Cooley

Consumer Protection Enforcement Trends to Watch as New Leadership Takes Over FTC

March 20, 2018

With new leadership poised to take the helm at the Federal Trade Commission, now is an opportune time to review consumer protection trends and developments to watch over the coming months as the new commissioners get down to business.

Who's Trump putting in charge at the FTC?

President Donald Trump's nominees to lead the FTC – Joe Simons as chair and Rohit Chopra, Noah Phillips and Christine Wilson as commissioners – should be in place soon.

The Senate Commerce Committee voted February 28 to confirm all four nominees, three of whom are Republicans (Simons, Phillips and Wilson) and one of whom is a Democrat (Chopra), leaving one vacancy on the five-person commission. By law only three commissioners can be from the same party, so while the full Senate could confirm the four current nominees any day, it is possible the vote will be held up until a fifth candidate, supported by Senate Minority Leader Chuck Schumer, is nominated. Recent press reports identify Rebecca Slaughter, Schumer's chief counsel, as the likely nominee.

Simons, who served as director of the FTC's Bureau of Competition during the George W. Bush Administration, brings substantial antitrust expertise to the chair's position, but has less of a track record on the agency's consumer protection work. In responding to Senate questions, he provided some insight into his views, noting "rapid changes in technology and cyber threats provide a significant challenge to the Agency's ability to fulfill its consumer protection mission.... It is critical, despite these challenges, that the FTC protect consumers," he said, but that it do so "without unduly burdening them or interfering with the ability of firms (especially small firms and new entrants) to use data to enhance competition."

Chopra, supported by Massachusetts Senator Elizabeth Warren as well as Schumer, would bring substantial consumer protection expertise to the job, but is not a lawyer, holding an MBA from Wharton. He has most recently served as a senior fellow at the Consumer Federation of America and was previously assistant director of the Consumer Financial Protection Bureau, where he oversaw the agency's agenda on students and young consumers. He was the agency's first student loan ombudsman, a position created by Dodd-Frank, and led enforcement actions securing relief for student loan borrowers.

In his testimony, Chopra praised the FTC's tradition of consumer and business education, as well as its law enforcement record, and highlighted the "massive data breach at Equifax" as suggesting we face "serious issues … with the security of the proliferation of consumer data in our economy and society."

Phillips comes to the agency from Capitol Hill, where he served as chief counsel to Texas Senator John Cornyn on the Senate Judiciary Committee, advising him on privacy and antitrust, among other issues.

Wilson, most recently a senior vice president at Delta Air Lines with responsibility for regulatory and international matters, was chief of staff at the FTC under Chairman Tim Muris and, in that role, had responsibility for helping Muris run both the consumer protection and antitrust sides of the agency.

Privacy and data security breaches – no harm no foul?

The precise reach of the FTC Act's prohibition of "unfair or deceptive acts or practices" with respect to privacy and data security is still being defined by the FTC and the courts. Developments over the coming months may provide more clarity to businesses seeking to stay on the right side of the law.

The FTC has challenged what it has asserted are inadequate data security measures as "unfair business practices," defined by the FTC Act to be practices 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."

There has been ongoing pushback against FTC actions where consumers have not suffered any known tangible harm.

Last September, in *FTC v. D-Link Corporation*, the US District Court for the Northern District of California dismissed an "unfairness" claim in an FTC complaint against D-Link Corporation, a manufacturer and marketer of routers and internet-protocol (IP) cameras. In addition to alleging that D-Link misrepresented the level of data security associated with its devices, the FTC alleged that the company failed to take reasonable steps to protect its routers and IP cameras from foreseeable security risks, thereby leaving consumers' personal information vulnerable to hackers.

The FTC argued that D-Link's alleged failure to take steps to address well-known and easily preventable security flaws was "likely to cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition," and therefore constituted an unfair act or practice in violation of Section 5 of the FTC Act.

The court disagreed, pointing out that the agency had not identified even a single incident in which a consumer's sensitive personal information had been accessed or misused in any way or in which an IP camera had been compromised by unauthorized parties. The court ruled that "[i]f the FTC had tied the unfairness claim to the representations underlying the deception claims, it might have had a more colorable injury element. A consumer's purchase of a device that fails to be reasonably secure – let alone as secure as advertised – would likely be in the ballpark of a 'substantial injury,' particularly when aggregated across a large group of consumers. But the FTC pursued a different and ultimately untenable track."

Currently the FTC is awaiting a decision from the Eleventh Circuit in another cybersecurity case it has pursued for years. In *LabMD, Inc. v. FTC*, the agency proved a security breach but did not offer evidence of any tangible harm to any consumer. Nevertheless, the commission held that "the disclosure of sensitive medical information…, [even] in the absence of proven economic or physical harm, satisfies the 'substantial injury' requirement."

The court of appeals granted LabMD's motion to stay the FTC's order, reasoning "it is not clear that a reasonable interpretation of [the statute] includes intangible harms like those that the FTC found in this case." The court said that it did "not read the word 'likely' to include something that has a low likelihood," citing the FTC's Policy Statement on Unfairness, which provide that the FTC "is not concerned with . . . merely speculative harms."

While these matters have proceeded, the FTC has engaged in its own analysis regarding the types of harms it should consider. In December 2017, the agency held a workshop examining "informational injury," a term coined to cover harms consumers suffer from privacy and data security incidents.

The FTC's acting chairman said the workshop should guide agency's case selection and policy work, and expressed her view that "government does the most good with the fewest unintended side effects when it focuses on addressing actual or likely substantial consumer injury instead of expending resources to prevent trivial or purely hypothetical injuries." She said the agency needs to understand consumer injury "to weigh effectively the benefits of intervention against its inevitable costs."

Going forward, we expect that the FTC will pay greater attention to data security and privacy cases where consumers have been actually injured – but time will tell.

Cybersecurity and deceptive advertising

Even without a security breach, companies are at risk of an FTC enforcement action if their data security practices do not live up to the promises they make to consumers through their advertisements or privacy policy.

In *D-Link*, for example, while the court dismissed the unfairness claims, the FTC's deception claims are moving forward. These include allegations that D-Link misrepresented that its routers were secure from unauthorized access through language such as "easy to secure" and "advanced network security" and that its security cameras were secure from unauthorized access and control through language such as "enter a password" to "secure your camera."

In January 2018, children's technology company VTech Electronics settled FTC claims that it had failed to abide by the terms of its privacy policy and violated the Children's Online Privacy Protection Act for failure to acquire parental consent regarding its data collection practices. VTech's privacy policy stated that it encrypted all transmitted registration data that contained personal identification information; however, the FTC alleged that VTech failed to do so.

To avoid FTC scrutiny, companies need to ensure that their privacy and data security practices live up to their claims – in their privacy policies, on their own web pages, in social media and in traditional advertising media.

Recurring payments – ensure disclosure compliance

The FTC continues to focus attention on ROCSA – the Restore Online Shopper's Confidence Act – which requires clear and conspicuous disclosure of material terms, a simple way to cancel services and the consumer's express informed consent before charging consumer's credit cards for recurring payments.

ROSCA also prohibits third-party sellers from charging consumers for post-transaction upsales unless they have obtained additional information from the consumer and the consumer agrees to the additional charges, but the agency's focus has been on recurring payments and subscription or "negative option" sales.

The FTC announced six enforcement actions based on alleged ROSCA violations in 2017 involving companies with products ranging from lingerie and teeth whitening subscriptions to credit monitoring and fitness apps. While some of the enforcement actions involved companies allegedly intentionally duping consumers into monthly payments through offers of free trials, legitimate companies are also being ensnared by alleged violations.

For instance, lingerie subscription service AdoreMe was charged with failing to provide a simple way to cancel subscriptions. The FTC alleged that AdoreMe (1) only allowed customers to cancel by phone, even if they signed up online, (2) under-staffed the customer service department resulting in long wait times, (3) after introducing an online cancellation process, made the process "drawn-out," requiring a five question survey and multiple pages explaining the service, and (4) failed to cancel accounts after the request was submitted.

FTC expanding endorsement guidelines enforcement to influencers

The last few years have seen FTC press releases and news reports focused on the agency's "endorsement" guidelines and related enforcement actions. Companies should expect the FTC to continue its strong push in endorsement guideline enforcement in 2018.

In September 2017, the FTC updated its guidance document *The FTC's Endorsement Guides: What People Are Asking.* The updated guidance clarifies that simply tagging a brand in a social media post without further description or praise of the product constitutes an endorsement requiring disclosure of "material connections." The updated guidance also advises that a company's offer of free travel to an endorser or offer to make a charitable donation on behalf of the endorser constitute compensation that must be disclosed.

The FTC also advised that companies should revise their disclosure procedures if they recommend using "#ambassador" or "#employee" to denote that an endorser has a material connection. The FTC guidance suggests these disclosures are likely inadequate and instead recommends "#XYZ-ambassador" or "#XYZ-employee," where "XYZ" is the name of the endorsed company.

In September 2017, the FTC announced that it had brought its "first-ever complaint against individual social media influencers." The FTC suit against endorsers of CSGOLotto, a gambling site, did not involve typical paid influencers but the owners and officers of the company, who failed to disclose their positions in social media posts touting the company's services.

The FTC also sent letters to 90 individual social medial influencers during 2017, identifying specific posts that the FTC believed were not compliant with the agency's *Endorsement Guidelines*. Twenty-one of these influencers received follow-up "warning letters" asking them to provide the FTC with information regarding material connections with the identified brands and the influencer's plan to ensure proper disclosures in the future. These letters suggest that the FTC will be bringing enforcement actions against paid influencers in the future.

To avoid adverse publicity from FTC enforcement, companies should train their endorsers to follow FTC guidance and monitor compliance.

Native advertising should be distinguishable from editorial content

The FTC published *Blurred Lines* in December 2017, a staff report detailing research on the effectiveness of disclosures for search and native advertisements. The report follows the FTC's December 2015 *Enforcement Policy Statement on Deceptively Formatted Advertisements*, as the agency continues to focus on so-called "native advertising."

The FTC describes native advertising as any commercial content "that bears a similarity to the news, featured articles, product reviews, entertainment, and other material that surrounds it online." FTC guidance advises that such commercial content is deceptive if it expressly or implicitly conveys that it is "independent, impartial, or from a source other than the sponsoring advertiser."

The new study was based on tracking eye movements and responses to questions as participants viewed advertisements. The agency reported that advertisements that were updated to be compliant with FTC guidance were 10-45 percent more likely to be identified as advertisements than the original advertisements used in the study.

With the FTC armed with this evidence, companies should expect that the FTC will make a renewed push for stronger disclosures when companies use native advertising, especially considering that industry reports suggest that over one-third of native advertisement may not be compliant with FTC guidance.

Health claims – what substantiation is required?

Does the FTC require "randomized, double-blind, and placebo-controlled" human clinical trials for health claims? Often not – but it depends on the claim.

The FTC generally requires "competent and reliable scientific evidence" for health claims, and agency guidance suggests that standard is "sufficiently flexible," stating there is "no fixed formula for the number or type of studies required or for more specific parameters like sample size and study duration."

However, recent FTC settlements in cases challenging advertisements sometimes do require claims to be supported by randomized clinical trials. Other orders impose randomized clinical trial requirements only if an expert in the relevant field "would generally require such human clinical testing to substantiate that the representation was true."

The FTC battled POM Wonderful for many years over its claims that pomegranate juice could treat, prevent or reduce the risk of heart disease, prostate cancer and erectile dysfunction, ultimately prevailing before the DC Circuit in 2015. That court rejected the FTC's requirement that POM have two well-controlled human clinical trials but affirmed the FTC's order requiring POM to have at least one such study before making disease prevention or treatment claims.

The most recent battle over health claims is taking place in *FTC v. Quincy Bioscience Holding Company Inc.* The defendant's dietary supplement, Prevagen, is advertised as clinically proven to improve memory, reduce memory problems associated with aging and provide other cognitive benefits. As support for these claims, the defendant performed a clinical trial, which showed no statistical difference between its supplement and a placebo at a general level, but found benefits for certain subgroups. The FTC and New York attorney general alleged that what they called Quincy's "cherry-picked" findings "do not provide reliable evidence" to support the company's advertising claims and argued that splicing the data after the trial to find a benefit is not reliable.

In September 2017, the court granted the defendant's motion to dismiss, finding that "[a]ll that is shown by the complaint is that there are possibilities that the study's results do not support its conclusion. It does not explain how the number of post hoc comparisons run in this case makes the results as to the … subgroups unreliable, or that the statements touting the study's results are false or unsubstantiated."

The FTC and New York AG have appealed the decision to the Second Circuit, arguing that the district court "improperly drew inferences against the complaint, appointed itself as an expert, and rendered factual findings – all fundamental errors of law," which "led the court to resolve complex scientific questions without a factual record or expert testimony, which are essential to determine whether an advertiser had a sufficient factual basis for its health claims." This is a case to watch in 2018.

Despite the FTC's loss in the district court, companies should expect the FTC to continue to aggressively investigate the substantiation of health claims and impose randomized clinical trial requirements in settlements.

Key Contacts

Sharon Connaughton Washington, DC	sconnaughton@cooley.com +1 202 728 7007
Howard Morse Washington, DC	hmorse@cooley.com +1 202 842 7852
Sarah Swain Washington, DC	sswain@cooley.com +1 202 728 7032