

## FTC Forum on Small Business Financing

May 10, 2019 |

On May 8, 2019, the Federal Trade Commission hosted a forum on small business financing to examine trends and consumer protection issues in this marketplace, including the recent proliferation of online loans and alternative financing products. The forum was conducted in a series of 3 panels:

- Panel 1 - Overview of the Small Business Financing Marketplace - comprised of representatives from the Federal Reserve Bank, the Electronic Transactions Association, and several online marketplace lenders.
- Panel 2 - Case Study on Merchant Cash Advances - comprised of brokers, providers of merchant cash advance ("MCA") products, and Hudson Cook partner, Kate Fisher.
- Panel 3 - Consumer Protection Risks and the Path Ahead - comprised of representatives from small business advocacy groups, online marketplace lenders, the Federal Reserve Bank, and the U.S. Small Business Administration.

The panel discussions suggest the FTC is grappling with several concerns. Some of the major themes that arose during the forum were as follows:

Small business funding is really important. There was widespread agreement that small businesses are vital to the health of the U.S. economy and a significant source of jobs. Ensuring small businesses have access to capital is important, but the FTC is concerned that they not be treated unfairly by funding sources that (in the view of some) have superior bargaining power.

Disclosure. The topic of disclosure came up repeatedly. FTC moderators wanted to know:

- What kinds of cost of credit disclosures are being provided today?
- Is it possible to provide disclosures that allow for meaningful comparison of the many different types of small business funding products in the marketplace (e.g., closed-end loans, open-end loans, factoring, merchant cash advance, equipment leasing)?
- Are disclosures being provided to businesses early enough in their search for funding?

Collection practices. The FTC was particularly interested in collection practices of MCA providers, with special emphasis on confessions of judgment ("COJs"). Panelists discussed the way COJs are used and why the policy rationale for the existing ban on COJs in consumer financing might not apply with equal force to small business funding.

Do small businesses deserve protections like those afforded to individual consumers?

Just asking the question implies that the answer is yes. In the panels, there was consensus that small business owners are sophisticated when it comes to understanding their own business. However, there was debate over whether small business owners are sophisticated enough to understand the funding products they are being offered.

Closing remarks were provided by Andrew Smith, Director of the FTC Consumer Protection Bureau. Mr. Smith remarked that he was "surprised" by "how little scrutiny" has been applied to small business loans at the federal level. After noting his concerns about the potential for deceptive sales and marketing and unfair collection practices, Mr. Smith offered that the FTC has a "special role" to play in the small business funding space because the scope of the FTC Act gives the FTC the power to regulate conduct that affects both individual consumers and business consumers. He gave examples of prior FTC actions to protect business consumers from what the FTC viewed as unfair and deceptive practices.

The FTC views its primary mission as preventing unfair and deceptive acts and practices in the marketplace. The kind of activity the FTC might consider "unfair or deceptive" is relatively broad and fluid. Therefore, it is difficult to make predictions about how the FTC might try to regulate small business funding. The FTC's choice of panelists and the questions posed to them during the forum may provide some insight.

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