

efforts; the role of government in protecting online information privacy; and special issues raised by the online collection and use of information from and about children.⁽⁷⁾ The Commission also has issued a series of reports to Congress regarding privacy online: *Privacy Online: Fair Information Practices in the Electronic Marketplace* (May 2000) (2000 Report); *Self-Regulation and Privacy Online: A Report to Congress* (July 1999); *Privacy Online: A Report to Congress* (June 1998) (1998 Report). In its 2000 Report, a majority of the Commission recommended to Congress that consumer-oriented commercial Web sites that collect personal identifying information from or about consumers online be required to comply with fair information practices.⁽⁸⁾

Concurrent with its online privacy activities, the Commission has implemented the Identity Theft and Assumption Deterrence Act of 1998.⁽⁹⁾ That Act directed the FTC to establish the federal government's centralized repository for identity theft complaints and victim assistance. Indeed, the Commission's toll free hotline, which was established so that consumers could report identity theft and obtain counseling to resolve identity theft issues, averaged over 1,000 calls per week during the months of July and August, 2000.

Identity theft occurs when a person's identifying information -- name, social security number, mother's maiden name, or other personal information

Additionally, to the extent the Study Agencies determine that certain personal information should be kept on the public record as part of the bankruptcy case, they may wish to consider the feasibility of restricting, in an appropriately tailored manner, the commercial use of such public record data for certain purposes unrelated to the bankruptcy.

As a related point, the Study Agencies have asked commenters to address "[p]rinciples for the responsible handling of information in bankruptcy records" and describe "[b]usiness or governmental models that can provide access to, and protect debtors' privacy interests in, bankruptcy records."

information obtained in a fiduciary capacity with the Department of Justice's recent rulemaking prohibiting standing trustees from using estate funds for their personal benefit.(18)

Finally, the commercial sale of such information by a trustee may implicate concerns under the Fair Credit Reporting Act (FCRA).(19) Generally, the FCRA limits the disclosure by "consumer reporting agencies" of "consumer reports," information that is used or expected to be used as a factor in determining a consumer's eligibility for credit, insurance, or employment. Applicability of the FCRA would turn on several factors including examination of the purposes for disclosing the information as well as the actual uses of the information.(20)

Notwithstanding these considerations, if the bankruptcy trustees begin to use debtors' non-public information for commercial purposes or any purpose other than the administration of the debtor's bankruptcy estate, the debtor should receive notice of this use and be given some opportunity to choose whether to have their information used in such a manner.

D. Related Issues

Finally, the Study Agencies may wish to consider the interplay between consumers' privacy interests and the Bankruptcy Code in the context of evaluating possible additional statutory changes. Traditionally, the Code vests a case trustee or a debtor in possession with sweeping powers to sell assets free and clear of liens and claims.(21) It is also well-settled, however, that a debtor or trustee in bankruptcy cannot take action in violation of extant law.(22) Recently, the Commission and various States have asserted that the sale of private customer information in direct violation of a company's privacy statement contravenes applicable law.(23) (We note that any governmental actions to exercise or enforce police and regulatory powers are exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4).)

13. 11 U.S.C. § 341(d) (requiring United States Trustees to "orally examine the debtor" in chapter 7 cases to ensure that the debtor is aware of certain consequences of seeking bankruptcy relief).

14. 65 Fed. Reg. 46736.

15. Some of the discussion pertains only to trustees who serve in a unique role in the bankruptcy context. To the extent, however, creditors and others involved in the bankruptcy process may gain otherwise unrestricted access to non-public data, they too should not be permitted to use it for purposes other than for which it was collected.

16. See, e.g., *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 278, *reh'g denied*, 312 U.S. 716 (1941). The common law duty of loyalty prohibits any self dealing. *Mosser v. Darrow*, 341 U.S. 26 (1951).

17. *United States Trustee v. Bloom (In re Palm Coast, Matanza Shores Ltd. Partnership)*, 101 F.3d 253, 257-58 (2d Cir. 1996); *Walsh v. Northwestern Nat'l Ins. Co. (In re Ferrante)*, 51 F.3d 1473, 1479-80 (9th Cir. 1995).

18. See 62 Fed. Reg. 30171 (Final Rule Establishing Qualifications and Standards for Standing Trustees), codified at 28 CFR § 58.4. Given the common law prohibitions against self-dealing, one approach could be to require the trustees to certify in writing that (1) this sensitive information will be distributed on the same terms and conditions to all persons or entities and (2) that the trustees will not benefit from the dissemination of this information in any way,