

# FTC Consumer Protection Investigations and Enforcement

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A Practice Note discussing how the Federal Trade Commission (FTC) investigates and enforces violations of consumer protection laws. This Note provides an overview of how the FTC becomes aware of potential violations, and the steps that businesses can expect to ensue from the beginning of an FTC investigation to administrative enforcement actions and federal litigation.

The Federal Trade Commission (FTC) is the primary federal agency charged with protecting consumers from unfair or deceptive acts and practices under Section 5(a) of the Federal Trade Commission Act (FTC Act) (15 U.S.C. § 45). The FTC promulgates and enforces a variety of consumer protection statutes and regulations that govern specific advertising, telemarketing, financial and privacy and data security practices, for example:

- The Children's Online Privacy Protection Act.
- The Do-Not-Call Implementation Act of 2003.
- The CAN-SPAM Act.
- The Fair Credit Reporting Act.

For more information on the FTC Act, see *Practice Note: Overview, Advertising: Overview: The Federal Trade Commission Act* (<http://us.practicallaw.com/2-501-2799>).

This Note describes the FTC's range of investigatory and enforcement options, including:

- The factors that can trigger an investigation.
- How the FTC initiates investigations, the form and content of information requests and practical insights for responding.

- How the FTC proceeds if it decides to pursue an investigation, including options for escalation within the agency.
- Settlements.
- Litigation.

It also provides recommended actions that companies can take in response to the FTC's actions.

## TRIGGERS FOR AN INVESTIGATION

Companies often wonder how they got on the FTC's radar screen. Although the FTC rarely discloses why it began investigating a company, there are several common triggers leading to investigations. Companies can decrease their chances of unwanted regulatory attention by actively monitoring these sources and by taking immediate steps to respond to any issues that might make them vulnerable to investigation by a regulatory agency.

## CONSUMER COMPLAINTS

Consumers can submit complaints about a particular company online by using the FTC Complaint Assistant. Other channels, such as blog posts and tweets, can also spark the FTC's interest.

The complaints filed by consumers at local Better Business Bureaus are reviewed and sometimes forwarded to the company or the FTC, or both. Complaints forwarded by another agency, such as a local Better Business Bureau, are often taken more seriously by the FTC. The FTC Staff review these complaints for trends and particularly egregious allegations to identify targets for investigations.

## NAD RECOMMENDATIONS

The National Advertising Division of the Council of Better Business Bureaus (NAD) is a self-regulatory body that reviews national advertising for truth and accuracy. The NAD itself initiates a review or does so in response to consumer or competitor complaints. It publishes decisions articulating its analysis and often makes recommendations for advertisers to modify their claims. If an advertiser refuses to participate or to comply with a NAD decision, the NAD may refer the case to the FTC.



## NEWS ARTICLES

Regulators monitor the "consumer reporters" from many news outlets, which uncover and warn consumers about illegal marketing practices by publishing articles and other news stories. For example, in 2011, Facebook announced changes to its privacy controls, which instantly drew scrutiny in the press. Later that year, the company entered into a settlement with the FTC related to its privacy practices. In August 2013, Facebook announced more changes, and just a few weeks later, the FTC announced that it was reviewing the changes to determine if they violated the 2011 settlement.

## PETITIONS AND REQUESTS FROM ADVOCACY GROUPS

Third parties seeking agency action may formally petition the FTC or make an informal request. For example, in 2011, the Humane Society of the United States filed a petition with the FTC requesting the investigation of Neiman Marcus and several other retailers in connection with alleged violations of the Fur Act. The FTC did not acknowledge that the petition triggered an investigation, but in 2013 it announced a settlement with Neiman Marcus regarding alleged false advertising of fur products.

## REQUESTS FROM COMPETITORS

A company may also request that the FTC investigate its competitors' alleged deceptive or unfair practices. This approach can be potentially risky because if the FTC suspects that the practice is industry-wide, it may also investigate the company making the request.

## DIRECT OBSERVATION

The FTC Staff are also consumers, and they pay close attention to claims that appear on television, in marketing e-mails and on the internet.

## INITIATION OF AN INVESTIGATION

When the FTC suspects that a violation of consumer protection laws may be occurring, it often does some initial research before deciding whether to open an investigation.

The information identified in this process usually dictates the types of questions the agency asks the company in an investigation. In some situations, particularly if the FTC believes that there is an imminent threat of significant consumer injury, it can seek immediate relief in court, for example by:

- Filing a complaint for a permanent injunction.
- Filing a motion for a temporary restraining order.
- Requesting an asset freeze.
- Requesting that a temporary receiver be appointed over the defendant.
- Seeking other equitable relief.

The FTC routinely uses options for immediate relief against companies that target consumers in financial distress. For example, in January 2013 a district court, at the FTC's request, temporarily shut down a company the FTC accused of operating a credit card interest rate reduction scam. The FTC brought seven cases in three months

against telemarketers allegedly pitching phony debt relief services to financially distressed consumers (see *FTC Brings Seventh Action in Three Months Against Debt Relief Companies*).

## INFORMATION REQUESTS

If the FTC does not seek immediate relief in court, it often contacts a target company to request information as part of an investigation. The request, which in most cases remains confidential, can be either:

- Informal (for example, in an access letter).
- Formal (for example, in a civil investigative demand (CID) or subpoena).

An access letter or other informal request for information typically comes from the FTC attorney who is leading the investigation. Most access letters make a general statement that the agency is conducting an investigation to determine if the practices violate a statute or regulation without including details about the investigation or alleged violations.

The FTC may issue a CID or subpoena if:

- The FTC has concerns that the company may not cooperate.
- The matter has a higher profile within the FTC.

An FTC commissioner must sign off on a CID. A CID can also be used to obtain oral testimony from a witness. The deadline for responding to a CID is generally less flexible than for an access letter.

## RESPONDING TO INFORMATION REQUESTS

A company's response to an information request sets the stage for the rest of the investigation. Responding to requests can be expensive and disrupt a company's day-to-day operations. However, failure to respond can result in a more aggressive posture from the regulator (for example, a motion to compel a response).

After receiving an information request, the target company should contact the FTC to negotiate:

- The scope of the request.
- The timing for production of information.
- The approach for electronic discovery.

The FTC typically permits rolling production of information if the gaps between productions are reasonable.

Companies can use the substance of their responses to explain why the marketing or advertising claims in question are substantiated or not misleading or have not otherwise violated the relevant law. Each submission of information should be viewed as an opportunity to tell the company's story, not just as a data dump.

For example, the company may benefit by providing certain information, even if the request does not specify it, if the information demonstrates that the company did not engage in any wrongdoing.

After receiving a company's initial responses, the FTC may pose follow-up questions. A company may also request a meeting with the FTC to clarify any confusion, answer additional questions and advocate its position (see FTC Staff). This process can move quickly or it can take months or even years.

A company under investigation should take measures to ensure that any information it provides does not get released to the public, for example, by:

- Marking all submissions and attachments as confidential.
- Requesting that the FTC retain all submissions as confidential.
- When possible, citing applicable government in the sunshine statutes (for example, the Freedom of Information Act (FOIA) and the US SAFE WEB Act of 2006).
- Requesting the FTC return the materials at the end of the investigation.

### ESCALATION WITHIN THE FTC

A target company has an opportunity to advocate for its position by requesting a meeting with FTC representatives beginning and ending with:

- FTC staff (see *FTC Staff*).
- The Director of the Bureau of Consumer Protection (see *Director of the Bureau of Consumer Protection*).
- The FTC commissioners (see *FTC Commissioners' Vote*).

### FTC STAFF

The FTC staff generally has discretion to:

- Review the information collected during an investigation.
- Conduct meetings with the target company.

At the conclusion of its investigation, the FTC staff makes a recommendation to the Bureau of Consumer Protection (Bureau) to either:

- Close the investigation without further action.
- Pursue a formal enforcement action.

### DIRECTOR OF THE BUREAU OF CONSUMER PROTECTION

If the FTC staff recommends that a formal enforcement action be pursued, it usually sends the target company a written notification along with a draft complaint and proposed settlement agreement called a consent order. The draft complaint and consent agreement are usually sent to the company at each stage of the ongoing discussion. If at any point the FTC decides to file the complaint in court, it can use the draft that was sent to the target company (or file a modified draft) and then notify the company of its decision.

A company involved in a formal enforcement action with the FTC can request a meeting with the Bureau Staff, including the director of the Bureau, to try to persuade them that the investigation should be closed. The Director has considerable discretion on how to proceed on each matter, so an effective presentation can slow the momentum as the Bureau deliberates or sends the matter back to the Staff for further investigation or settlement discussions.

### FTC COMMISSIONERS' VOTE

If the Bureau agrees with the FTC staff's complaint recommendation, the proposed complaint and settlement terms (consent order)

are forwarded to the FTC commissioners. A majority of the FTC commissioners must vote in favor of issuing a complaint against the company. Before the vote, the company can request a meeting with each commissioner to explain why a complaint should not be issued or why it cannot agree to the current proposed consent order. The length of deliberations at the Commission level varies depending on a variety of factors, including:

- The nature of the allegations.
- The factual complexities.
- The company's posture (for example, whether it completely disagrees with the staff's position or whether it is willing to settle, but cannot agree to the staff's proposed consent order).

After deliberation, the commissioners can either:

- Instruct the Bureau to close the case.
- Send the file back to the Bureau and the Staff for settlement negotiation (see *Settling by Consent Order*).
- Vote to file a complaint (see *Litigation*).

### SETTLING BY CONSENT ORDER

If the FTC believes that an investigation has uncovered illegal acts or practices, it usually attempts to settle with the target company by entering into a consent order before resorting to litigation. Once the FTC has drawn preliminary conclusions of wrongdoing, the parties can reach a settlement at any point, even after a complaint recommendation has been forwarded to the Bureau of Consumer Protection, the FTC commissioners or the US Department of Justice (DOJ).

FTC consent orders typically require injunctive relief to immediately stop the acts or practices at issue. Many agreements also include:

- Fencing in provisions that are broader in scope than the conduct that is declared unlawful to prevent future unlawful conduct.
- Restitution or other financial relief for consumers.
- Civil penalties, where applicable, for alleged violation of a rule or a previous administrative order.

Consent orders can vary in term. Administrative settlements generally have a term of 20 years. However, settlements filed in federal court are usually indefinite.

The FTC requires certain boilerplate language in all consent orders. For example, the FTC always requires the settling party to:

- Distribute a copy of the consent order to relevant employees.
- File periodic reports demonstrating its compliance with the order.

### LITIGATION

If settlement discussions crumble and the FTC decides to pursue the case, the next step is litigation. The FTC can bring an:

- Administrative action (see *FTC Administrative Actions*).
- Action in federal court (see *Federal Lawsuits by the FTC*).

## FTC ADMINISTRATIVE ACTIONS

FTC administrative proceedings function like expedited court proceedings in which FTC staff attorneys prosecute as complaint counsel. After an evidentiary hearing, an administrative law judge (ALJ) evaluates whether the company has committed the alleged acts. Cases typically last one to two years and include, among other initiatives used in litigation:

- Conferences.
- Motions.
- Discovery requests.
- Depositions.
- Interviews with employees and related third parties.
- Preparation of witnesses.
- Use of experts.

The FTC's Rules of Practice govern its adjudicative proceedings (16 C.F.R. §§ 3.1-3.83).

### Evidentiary Hearings

FTC evidentiary hearings are open to the public and are intended to be expeditious (around 200 hours). To be admissible, evidence must be relevant, material and reliable.

FTC counsel are permitted to disclose any information obtained during the initial investigation if it is necessary to the administrative proceeding. At the conclusion of the hearing, both parties may file proposed findings of fact, conclusions of law and supporting briefs for the ALJ's consideration.

### Commission Orders and Appeals

The ALJ typically renders an initial decision within two months after the parties have filed proposed findings. The initial decision can be appealed to the full commission, which conducts an appellate-like hearing in which it:

- Receives briefs.
- Holds oral arguments.
- Issues its own final decision and order.

The commissioners review the ALJ's findings de novo, but usually support and uphold the allegations in the complaint

The FTC can only seek injunctive relief in an administrative proceeding. To obtain a civil penalty, the FTC must pursue an action in federal court (see *Federal Lawsuits by the FTC*). In addition to enjoining the challenged conduct, FTC orders often contain provisions enjoining related conduct that does not necessarily violate the FTC Act, but "fences in" conduct that may lead to future violations.

A FTC decision may be appealed to any federal appellate court in the jurisdiction where:

- The company resides.
- The company conducts business.
- The challenged practice occurred.

However, most appeals are heard in the US Court of Appeals for the D.C. Circuit. The appellate court evaluates whether the FTC's findings of fact were supported by substantial evidence. The agency is generally afforded deference.

## FEDERAL LAWSUITS BY THE FTC

The FTC can also opt to file a lawsuit in a federal district court for:

- Violations of regulations enforced by the FTC.
- Violation of an existing administrative or federal court order.
- Acts and practices that have been found by previous FTC decisions to violate the FTC Act (companies are generally notified of this type of violation in a synopsis letter, which summarizes the FTC's decisions on the acts or practices in question).

To initiate a federal lawsuit, the FTC sends a recommendation to the DOJ. DOJ attorneys consult with FTC attorneys before deciding whether to file a claim. During that time, the target company often has an opportunity to present its case to the DOJ attorneys. If the DOJ files a complaint, the litigation often takes much longer than an administrative action (in the absence of an expedited process like a motion for a temporary restraining order).

In a federal lawsuit, the FTC can seek:

- Injunctive relief.
- Civil penalties of up to \$16,000 per violation of FTC regulations ("per violation" is often broadly construed by the courts).
- Restitution.

The district court's ruling can be appealed to a circuit court, and ultimately to the US Supreme Court.

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