



# FTC and CFPB Set Sights on Employment Relationships and Labor Markets

September 8, 2022

**Leonard L. Gordon**

Partner | 212.370.6252 | [LLGordon@Venable.com](mailto:LLGordon@Venable.com)

**Alexandra Megaris**

Partner | 212.370.6210 | [AMegaris@Venable.com](mailto:AMegaris@Venable.com)

**Nicholas M. Reiter**

Partner | 212.370.6296 | [NMReiter@venable.com](mailto:NMReiter@venable.com)

**VENABLE** LLP



---

# WHAT ARE THE FTC AND CFPB?

---

# FTC & CFPB From a 30,000 Foot View

## FTC

- Created in 1914 when the Federal Trade Commission Act (FTCA) was signed into law; has been amended over the years
- Federal agency with 5 Commissioners, appointed by the President
- Mission is to protect the public from deceptive or unfair business practices and from unfair methods of competition
- Achieves mission through law enforcement, rulemaking, advocacy, research and education
- Consumer protection and competition jurisdiction is broad; few exceptions
- FTC enforces Section 5 of FTCA
- FTC also administers variety of other consumer protection laws

## CFPB

- Created in 2010 when Dodd-Frank Wall Street Reform and Consumer Protection Act passed in wake of Great Recession
- Federal agency with single Director, appointed by the President
- Focus is on consumer financial products and services
- Similar tools and authority as FTC, but also has supervision authority over certain businesses
- Jurisdiction extends to banks and non-banks selling or involved in servicing a consumer financial product



# Remedies Available to FTC & CFPB

## FTC

- Can seek injunctive relief in federal district court to stop or prevent unfair or deceptive conduct
- Can seek monetary relief in certain situations
- Can seek penalties for violations of existing consent orders and regulations
- 2020 Stats:

**TOP 5 REDRESS, DISGORGEMENT AND CIVIL CONTEMPT JUDGMENTS**

AmenDiebt (Andris Plukke)	\$179 million
Progressive Leasing	\$175 million
First Data Merchant Services	\$40 million
Elegant Solutions (Mission Hills Federal)	\$27.6 million
CD Capital Investments	\$10.7 million

**TOP 5 CIVIL PENALTY CASES**

Facebook, Inc.	\$5 billion
Lish Network LLC	\$128 million
Kohl's	\$220,000
Hyberbeard	\$150,000
Mortgage Solutions FCS, Inc.	\$120,000

**1.66 MILLION** consumers received **\$106.8 MILLION** in redress directly from the FTC

**ADDITIONAL REDRESS ADMINISTERED BY OTHERS** \$376.19 million

**NEW REDRESS, DISGORGEMENT AND CIVIL CONTEMPT AWARDS** \$507.11 million

**CIVIL PENALTIES AWARDED** \$5.13 billion

## CFPB

- Can bring action in state or federal court, or institute administration adjudication proceeding before ALJ
- Can seek injunctive relief, consumer remediation, and/or civil penalties

### Data snapshot through 2021

\$13.5 billion in consumer relief

Approximate monetary compensation, principal reductions, canceled debts, and other consumer relief ordered as a result of enforcement actions.

175 million people eligible for relief

Estimated consumers or consumer accounts eligible to receive relief from enforcement actions.

\$1.8 billion in penalties

Approximate civil money penalties ordered as a result of enforcement actions.



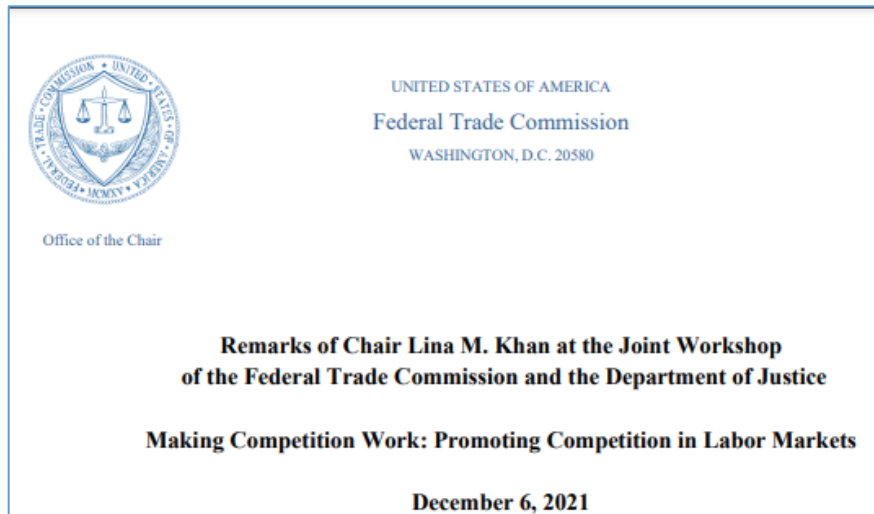
---

# **RECENT DEVELOPMENTS AT AGENCIES IMPACTING EMPLOYMENT RELATIONSHIPS**

---

# Protecting Workers Emerges as Common Mission Across Agencies

- President Biden issues Executive Order on Promoting Competition in the American Economy on July 9, 2021
- Personnel is policy
  - Lina Khan appointed Chair of FTC
  - Rohit Chopra nominated to lead CFPB; at the time was sitting Commissioner at FTC



First, we are redoubling our commitment to investigating potentially unlawful transactions or anticompetitive conduct that harm workers. In particular, we must scrutinize mergers that may substantially lessen competition in labor markets, recognizing that the Clayton Act's purview applies to product and labor markets alike. Recent scholarship and research—including by many of our panelists—

Second, the FTC is scrutinizing whether certain terms in employment contracts, particularly in take-it-or-leave-it contexts, may violate the law. At the Commission's open meetings, some workers

Third, as part of our efforts to approach our competition and consumer protection work in an integrated manner, we are also scrutinizing unfair or deceptive practices that may harm workers.

## Shining a Spotlight on Workers' Financial Experiences



Rohit Chopra   
@chopracfpb

Too many tech workers are asked to code and build products that violate consumer protection and fair competition laws. From dark patterns to discriminatory algorithms, we are urging the tech worker community to blow the whistle on wrongdoing.

MAR 09, 2022



that too many American workers face financial hardship, even as unemployment remains relatively low. [Larger firms dominate](#) [over workers are directly employed](#) by the larger firms that exert labor conditions within their markets and supply chains. In workers about financial risk or harm at the hands of the very seek to earn a living, the CFPB is looking into the consumer ces that workers face in the workplace.

recently, the CFPB invited worker organizations and labor unions representing workers in a wide range of sectors and occupations to share their members' experiences and challenges. Participants conveyed that workers are increasingly subject to specific consumer financial products or services that can leave them financially worse off and unable to change jobs.



Lina Khan   
@linakhanFTC

One key reform: Congress clarifying that labor organizing by workers is not subject to antitrust liability, even if workers are classified as non-employees. This is especially critical given the prevalence of "gig economy" firms that rely on workers classified as non-employees.

hopra   
acfpb

market operates at its best when workers are ve freely within it. The @CFPB has launched into the effects of an emerging form of debt ave the potential to trap employees in place.

# Recent FTC & CFPB Actions to Protect Workers

- February 2022, FTC announced an Advanced Notice of Proposed Rulemaking for a potential rule concerning earnings claims, partly driven by prevalence of misleading earnings claims used to recruit gig workers.
- FTC issued Notice of Penalty Offenses Concerning Money Making Opportunities to hundreds of businesses and employers, including major gig platforms and, in October 2021
- CFPB issued Request For Information Regarding Employer-Driven Debt June 2022
- MOU between FTC and National Labor Relations Board announced July 2022
- Multiple enforcement actions against gig economy platforms for misrepresenting (to potential workers and customers) earning potential and how workers are paid
  - State Attorneys General also actively investigating companies
- FTC merger review process taking closer look at employment practices, including non-compete contracts





---

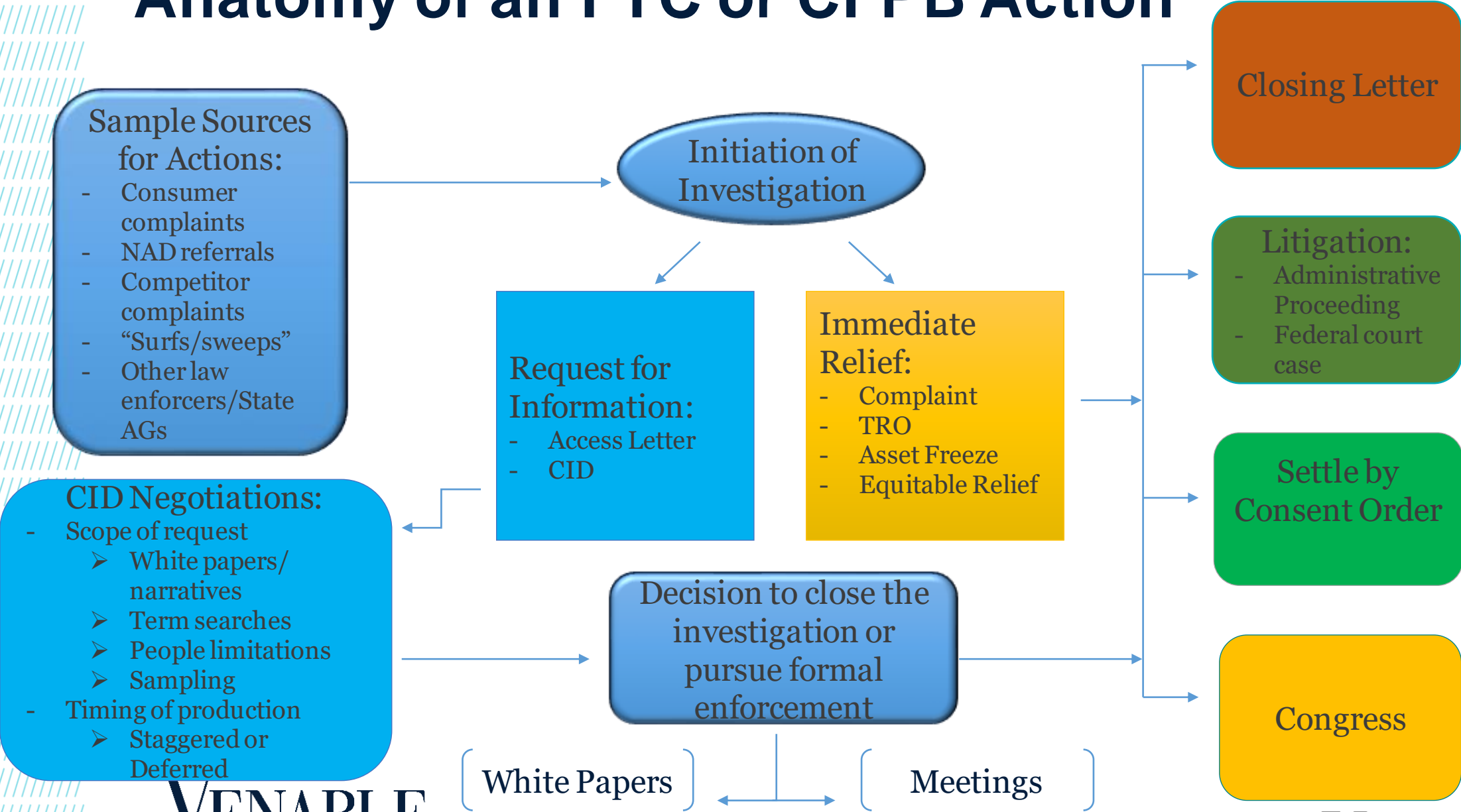
# WHAT DOES THIS MEAN FOR EMPLOYERS?

---

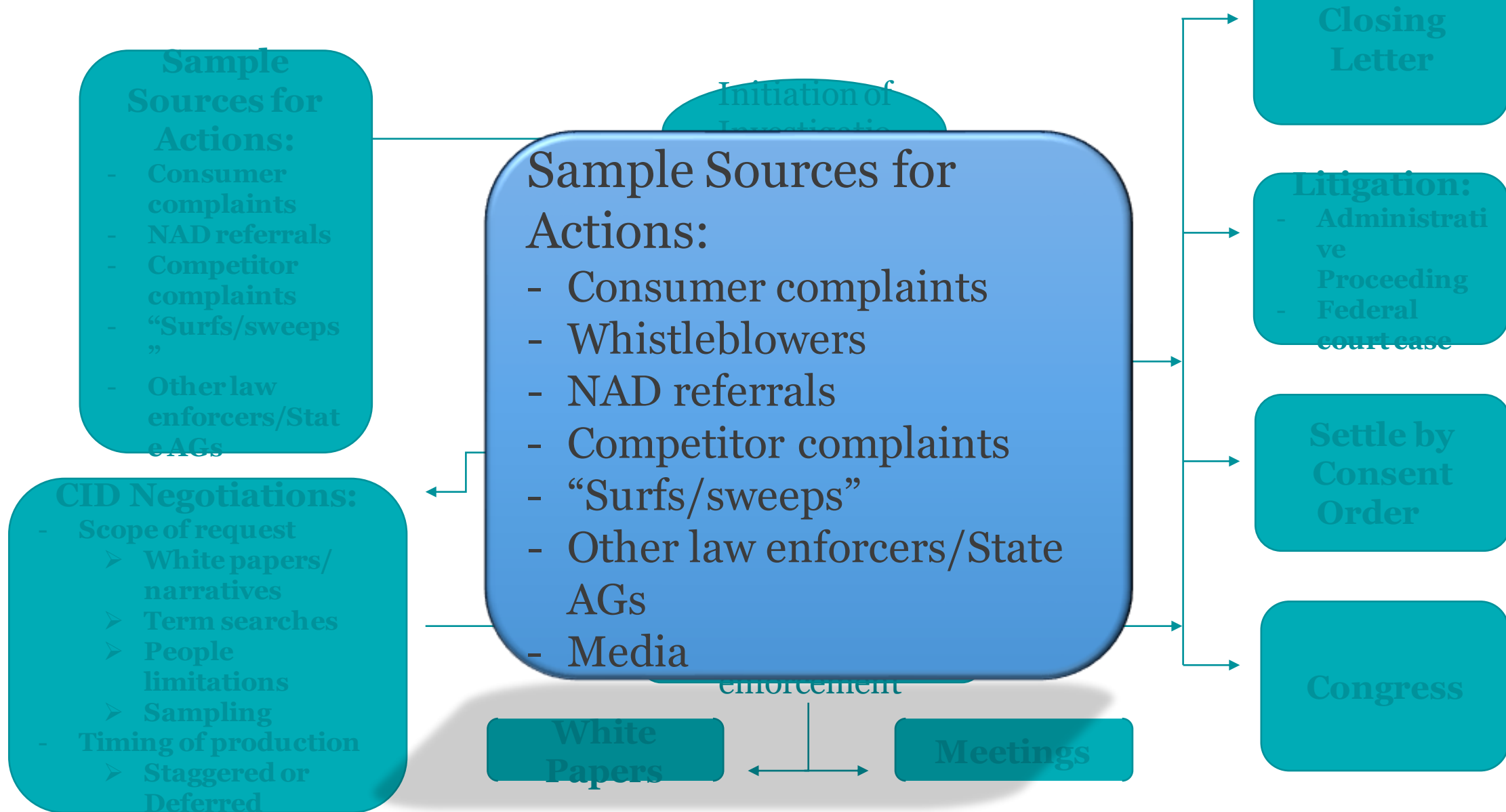
# Brave New World

- Potential new standards and requirements depending on outcome of proposed rulemaking and CFPB RFI
  - Such rulemakings take years and very likely could be stymied by a future administration
- Increased scrutiny on employment practices by FTC if participating in a merger requiring FTC premerger review
- Increased enforcement of earnings representations and other forms of “dark digital patterns” as UDA(A)Ps
- All of this could result in increased legal risk and costs associated with heightened compliance costs and costs of responding to investigative demands and potentially defending practices before the agencies

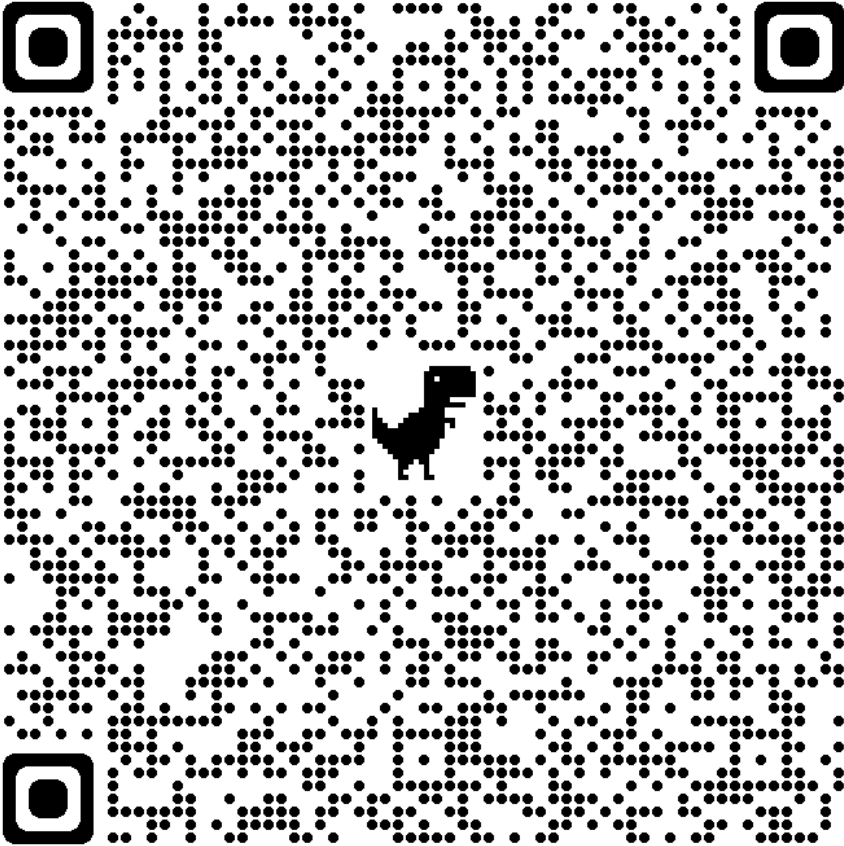
# Anatomy of an FTC or CFPB Action



# How Companies Get on the FTC's Radar



# CLE QR Code



# Questions?



**Leonard L. Gordon**  
Partner  
212.370.6252  
LLGordon@Venable.com



**Alexandra Megaris**  
Partner  
212.370.6210  
AMegaris@Venable.com



**Nicholas M. Reiter**  
Partner  
212.370.6296  
NMReiter@Venable.com



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

**VENABLE** LLP