Healthcare.gov Isn't The Only Federal Website That's Harming Consumers

By John Berlau November 5, 2013

Next to the infamous Healthcare.gov, the website that featured the most bugs last month was FTC.gov, the site of the Federal Trade Commission.

During the shutdown, many government websites were frozen to avoid the cost of upkeep, but with disjointed patterns. And Cato Institute Research Fellow Julian Sanchez noted at Slate that the FTC site was among the "weirder."

"Browse to any of their pages and you'll see, for a split second, the full content of the page you want—only to be redirected to a shutdown notice page *also hosted at FTC.gov,"* Sanchez wrote. "If the full site is actually still running, it's hard to see how a redirect *after* the real page is served could be avoiding any expenditures."

Now that the shutdown is over, the agency and its website are up and running again. But that is not good news for millions of Americans who wish to improve their credit scores.

The FTC will likely resume sending mixed signals, paralleling the stop-and-go messages of its shutdown website, to entrepreneurs attempting to help folks improve their credit. And its regulatory overreach will continue to threaten to shut these valuable services down.

Credit repair firms provide advice, fill out documentation, and assist with correspondence for their consumer and small business clients hoping to improve their credit scores. Like law firms and a host of other companies providing technical expertise, these firms charge for their services to cover costs and make a profit.

Also like professionals from attorneys to physicians, these practitioners cannot guarantee fully successful results. Yet the FTC, while at times acknowledging the value of credit repair firms, holds them to an impossible standard of guaranteeing results that no other service business could meet. These actions prevent legitimate credit repair firms from forming or expanding to meet the vital needs of consumers and entrepreneurs seeking access to credit.

Before venturing further, we first need to provide some background into the disjointed financial regulatory policy that gives banking agencies jurisdiction over virtually the entire credit scoring process, yet leaves the FTC in charge of the firms engaged to improve consumers' credit scores.

Under the Dodd-Frank financial "reform" law of 2010, the newly created Consumer Financial Protection Bureau became the primary regulator of firms that produce credit reports and credit scores, such as TransUnion and Experian.

Indeed, the CFPB has been calling attention to errors in credit reports and credit scoring that have adversely affected individuals' ability to borrow. Given the CFPB's track record, it won't be surprising if it issues sweeping regulations on the credit reporting agencies, or members of Congress propose bills that crack down with volumes of rules.

Such overreach, like all excessive regulation, will likely do more harm than good. Credit bureaus have an obligation to correct errors promptly when notified by consumers, but as aggregators of data from other business, they can't stop false information from initially getting into their system.

Forcing the credit bureaus to independently verify all such consumer info before publishing it would almost certainly result in a cutback of positive information that makes it easier for consumers to get credit. The famed liberal Supreme Court Justice William O. Douglas wrote in 1971, around the time of the birth of the modern credit reporting industry, that "financial data … are part of the fabric of national commercial communication." In a dissent that would have expanded credit bureaus' First Amendment protection from libel laws, Douglas concluded that while "there is no doubt that an adverse credit rating can injure a subject … such speculative costs of unfettered communication are preferable to the chill upon free expression" that restrictions would impose.

Certainly before imposing onerous restrictions on credit reporting, the CFPB ought to lift regulatory barriers to the market solution of credit repair firms advocating for consumers. In this case, however, there is very little the CFPB can do, because credit repair firms are still regulated by the FTC.

In its "wisdom" in writing Dodd-Frank, Congress gave the CFPB jurisdiction over credit bureaus through its new enforcement of the Fair Credit Reporting Act. But it left the FTC with enforcement of the Credit Repair Organizations Act (CROA), which oversees credit repair firms. And the FTC has continued to exceed its authority under this law.

CROA states that "no credit repair organization may charge or receive any money or other valuable consideration for the performance of any service … before such service is fully performed." In enforcing the law, however, the FTC has often stretched the interpretation of "such service" to mean "all possible services," charges a white paper from the National Association of Credit Service Organizations (NACSO). Further, in a 2011 letter to Congress cited by the white paper, then-FTC Chairman Jon Leibowitz claimed that a credit repair firm cannot charge for services "until such time as it has significantly improved the customer's creditworthiness."

But "significant improvement" is an arbitrary standard that is impossible for any firm to meet. If applied to law firms, the FTC's rules would mean that not only could they not charge fees until the case is over, but until the case is won.

Federal judge Charles Breyer, a Clinton appointee to the Ninth Circuit of the United States District Court (and brother of Supreme Court Justice Stephen Breyer), slapped down the FTC's interpretation of CROA. In *Ducharme v. Heath* (2010), Breyer wrote that "CROA's ban on advance payments for work that has not been fully performed cannot mean that credit bureaus are not to be paid until all work on a client's behalf is completed." Thus, according to Breyer, "by billing clients on a monthly basis for legal tasks that were indisputably performed during the previous month, [a credit repair firm] does not run afoul of [CROA's] prohibition on advanced payments."

But because the FTC hasn't heeded Breyer's words and still often interprets CROA to ban payments until "all services" are performed and "significant improvement" is achieved, legitimate credit repair firms operate in a legal grey area. Not only does this limit consumers' options for improving their credit scores, it perversely clears the field for scammers — who dodge the law with temporary emails and phone numbers — to operate.

As the NACSO white paper points out: "FTC staff's interpretation of CROA would thus tempt companies to shortcut the process, with no warranty or guarantees, or force legitimate companies out of business entirely. Given the tremendous consumer need for credit repair, consumers would become more prone than ever to credit repair scams."

And though research is limited — given that credit repair is a young industry — there is some strong evidence that legitimate credit repair firms can indeed improve significantly individual credit scores. *Tallahassee Democrat* business columnist Joe Manausa followed a customer working with the credit repair firm U.S. Consumer Credit Restoration Association and found that the firm helped the consumer raise his credit score by 177 points in five months. Kansas City's KCTV documented how the credit repair firm Kansas City Credit Services helped a man straighten out a credit score that was inaccurately tied to the debts of his brother

Credit repair firms, however, cannot guarantee successful results any more than any other businesses can. But as long as the firms provide accurate information about their services, the choice to engage them should be up to the consumer, rather than Nanny-state bureaucrats at the FTC.

For all the damage the shutdown supposedly did, often the biggest danger to economic well-being occurs when the government is "functioning."

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