the federal government hold a regulated business to a lesser standard?

Or the staff can Google the term "material error of fact" and find suitable definitions. Or refer to the definition in the auditing field: "The essence of the materiality concept is clear. The omission or misstatement of an item in a financial report is material if, in the light of the surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion of correction of the item."

The FTC's current definition of "material error" matches none that I could find on the Internet. It is even more narrow that the definition in baseball: "A defensive fielding or throwing misplay by a player when a play normally should have resulted in an out or prevented an advance by a base runner."

I suggest that the FTC in its forthcoming study tally three categories: (1) Small inaccuracies that the consumer finds insignificant and that would be unlikely to affect any decision based on a credit report. (2) An assertion that deviates from what is known now to be correct, right, or true. (3) A material error that is likely to affect a credit score or decision about the consumer. Category (2) will include totals in Category (1).

Then the FTC should publish all three statistics for each FCRA entity by name, require the entities to submit comparable data each five years, and publish the results, along with the 2010 baseline for each FCRA entity, in a way that is meaningful to consumers. Consumer groups, which monitor the credit bureaus in the interests of consumers, will find the published data immensely helpful.

Robert Ellis Smith

Publisher, Privacy Journal

Robert Ellis Smith, a lawyer and journalist, began covering the credit-reporting industry in 1973. The next year he founded PRIVACY JOURNAL newsletter, which has regularly reported on news in the credit reporting industry and its impact on personal privacy. He has been an expert witness on industry standards in litigation, and has testified on credit reporting before committees in both houses of Congress and task forces at the FTC. Equifax, in a publication in 1990 listed Smith among eight "Experts on Privacy" and acknowledged his advice. In 2000, Trans Union invited Smith to Tucson to address its senior executives on consumer expectations in privacy protection.