

Defending Federal Trade Commission Consumer Protection Investigations: A How-To Guide

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THE FEDERAL TRADE COMMISSION has broad authority to investigate the conduct and practices of virtually any person or corporation and to bring enforcement actions against violations of a variety of consumer protection statutes.

This article explores strategies for defending FTC consumer protection investigations, drawing attention to similarities with and differences from antitrust investigations.

Key Considerations when Dealing with the FTC

To be successful, targets of any FTC investigation should recognize certain characteristics of the agency:

- First, while private plaintiffs typically pursue legal action for an economic return, the FTC is motivated by communicating enforcement principles and policy. The Commission will consider the amount of commerce affected by a practice and the extent of consumer harm but is generally more concerned with establishing precedent.
- Second, the FTC staff are both “investigator” seeking to uncover facts and “judge” deciding whether to bring a case. While targets can argue “up the chain” at the FTC to the Commissioners and force the FTC staff to prove their case before an administrative law judge or federal judge, it is quicker and less expensive to convince the staff not to recommend a case in the first instance. Doing so often requires investigative targets to be forthcoming rather than attempt to hide the ball.
- Third, most FTC staff are hard-working and committed to the agency’s mission to protect competition and consumers. FTC staff advance their careers by bringing cases, but will close a case if convinced it is not in the public interest to bring an enforcement action or they will lose if forced to litigate. Targets can argue to senior agency offi-

cial that bringing an enforcement action would be bad policy, but are unlikely to be successful if disrespectful of the investigative staff.

- Fourth, staff are generally skeptical of assertions by targets of investigations. They are more likely to accept facts presented by a business executive than outside counsel and are more likely to credit ordinary course documents than oral representations.
- Finally, it is critical for targets to maintain credibility throughout an investigation. Companies or counsel that misstate or overstate facts will have a much tougher road because the staff will be suspicious of future representations.

We turn now to the typical course of an FTC consumer protection investigation.

Learning of an FTC Investigation

Most targets learn of FTC consumer protection investigations when served with a Civil Investigative Demand (CID) or an “access letter” requesting documents and information, though they may occasionally hear industry rumors that the FTC is making inquiries or publicity surrounding a complaint filed with the FTC.

A target may also first receive notice of a temporary restraining order, asset freeze, or the appointment of a receiver by a federal court in response to an ex parte request of the FTC or by the FTC filing a complaint and motion for preliminary injunction. Such actions are generally reserved for cases where the Commission believes (1) there is an immediate threat of significant consumer harm or (2) there is significant risk that the company’s assets will disappear before relief can otherwise be sought.¹

FTC staff do not typically disclose or confirm what led the agency to investigate, though it may be obvious that the CID or access letter is based upon a published article, academic research, or referral from the National Advertising Division of the Council of Better Business Bureaus (NAD). A CID may also follow a publicly filed petition or an FTC announcement that it is conducting an industry-wide sweep.

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The FTC staff also initiate investigations in response to consumer or competitor complaints. The agency's Bureau of Consumer Protection reported receiving over 3 million complaints, not including Do Not Call Registry complaints, during 2016.² And staff commence investigations based on information uncovered in other investigations; requests from Congress, other federal agencies, and state enforcers; the staff's own experiences as consumers; and after monitoring industry activities, particularly after issuing new guidance.

FTC Investigative Authority and Tools

To defend an FTC consumer protection investigation, it is necessary to understand the laws the agency enforces and the tools the agency can use to obtain information.

Consumer Protection Statutory Authority. The principle consumer protection statute enforced by the FTC, Section 5(a) of the FTC Act, 15 U.S.C. § 45, provides that “unfair or deceptive acts or practices in or affecting commerce” are unlawful. The FTC relies on Section 5 to challenge everything from advertising and marketing practices to privacy and data protection practices.³

Deception. The FTC primarily relies on its authority to stop “deceptive” practices, which it defines as a representation, omission, or practice that is “material” and likely to mislead a consumer acting reasonably under the circumstances. Deception is material if likely to affect the consumer's conduct or decision with regard to a product or service.⁴

The FTC requires a “reasonable basis” for most representations,⁵ though it requires “competent and reliable” scientific evidence for health and safety claims.⁶ A misrepresentation can be express or implied based on overall “net impression.” No definitive proof of harm is needed; the FTC may find a violation if “the representations or practices were likely to mislead consumers acting reasonably.”⁷

The FTC requires qualifying information necessary to prevent a claim from being misleading to be disclosed in a “clear and conspicuous” manner. A disclosure cannot, however, contradict and cure a false claim. If a statement is false, it must be modified.

Unfairness. The FTC also uses its authority to stop unfair practices, defined as those that “cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁸

In the Commission's view, substantial injury can be found from acts or practices “causing very severe harm to a small number of people” or a “small harm to a large number of people.”⁹ Substantial injury usually involves monetary injury, not emotional or other subjective harm. At least one appellate court has rejected the FTC's position that a practice may be deemed unfair if the potential injury is large, even if the chance of injury is low.¹⁰

Other Consumer Protection Laws. The Commission enforces numerous other consumer statutes as well, including the Children's Online Privacy Protection Act, the Con-

trolling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM), the Fair Credit Reporting Act, and the Restore Online Shopper's Confidence Act.

The FTC's Bureau of Consumer Protection typically brings more cases every year than the Bureau of Competition. During 2016, the Commission reported filing 70 consumer protection actions (including 45 federal court cases, 19 administrative actions, and 6 civil penalty actions) compared to 23 antitrust enforcement actions.¹¹

Demands for Information. The FTC has broad statutory authority to “gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce” with limited exceptions for banks, savings and loans, credit unions, and common carriers.¹²

While the FTC can use either subpoenas or CIDs in antitrust matters, the agency is restricted to the use of CIDs in consumer protection matters.

While the FTC can use either subpoenas or CIDs in antitrust matters, the agency is restricted to the use of CIDs in consumer protection matters.¹³ Similar to a subpoena, a CID can be used to require production of “documentary materials” or “oral testimony.” Unlike a subpoena, however, a CID may also require the recipient “to file written reports or answers to questions” (i.e., answers to interrogatories) and require production of “tangible things” (i.e., physical objects). CIDs can also be served upon entities “not found within the territorial jurisdiction of any court of the United States” (i.e., worldwide).¹⁴

The FTC takes testimony at “investigational hearings” (similar to depositions in civil litigation), and it does so regularly in antitrust investigations. While such hearings are sometimes used in consumer protection investigations, the staff regularly bring and close cases based solely on review of the target's documents.

In order to issue a CID, a majority of the Commission must first vote to adopt a resolution authorizing the use of compulsory process, and then a Commissioner must sign off on a proposed CID.¹⁵

The FTC relies on both “omnibus” industrywide resolutions and “blanket” resolutions to investigate certain types of practices. Such resolutions can remain in force for years and authorize issuance of CIDs for a large number of consumer protection investigations across an industry or group of industries. In antitrust matters, by contrast, the agency principally relies on case-specific resolutions. Courts have upheld the agency's broad resolutions as adequate to provide the required statutory notice of the “nature of the conduct con-

stituting the alleged violation which is under investigation” and “the provision of law applicable to such violation.”¹⁶

If any person fails to comply with a CID, the FTC may enforce the CID by filing a petition in federal court where the CID recipient “resides, is found, or transacts business.” CID enforcement actions can take months or even years to resolve.¹⁷

In order to avoid the layers of internal agency review and process required to issue a CID and to speed issuance of a request, the FTC staff may alternatively choose to request information from a target through an access letter.¹⁸ Such letters are often characterized as “informal,” and targets may have somewhat greater flexibility in responding, given that access letters cannot be enforced in court. Nevertheless, it is generally inadvisable to ignore such a request as the FTC staff can always seek to issue a CID for the same information, and the staff are less likely to be flexible after doing so.

While most FTC staff use CIDs when concerned that a target may not cooperate, some staff regularly use CIDs rather than access letters, believing CIDs provide greater negotiating leverage or greater compliance, so little can be read into the choice to issue a CID versus an access letter.

Preliminary Actions for Targets

Upon learning that a company or individual is a target of an FTC investigation, the target should typically: (1) preserve relevant materials, (2) attempt to understand the nature of the investigation, (3) consider potential exposure, and (4) ensure ongoing conduct does not violate the law.

Implement a Document Hold. The first step that any target should take is to preserve relevant documents and information.

The typical CID/access letter instructs targets to preserve relevant documents, but even companies that learn of an FTC investigation through other means should consider whether to implement a document hold so executives do not take it upon themselves to destroy or modify documents or take other action that may lead to obstruction of justice charges.¹⁹

Document hold notices should be broad enough to cover relevant materials and personnel likely to have relevant materials and detailed enough to identify material to be preserved, but not so long that they will not be read or so alarmist as to cause panic among employees. What is important is promptly to implement a hold, which can be expanded once the scope of the inquiry is clearer. IT personnel typically need to be part of the process.

Understanding the Nature of the Investigation. Another important initial step is to gather information regarding the nature of the investigation through (1) careful review of the CID and FTC resolution or the access letter and (2) conversations with FTC staff.

The focus of the investigation may be clear from the information requested or may be discerned from reading between the lines by counsel familiar with FTC practice, as well as

recent FTC enforcement actions and speeches by agency officials.

Understanding the staff’s interests allows targets to educate the staff about the company’s business, to negotiate the CID or access letter to minimize burden while getting the staff what they need, and to prepare defenses and efficiently resolve the matter.

Conducting an Internal Investigation. It is generally advisable for counsel to interview key witnesses and review documents to determine if the target is in compliance with the law, develop arguments against an enforcement action, and advise the company regarding its potential exposure. Counsel must make clear to company employees that he or she is representing the company and not the individual through an appropriate warning that accounts for potential individual liability.²⁰

Taking Corrective Actions. Targets should consider whether they want to take unilateral action to modify conduct that might be challenged by the FTC.

Agency policy may be to require a consent order if changes are made after a target learns of the agency’s investigation; however, FTC closing letters show that making changes early in an investigation will sometimes convince the staff that the investigation is not worth pursuing.²¹ Further, even if the agency does not close the investigation, making changes early in an investigation may allow the target to portray challenged conduct as old and discontinued if the FTC brings a case and to state that the FTC’s order will not require any change in conduct. These considerations must be balanced against concern that making any change will be perceived as an admission of wrongdoing and concern that the staff may demand even more relief.

Approaching FTC Staff. While targets must develop an appropriate strategy for each individual case, it is often wise to initiate early contact with FTC staff, which may serve to: (1) assure the staff that the target intends to “cooperate” so that court action is not necessary, (2) gain an understanding of the staff’s theories and concerns, (3) begin to educate the staff about the target and the industry, (4) smooth the way for an extension of time to respond and for modifications to the CID/access letter, (5) foreshadow the company’s defenses, and (6) develop a relationship of trust with the staff. Such contact can be by phone or in person by outside counsel alone or together with in house counsel or business officials, and may in some cases warrant preparation of a slide deck. In any event, as discussed below, CID recipients must contact the FTC within 14 days of receipt of a CID.

Targets should not expect to convince the staff to withdraw the CID/access letter before receiving at least some requested documents. Nonetheless, early meetings may help the staff to understand relevant facts that will make it easier to negotiate modifications to the requests, allow the staff to better understand the materials that will be produced, and lay the groundwork to argue why there has been no violation or to minimize relief.

Understanding the internal organization of the FTC and personnel is also critical to defending an investigation. Consumer protection investigations are led by one of five divisions within the Bureau of Consumer Protection (Advertising Practices, Enforcement, Financial Practices, Marketing Practices, or Privacy and Identity Protection) or by a regional office, some of which also handle competition matters. Each division is headed by an associate director and assistant directors, and each regional office is headed by a regional director and assistant regional directors. All consumer protection matters are reviewed by the Director of the Bureau of Consumer Protection, supported by deputies and counsel.

A majority of sitting Commissioners (nominated by the President and confirmed by the Senate to staggered seven year terms) must vote to authorize an enforcement action or accept a consent decree. The FTC Act provides for five commissioners, no more than three of whom can be of the same political party.

Other Preliminary Steps. Investigative targets should also consider whether insurance policies may cover the costs of defending the investigation and whether the investigation must or should be disclosed to a company's board of directors, shareholders, lenders, or others. Production of some documents to the FTC, for example, may require advance notice to business partners.

Entering joint defense agreements with others under investigation may also be in a target's interest, to facilitate sharing of information and legal theories in order to mount the best defense.

Negotiating or Moving to Quash a CID

CID recipients almost always negotiate the return date and scope of required documents and information. If an agreement cannot be reached, the recipient can move to quash the CID.

CIDs often impose tight deadlines, sometimes with the aim of negotiating a production schedule within the stated deadline or to get the target's attention. The staff will almost always agree to reasonable extensions of time, in part because it would take much longer to enforce the CID in court.

A target may seek to produce materials in phases or on a rolling basis, which may give the staff some materials more quickly, show that the target intends to comply, and provide a basis for agreement on a reasonable overall timeline for compliance, which may require months.

The staff often make requests for information that are much broader than necessary (e.g., requiring a search of the entire company and agents/representatives), but the staff will generally agree to limitations, such as a specific list of company officials to be searched.

In contrast to merger investigations, where the FTC has issued a model Second Request and announced a presumptive limit on the number of custodians to be searched and number of years to be covered, CIDs in consumer protection matters vary widely. A 2014 ABA study found the cost of

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responding to a Second Request ranges from \$2 million to \$9 million, with a median cost of \$4.3 million and a per custodian median cost of \$151,000.²² In our experience, the burden of complying with a consumer protection CID varies widely though is generally less than the burden of responding to a Second Request.

Issues the target should consider when negotiating the scope of the demand include:

- Is the deadline realistic? If not, what is a realistic deadline?
- Would it make sense to provide information in a phased response?
- Does the agency have any priority requests that might be addressed first, while allowing additional time for other requests?
- Which requests will be easy or hard for the company to complete?
- Are there alternative formats for requested information that would be easier for the company to produce?
- What individuals are most likely to have the requested documents? Are other personnel likely to have only the same documents?
- Do the requests seek "all" documents or only "documents sufficient to show"?
- Would a narrative response be easier to draft than producing documents and be acceptable to the staff?
- Could the company utilize a sampling technique instead of producing all of the requested documents or information, for example if the agency requested recorded phone calls?
- Will producing the requested information cause an undue burden or cost on the company?
- What is the basis for the time period covered by the CID? Can the time frame for requested information be limited?
- Have there been any incidents or changes that may impact the availability of the requested information or documents (for instance a change in computer programs or a system failure that erased records)?

FTC rules require CID recipients to meet and confer with the FTC staff within 14 days of receipt of the CID or, if sooner, before the deadline to file a petition to quash.²³ The rules also require the recipient to file any petition to quash the CID with the Commission before the sooner of 20 days after service of the CID or the return date.²⁴ The Commission will only consider issues on a motion to quash that have been raised with the staff.²⁵

Petitions to quash, which are filed only rarely, are ruled on by a single FTC Commissioner, with appeals to the full Commission. When considering whether to file a petition, targets must take into account the fact that the FTC makes such petitions and decisions on them public, while the investigation might otherwise remain confidential.²⁶

CID recipients may object when responding to a CID even if they do not file a petition to quash, for example, to requests that are overly burdensome and to terms that are vague and ambiguous. Courts may not enforce a CID if (1) it is “too indefinite,” “unduly burdensome” or “unreasonably broad,” (2) it “threatens to unduly disrupt or seriously hinder normal operations of a business,” or (3) the information sought is not “reasonably relevant” as “measured against the scope and purpose of the FTC’s investigation, as set forth in the Commission’s resolution.”²⁷

Confidentiality

Targets of FTC investigations are often concerned about both the confidentiality of the investigation and the confidentiality of sensitive information that must be produced in response to a CID or access letter.

Concerned parties can designate materials as “confidential,” request confidential treatment when producing materials to the FTC, and request the return of materials at the end of the investigation.

The FTC generally takes the position that its investigations are not public, meaning that the agency will not disclose the existence of an investigation until it issues a complaint, files suit in court, accepts a consent agreement, or closes its investigation, unless the target has disclosed the investigation in a press release or government filing or where there has been substantial publicity about the investigation.²⁸ The FTC staff will, however, disclose the fact that the FTC is investigating as necessary to conduct the investigation. Thus, the staff will disclose to witnesses who the staff seek to interview the reason for the interview. Notably, there is no obligation on the target not to disclose the investigation, and public companies sometimes consider the existence of an investigation to be material, requiring disclosure.

The FTC generally will not turn over material produced in response to a CID or access letter to other persons. The FTC Act, in fact, prohibits disclosure of confidential trade secrets and commercial or financial information,²⁹ testimony and materials submitted pursuant to a CID,³⁰ and information submitted to or obtained by the Commission other than in response to a CID if marked confidential (unless the Commission determines that the information is not a trade secret or confidential commercial or financial information and gives the submitter 10-days’ notice).³¹ FTC Rule 4.10(d) goes further and prohibits disclosure of information marked confidential that is “provided voluntarily in place of compulsory process.”³² Information submitted to the FTC during the course of an investigation is exempt from disclosure under the Freedom of Information Act (FOIA).³³

There are exceptions to these confidentiality requirements, so that information may (1) be used during investigational hearings; (2) disclosed to other government agencies for use in federal, state, and foreign investigations with notice to the submitter (unless the law enforcement agency requests the submitter not be notified);³⁴ (3) disclosed in response to a Congressional request with notice to the submitter;³⁵ (4) used in judicial proceedings;³⁶ or (5) disclosed in aggregate form with notice to the submitter.³⁷

Information that is provided voluntarily and is not marked “confidential” can be disclosed without notice to the submitter. Thus, marking material as confidential generally ensures notice to the submitter before disclosure and reduces the risk of inadvertent disclosure by agency staff.

Potential Outcomes

At the conclusion of an investigation, in order to bring an enforcement action, a majority of the FTC Commissioners must vote to file an administrative complaint, authorize the staff to file a suit in court, or accept a consent decree.

Commencing administrative litigation requires the Commission to find it has “reason to believe” that a violation has occurred and conclude that a proceeding “would be in the interest of the public.”³⁸

Once the staff conclude that enforcement is appropriate, and before forwarding their recommendation to the Commission, they typically present investigative targets with a proposed complaint and consent agreement to be filed administratively or in federal court. That provides the target an opportunity to argue to the staff and then to the Director of the Bureau of Consumer Protection that enforcement is unwarranted or to negotiate terms of the proposed consent decree.

Targets of investigations often submit white papers with supporting evidence, including declarations of witnesses and expert reports, and bring executives or experts to meetings if they believe providing such evidence is likely to convince the staff or Commission to close its investigation or narrow the relief sought. If expert reports may be needed from marketing, economic, industry, or other experts, it may of course be prudent to engage such experts earlier in the process as some reports, such as consumer perception surveys, may take considerable time to prepare.

Before a final decision, the target may meet with each commissioner. These meetings must be conducted either individually with each commissioner or at most with two commissioners, as a majority of sitting commissioners cannot meet without violating the Sunshine Act.³⁹

Closure or Voluntary Changes. If the FTC staff or the Commission conclude there has been no violation or that an enforcement action would not be in the public interest, the Commission may close its investigation without seeking any remedy from the target.

FTC staff may request that a target change practices without a consent agreement. Making such changes may be in the

target's interest to avoid the adverse publicity and the cost and burden of complying with a formal consent decree. Without an order, the target remains free to modify conduct in the future, subject to risk that the FTC staff may re-open the investigation. On the other hand, the staff might recommend closing the investigation even if the target refuses to make requested changes; indeed, the request itself may suggest that the staff do not believe enforcement is warranted.

Enforcement Actions and Remedies. The FTC regularly files consumer protection enforcement actions in federal court to obtain monetary equitable relief, including consumer redress or restitution, rescission, and disgorgement of unjust enrichment, with funds directed to consumers, the U.S. Treasury, or to indirectly benefit consumers, as well as injunctive relief, under Section 13(b) of the FTC Act.⁴⁰

The only remedy that can be imposed in an administrative action is a cease and desist order, restricting future conduct.⁴¹

Consent Decrees. Both administrative consent agreements and proposed federal court consent orders may be filed simultaneously with complaints or may be negotiated during litigation. A negotiated consent avoids the cost of litigation and, if negotiated in advance, the target may have some ability to shape the complaint that is filed by pointing out factual inaccuracies in the complaint and requesting that they be corrected before agreeing to sign the consent. Respondents that agree to consents typically are not required to admit liability, which may impact follow-on private litigation and adverse publicity.

Issues to consider in negotiating a consent include: (1) the entity named in the matter, (2) the scope and details of prohibitions on future conduct, (3) the effect of general obligations to comply with the law, (4) the frequency and duration of reporting requirements, (5) the extent and duration of record keeping provisions, and (6) the definitions of terms. At the same time, parties must recognize that the FTC staff consider some requirements and language to be non-negotiable because the Commission will not accept a consent without those terms. Reviewing recent consent agreements addressing similar issues is usually informative.

FTC cease and desist orders and stipulated orders for injunctions often prohibit conduct beyond that alleged to be illegal, thereby “fencing in” the respondent. Such provisions “serve to ‘close all roads to the prohibited goal, so that [the FTC’s] order may not be by-passed with impunity.’”⁴² For instance, orders may prohibit conduct with respect to “all products or all products in a broad category, based on violations involving only a single product or group of products.”⁴³ Fencing-in provisions may even prohibit conduct that would otherwise be lawful.

FTC orders typically apply to successors, which may discourage potential buyers from acquiring the target.

While consent orders often do not require the target to admit liability, any future violation of the consent order, including of the broader fencing-in provisions, can result in contempt and/or civil penalties. Violations of FTC orders can

be punished through civil penalties that now exceed \$40,000 per violation, with each day counted as a separate violation for continuing activity.⁴⁴

Administrative consent orders typically sunset after 20 years, while federal court orders are typically indefinite. Respondents may petition the FTC or the court to modify or set aside an order, though doing so typically requires changes in the law or facts.⁴⁵

In addition to issuing a press release bringing attention to FTC enforcement actions, the agency now regularly posts about complaints and consents to its blog, often in more colorful language than the press release.

Administrative Hearings. A respondent that contests an administratively filed complaint is entitled to a hearing before an administrative law judge (ALJ). The ALJ will issue an initial decision that contains both findings of facts and conclusions of law. The respondent and FTC staff may appeal the initial decision to the full Commission. The Commission conducts a de novo review of the facts and law, though it will defer to conclusions regarding the credibility of witnesses that testified live before the ALJ.⁴⁶ The respondent (but not FTC staff), may seek review of the Commission’s final decision by a federal court of appeals where the challenged act or practice was used or the person or corporation resides or carries on business.⁴⁷

Federal Judicial Enforcement. Section 13(b) of the FTC Act authorizes the FTC to obtain preliminary and permanent injunctions as well as consumer redress to remedy violations of “any provision of law enforced by the Federal Trade Commission.”⁴⁸ Even though Section 13(b) only explicitly authorizes preliminary and permanent injunctions, courts have interpreted the statute to authorize other forms of equitable relief, including rescission of contracts, disgorgement, and customer restitution.⁴⁹

For violations of trade rules, such as the Children’s Online Privacy Protection Rule or the CAN-SPAM Rule, the FTC can also seek remedies under Section 19 of the FTC Act.⁵⁰ Section 19 provides for redress in the form of “rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice,” but explicitly prohibits the imposition of “exemplary or punitive damages.” Remedies afforded by Section 19 are largely duplicative of Section 13(b), and since the FTC often brings cases under both Section 5 and an applicable FTC rule, the restriction on exemplary and punitive damages imposed by Section 19 may often be circumvented.⁵¹

Section 13(b) of the FTC Act authorizes federal courts to grant FTC requests for temporary restraining orders and preliminary injunctions to stop actual and threatened violations of any law the FTC enforces, pending administrative litigation, as well as permanent injunctions in “proper cases.”⁵² The Bureau of Competition regularly seeks preliminary injunctions to block mergers pending an administrative trial, but the Bureau of Consumer Protection litigates most con-

sumer protection matters entirely in federal court, allowing the agency to obtain monetary as well as permanent injunctive relief.⁵³

The FTC does sometimes bring administrative actions, which allow it to find facts and write a reasoned decision before its enforcement actions are reviewed in court, particularly when the Commission seeks to pursue a novel theory.⁵⁴

Practice Points

Targets of FTC consumer protection investigations should keep the following points in mind, to limit burden and maximize the likelihood of a successful outcome.

- The FTC has broad power to investigate unfair and deceptive acts and practices, but the FTC staff will negotiate to limit the burden of document and information requests, so long as they get what they think they need to conduct their investigation.
- There are significant differences between private litigation and FTC investigations that should be considered when evaluating strategies to respond to information requests and potential enforcement actions.
- The FTC staff will not generally disclose what led to the investigation, but targets should be able to understand what the FTC is investigating and should quickly undertake an internal investigation, modify potential risky conduct, and prepare a defense.
- CID recipients must promptly meet and confer with the FTC staff and should maintain good communications and credibility with the staff.
- Targets should designate information submitted to the FTC in response to either a CID or access letter as confidential, but recognize that the FTC may disclose such information in certain circumstances.
- Depending on the facts uncovered in the investigation, the strength of the case, and available enforcement resources, the FTC may close its investigation, request voluntary changes, negotiate a consent agreement, bring administrative litigation to obtain a cease and desist order, or file a civil action in federal court to halt allegedly illegal actions and obtain a monetary remedy.
- Targets of investigations may be just as concerned about adverse publicity from an enforcement action as they are about having to stop challenged conduct.

While enforcement priorities may shift over time, there is little doubt that consumer protection enforcement will continue. ■

³ The FTC also enforces other consumer protection statutes that prohibit specific practices, including the Children's Online Privacy Protection Act, the CAN-SPAM Act, and the Restoring Online Shoppers Confidence Act.

⁴ Federal Trade Comm'n, Policy Statement on Deception, 103 F.T.C. 174, 175 (1984).

⁵ Federal Trade Comm'n, Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984).

⁶ Federal Trade Comm'n, Enforcement Policy Statement on Food Advertising, (1994), <http://www.ftc.gov/bcp/policystmt/ad-food.shtm>.

⁷ *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006).

⁸ 15 U.S.C. § 45(n).

⁹ *Int'l Harvester Co.*, 104 F.T.C. 949, 1064 (1984).

¹⁰ *LabMD, Inc. v. FTC*, 2016 U.S. App. LEXIS 23559 at *10–11 (11th Cir. Nov. 10, 2016) (Order granting Motion to Stay Enforcement of the Commission's Final Order Pending Appeal).

¹¹ Federal Trade Comm'n, Stats & Data (2016), <https://www.ftc.gov/node/1205233>.

¹² 15 U.S.C. 46(a).

¹³ The FTC has not been able to issue subpoenas in consumer protection matters since passage of the FTC Improvements Act of 1980. P.L. 96-252, 94 Stat. 34 (May 28, 1980); 15 U.S.C. § 57b-1.

¹⁴ 15 U.S.C. §§ 57b-1(c)(1), (7)(B).

¹⁵ 15 U.S.C. § 57b-1(i); 16 C.F.R. § 2.7(a).

¹⁶ 15 U.S.C. § 57b-1(c)(2). In *FTC v. National Claims* for instance, the court said that the FTC need not "inform the subject of an investigation about any particular wrongful conduct," citing earlier decisions upholding arguably vague resolutions. *FTC v. National Claims Serv., Inc.*, 1999 U.S. Dist. LEXIS 3312 (E.D. Cal. Feb. 9, 1999).

¹⁷ 15 U.S.C. § 57b-1(e). See, e.g., *FTC v. Boehringer Ingelheim Pharm.*, No. 1:09-mc-564, 4 (D.C. Cir.) (subpoena issued in February 2009; enforcement efforts continuing March 2017); *FTC v. Western Union*, 1579 Fed. App'x 55 (2d Cir. 2014) (CIDs issued in November and December 2012; petition to quash filed in January 2013 and denied in March 2013; district court order issued June 2013 partially granting CID enforcement; court of appeals reversed decision in part and remanded in October 2014).

¹⁸ FTC OPERATING MANUAL § 3.1.3.1.

¹⁹ See, e.g., 18 U.S.C. § 1519 (authorizing fines and imprisonment of persons who destroy evidence in contemplation of a federal investigation); 18 U.S.C. § 1505 (authorizing fines and imprisonment of persons who destroy evidence in connection with a CID under the Antitrust Civil Process Act or any pending proceeding before any department or agency of the United States); 18 U.S.C. § 1512(c) (authorizing fines and imprisonment of any person who "corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding" or "otherwise obstructs, influences, or impedes any official proceeding").

²⁰ *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). Courts may find personal liability for directors, officers, or controlling shareholders only where (1) the corporation violated Section 5 of the FTC Act; (2) the individuals "either participated directly in the deceptive acts or practices or had authority to control them"; and (3) the individuals knew or should have known about the deceptive practices. *FTC v. World Media Brokers*, 415 F.3d 758, 763–64 (7th Cir. 2005). The Supreme Court has held that it is appropriate for individuals to be named where they own, dominate, or manage the company and need to be named in order for the FTC's order to be effective. *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937).

²¹ See, e.g., *Microsoft/Starcom*, FTC File No. 142-3090 (Aug. 26, 2015), https://www.ftc.gov/system/files/documents/closing_letters/nid/150902_machinima_letter.pdf; *TRIA Beauty, Inc.* FTC File No. 142-3162 (July 31, 2015), https://www.ftc.gov/system/files/documents/closing_letters/nid/150731triatebeauty.pdf.

²² Peter Boberg & Andrew Dick, *Findings from the Second Request Compliance Burden Survey*, THE THRESHOLD (ABA Section of Antitrust Law Newsl.), Summer 2014, at 28, 33.

¹ See e.g., Motion for Temporary Restraining Order, Asset Freeze, Appointment of a Temporary Receiver, Immediate Access, and Order to Show Cause Why a Preliminary Injunction Should Not Issue, *FTC v. Apply Knowledge, LLC*, No. 2:14-cv-00088-DB (D. Utah Feb. 11, 2014), <https://www.ftc.gov/system/files/documents/cases/140224applyknowledgetro.pdf>.

² Federal Trade Comm'n, Stats & Data (2016), <https://www.ftc.gov/node/1205233>.

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- ²³ 16 C.F.R. § 2.7(k).
- ²⁴ 16 C.F.R. § 2.10.
- ²⁵ 16 C.F.R. § 2.7(k).
- ²⁶ 6 C.F.R. § 2.10.
- ²⁷ See *FTC v. Texaco Inc.*, 555 F.2d 862 (D.C. Cir. 1977); see also *FTC v. Church & Dwight Co.*, 665 F.3d 1312 (D.C. Cir. 2011).
- ²⁸ Federal Trade Comm'n, Policy Concerning Disclosure of Nonmerger Competition and Consumer Protection Investigations: Notice of Revised Policy, 63 Fed. Reg. 63,477 (Nov. 13, 1998).
- ²⁹ 15 U.S.C. § 46(f).
- ³⁰ 15 U.S.C. § 57b-2(b).
- ³¹ 15 U.S.C. § 57b-2(c).
- ³² 16 C.F.R. § 4.10(d).
- ³³ Section 21(f) of the FTC Act states: "Any material which is received by the Commission in any investigation . . . which is provided pursuant to any compulsory process under this subchapter or which is provided voluntarily in place of such compulsory process shall not be required to be disclosed under section 552 of title 5 [FOIA]." 15 U.S.C. § 46(f).
- ³⁴ 15 U.S.C. §§ 46(f), 57b-2(b); 16 C.F.R. § 4.11 (c)(j).
- ³⁵ 5 U.S.C. §§ 57b(b)(3)(C) and (d)(1)(A); 16 C.F.R. § 4.11(b).
- ³⁶ 15 U.S.C. §§ 57b-2(d)(1)(C); 57b-2(d)(2). In FTC administrative proceedings, before disclosure, the submitter will be notified and given the opportunity to seek protective or in camera orders, 16 C.F.R. § 4.10(g).
- ³⁷ 15 U.S.C. §§ 46(f); 57b; 57b-2.
- ³⁸ 15 U.S.C. § 45(b).
- ³⁹ See Government in the Sunshine Act, Pub. L. No. 94-409; 5 U.S.C. § 526.
- ⁴⁰ 15 U.S.C. § 53(b).
- ⁴¹ See 15 U.S.C. § 45(b).
- ⁴² *Cal. Naturel, Inc.*, 2016 FTC LEXIS 236 at *22 (Dec. 5, 2016) (citing *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982)).
- ⁴³ *Id.* (citing *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976)).
- ⁴⁴ 15 U.S.C. § 45(l); 82 Fed. Reg. 8135 (Jan. 24, 2017) (civil penalty per violation adjusted, effective Jan. 24, 2017).
- ⁴⁵ See 15 U.S.C. § 45(b) (requiring FTC to reopen and consider whether respondent makes a "satisfactory showing that changed conditions of law or fact require" the order to be set aside or modified); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992) (interpreting Federal Rule of Civil Procedure 60(b) to require defendant to show a "significant change in factual conditions or law" to prevail on a contested motion to modify).
- ⁴⁶ See, e.g., *LabMD, Inc.*, 2016 FTC LEXIS 128 at *22 (July 28, 2016).
- ⁴⁷ 15 U.S.C. § 45(c).
- ⁴⁸ 15 U.S.C. § 53(b).
- ⁴⁹ *Verity International*, 443 F.3d at 66.
- ⁵⁰ 15 U.S.C. § 57b(a). The FTC can also seek civil penalties for rule violations under Section 5(m). However, there are few cases brought under that section, likely because the FTC is required to prove "actual knowledge or knowledge fairly implied." 15 U.S.C. § 45(m).
- ⁵¹ See, e.g., *FTC v. Washington Data Resources*, 856 F. Supp. 2d 1247, 1281 (M.D. Fla. 2012).
- ⁵² See 15 U.S.C. § 53(b).
- ⁵³ Federal Trade Comm'n, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority (2008) ("[M]ost consumer protection enforcement is now conducted directly in court under Section 13(b) rather than by means of administrative adjudication."). While perhaps a minor consideration, it is worth noting that federal court injunctions take effect immediately, while administrative cease and desist orders become effective only after a 30-day public comment period.
- ⁵⁴ See, e.g., *POM Wonderful, LLC*, FTC No. 9344, 2013 WL 268926 (2013); *Courtesy Auto Group, Inc.*, FTC No. 9359 (Jan. 7, 2014) (FTC complaint, case settled in March 2014 after an ALJ was assigned).