

Generating Leads Legally: Regulatory and Litigation Quick Hits

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Welcome and Our Presenters



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Today's Webinar

- Reaction to the “Fireside Chat” with the FTC Bureau of Consumer Protection from the LeadsCouncil's Buyer's/Seller's Summit at LeadsCon
- Other federal and state regulatory consumer protection priorities
- TCPA developments
- Strategies for enhancing compliance and avoiding legal pitfalls
- Q & A








Reaction to the “Fireside Chat” with the FTC Bureau of Consumer Protection from the LeadsCouncil's Buyer's/Seller's Summit at LeadsCon

Reaction to the "Fireside Chat" with the FTC Bureau of Consumer Protection from the LeadsCouncil's Buyer's/Seller's Summit at LeadsCon



LeadsCon's Fireside Chat with the FTC BCP Director

	Joseph J. Simons Chairman Sworn in: May 1, 2018 Biography Speeches, Articles, & Testimony Twitter
	Noah Joshua Phillips Commissioner Sworn in: May 2, 2018 Biography Speeches, Articles, & Testimony Twitter
	Rohit Chopra Commissioner Sworn in: May 2, 2018 Biography Speeches, Articles, & Testimony Twitter
	Rebecca Kelly Slaughter Commissioner Sworn in: May 2, 2018 Biography Speeches, Articles, & Testimony Twitter
	Christine S. Wilson Commissioner Sworn in: September 26, 2018 Biography Speeches, Articles, & Testimony



FTC's Enforcement Authority

- **FTC Act**
 - **Broad jurisdiction**
 - **Section 5**
 - **Deception**
 - **Unfairness**
- **Consumer Financial Laws (shared w/CFPB)**
- **Rules – e.g., Telemarketing Sales Rule, Mortgage Acts and Practices Rule**

FTC's Bureau of Consumer Protection

- The Bureau of Consumer Protection's mandate is to protect consumers against unfair, deceptive or fraudulent practices.
- The Bureau enforces a variety of consumer protection laws enacted by Congress, as well as trade regulation rules issued by the Commission.
- Its actions include individual company and industry-wide investigations, administrative and federal court litigation, rulemaking proceedings, and consumer and business education.
- In addition, the Bureau contributes to the Commission's ongoing efforts to inform Congress and other government entities of the impact that proposed actions could have on consumers.
- About 450 FTEs
- Division of Advertising Practices
- Division of Consumer Education & Business Education
- Division of Consumer Response & Operations
- Division of Enforcement
- Division of Financial Practices
- Division of Litigation Technology & Analysis
- Division of Marketing Practices
- Division of Privacy and Identity Protection
- 7 Regional Offices

Highlights from Fireside Chat @ LeadsCouncil Buyer's/Seller's Summit

- FTC Bureau Director Andrew Smith's emphasis
 - Although new, commissioners are committed to rigorous enforcement
 - FTC brings cases it is prepared to litigate
 - Transparency with the consumer is the key
 - Vendor and reverse vendor due diligence

Example: FTC Action Against “Copycat” Military Websites

- Targeted people seeking to join the armed forces and tricked them by falsely claiming to be affiliated with the military in order to generate sales leads for post-secondary schools.
- The FTC charged the defendants with violating the FTC Act and the FTC’s Telemarketing Sales Rule (TSR). The agency also alleged that they violated the Do Not Call provisions of the TSR by placing hundreds of thousands of illegal telemarketing calls to phone numbers on the National Do Not Call Registry and by failing to pay required fees.
- Turn over websites, civil penalties, ban misrepresentations, and disclosures.
- Settlement w/companies and persons as individuals and as corporate officers.



More FTC Enforcement Examples

▪ Deceptive Claims to Consumers

- Who can be held liable

- ✓ Publisher
- ✓ Affiliate Network
- ✓ Service Provider

*(FTC v. LeanSpa, FTC v. Inbound Call Experts,
FTC v. Five Star Auto)*

▪ Unfair Sale of Sensitive Data

- Payday Loan Applications

(FTC v. Sequoia One, FTC v. Sitemsearch)

- Confidential Phone Records

(FTC v. Accusearch)

- Debt Portfolios

*(FTC v. Cornerstone, FTC v. Bayview
Solutions)*

FTC Focus and Litigation Involving Platform/Marketplace Lenders (Generating Loans)

- Focus on advertising claims, including refinancing claims
- Technical focus on debit account authorization and privacy notices
- FTC in 2016 examined marketplace lending models, benefits to consumers, and possible consumer protection concerns
- Reviewed websites and types of data requested



FINTECH SERIES Marketplace Lending

FTC Amends Complaint against Lending Club

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FOR YOUR INFORMATION

November 29, 2018

TAGS: Bureau of Consumer Protection | Consumer Protection | Credit and Finance

The Federal Trade Commission has amended its complaint against LendingClub Corporation, an online lending company that the Commission alleges deceived consumers by falsely promising them loans with no hidden fees.

According to the FTC's original complaint, filed in April 2016, Lending Club falsely promises consumers that they will receive a specific loan amount with "no hidden fees," when, in actuality, the company deducts hundreds or even thousands of dollars in hidden up-front fees from the loans. The FTC also alleged that Lending Club tells consumers they are approved for loans when they are not, takes money from consumers' bank accounts without authorization, and has failed to provide required privacy notices.

The amended complaint adds further detail about the scope of the harm caused by Lending Club's allegedly unauthorized bank account withdrawals and includes additional examples of the company's alleged deception about loan approval.

The Commission vote approving the amended complaint was 5-0. It was filed in the U.S. District Court for the Northern District of California on October 22, 2018.

NOTE: The Commission files a complaint when it has "reason to believe" that the law has been or is being violated and it appears to the Commission that a proceeding is in the public interest. The case will be decided by the court.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about consumer topics and file a consumer complaint online or by calling 1-877-FTC-HELP (362-4357). Like the FTC on Facebook (f), follow us on Twitter (t), read our blogs, and subscribe to press releases for the latest FTC news and resources.

CONTACT INFORMATION

MEDIA CONTACT:

Online Student Loan Refinance Company SoFi Settles FTC Charges, Agrees to Stop Making False Claims About Loan Refinancing Savings

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FOR RELEASE

October 29, 2016

TAGS: Finance | Bureau of Consumer Protection | Consumer Protection | Advertising and Marketing | Credit and Finance | Credit and Loans

Online student loan refiner SoFi has agreed to stop misrepresenting how much money student loan borrowers have saved or will save from refinancing their loans with the company, in order to settle Federal Trade Commission charges that it deceptively advertised inflated figures for more than two years.

In a complaint against Social Finance, Inc. and subsidiary SoFi Lending Corp., the FTC alleged that since at least April 2016, they made prominent false statements about loan refinancing savings in television, print, and Internet advertisements.

"Student loan debt is a huge problem facing students and graduates across the country," said FTC Chairman Joe Simons. "Lenders who offer refinancing options must be upfront with students about savings. They cannot make deceptive claims and bury the truth in fine print."

According to the FTC, one online SoFi ad claimed, "Refinancing student loans saves \$22,359 on average," while another ad told readers to "Start saving on your student loans. Average monthly savings \$252."

Key Workshop Takeaways

- Disclose clearly to consumers who you are and how you will share their information.
- Monitor lead sources for deceptive claims and other warning signs like complaints.
- Vet lead buyers and avoid selling remnant leads to buyers with no legitimate need for sensitive data.
- Keep sensitive data secure.

FTC Focus on Small Business Financing

- May 8, 2019
- Examine trends and consumer protection issues in small business financing, including “proliferation of online loans and alternative financing products”
- Expect focus on advertising and marketing
- FTC has jurisdiction over advertising and marketing of small business loans under FTC Act in most instances, and some limited jurisdiction related to telemarketing of such loans, depending on the facts



Strictly Business:

An FTC Forum on Small Business Financing



Other Federal and State Regulatory Consumer Protection Priorities

Other Federal and State Regulatory Consumer Protection Priorities

▪ Consumer Financial Protection Bureau

- Under New Management
- Continues to Supervise Larger Participants w/ Examinations (including focus on advertising)
- Enforcement investigatory activity continues on a confidential basis
 - Some shift in focus to traditional areas of advertising and marketing and facial compliance with consumer financial law
- Small Dollar Lending / Payday Rule in Flux, resulting in continued ability for innovation and products for consumers
 - Continues to take aggressive position on small dollar lending related to advertising void loans

▪ State Regulatory Developments

- Consumer Finance Lenders Law – Legislative Proposal and Enforcement of Existing Law
- Vermont Enforcement
- Connecticut Licensing for Mortgage
 - Other states are active / Licensing is often expected
- Streamlining licensing process through NMLS (slowly)
- Shift to focus on non-mortgage lending, including loan “broker” activity
- Attention is on California and the California Consumer Privacy Act (CCPA)

▪ State Attorneys General

TCPA Developments

Full and Clear Disclosure + Consent

- Disclosure
 - Identify who you are, and who you are not
 - Explain what you do and who you partner with
 - Make clear what you plan to do with the customer's data
- Consent
 - Obtain consent
 - to use the customer's data in the way you plan to use it (i.e., TCPA-proof consent)
 - to share the data with the people and companies you plan to share it with

TCPA Basics

- Type of call or text—“telemarketing” vs. transactional or informational
- Level of consent needed based on call/text **type** and **method of delivery** (i.e., autodialers), and how to get it
- Revocation of consent
- Reassigned or wrong numbers
- New(ish) technologies – soundboard and ringless voicemail
- Do Not Call list issues

Type of Call

- “Telemarketing”—calls or texts with “the purpose of encouraging the purchase or rental of . . . goods, or services”
 - Broadly construed by courts and the FCC

Method of Delivery

- Autodialer vs. manual
- Prerecorded voice

What Is an Autodialer!?!?

- Autodialer or ATDS—“capacity to store or produce phone numbers to be called, using a random or sequential number generator and to dial such numbers”
 - Basically, a platform that has the “**capacity**” to dial thousands of numbers in a short period of time **without human involvement**
- May 14, 2018 – following a joint trade petition filed by 20 stakeholders, FCC issues a request for public notice to address various issues following *ACA Int’l*, including:
 - What constitutes an autodialer;
 - How to interpret “capacity” in the ATDS definition;
 - How to treat calls to reassigned & wrong numbers (standard of liability); and
 - Whether/circumstances under which consent may be revoked

Level of Consent Needed

- **No consent**
- **Prior express consent:** “persons who knowingly release their phone numbers [to the caller] have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”
- **Prior express *written* consent:** need the signature of the person called or texted (either traditional “wet” signature or an electronic one) that clearly authorizes caller to deliver telemarketing messages to the phone number to which the signatory authorizes such telemarketing messages to be delivered.
 - ***If the caller utilizes an autodialer and/or prerecorded message***, then the written agreement/disclosure must also clearly and conspicuously disclose ***both*** that (a) the call/text may be delivered using an autodialer and/or prerecorded message, and (b) the person is not required to provide her consent as a condition of purchase.

Putting It All Together

	Cell Phone		Landline	
	Telemarketing	Not Telemarketing	Telemarketing	Not Telemarketing
Autodialer (voice call)	Prior express <i>written</i> consent	Prior express consent*	No consent needed	No consent needed
Autodialer (text message)	Prior express <i>written</i> consent	Prior express consent*	No consent needed	No consent needed
Prerecorded message call	Prior express <i>written</i> consent	Prior express consent*	Prior express <i>written</i> consent	No consent needed
Live operator (not autodialer)	No consent needed	No consent needed	No consent needed	No consent needed

New Technologies

- Ringless voicemails are “calls” subject to the TCPA’s prohibitions/consent rules.
 - *Saunders v. Dyck O’Neal, Inc.*, 319 F. Supp. 3d 907 (W.D. Mich. 2018)
- Do soundboard (or “avatar”) calls constitute “artificial or prerecorded voices” under the TCPA?
 - Issue currently being litigated

Do Not Call Rules

- ***Apply only to telemarketing calls or texts***
- Exemptions: (i) written and signed consent from the consumer; or (ii) an “established business relationship” with the consumer
 - “Inquiry EBR”—for inquiries about product or service (three months)
 - “Transactional EBR”—based on consumer purchase or transactions (18 months)
- Method of calling or texting is irrelevant
- Must maintain an internal Do Not Call list (even if not telemarketing, best practice to honor DNC requests)

Telemarketing Sales Rule

Applies only to telemarketing calls or texts

- Enforced by the FTC → no private right of action
- Requires, among other things,
 - Prompt oral disclosures in outbound telemarketing sales calls or texts and upsells
- Prohibits, among other things,
 - Material misrepresentations
 - Telemarketing calls to numbers on NDNC and IDNCs (absent an exception)
 - Prerecorded voice “robocalls” (absent an exception)
- Does not apply to B-to-B transactions, but FTC’s UDAP authority does

Continued Bipartisan Attacks on “Robocalls Scams” v. Industry Efforts to Curtail Uncapped Litigation

- TRACED Act
- FCC Developments
 - *ACA International v. FCC*
- *Johnson v. Yahoo* – narrow ATDS interpretation
- *Marks v. Crunch San Diego*
- and more....



Strategies for Enhancing Compliance and Avoiding Legal Pitfalls

Examples of Best Practices

- **Understand basic advertising law.**
 - Advertising must be truthful and not misleading. Marketers and lead generators should understand what can make an advertising claim “deceptive,” as well as the appropriate use of disclaimers.
- **Understand laws regulating communications with leads.**
 - TCPA, CAN-SPAM Act, and state laws regulating commercial emails, such as California Business & Professions Code Section 17529, all regulate how advertisers can communicate with leads they purchased via outbound phone calls, text messaging, and commercial email.
- **Understand vertical-specific laws.**
- **Recognize the risk of noncompliance.**
 - Risk is often greater than ROI, and can impair future compliance initiatives.
- **Know your lead sources and/or buyers.**
 - Develop a due diligence and monitoring program tailored to the activity and risks associated with the campaign, including vendors and customers.
- **Comply with TSR and state DNCs.**
- **Be careful with upsells, cross-sells, and advance consent.**
- **Establish contractual protections.**
- **Protect and safeguard private information.**
- **Promotions, endorsements, and testimonials all have specific requirements.**
- **Adlaw applies to mobile advertising and social media.**
 - **Application and operational compliance can be complex and evolving.**

Questions?



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ALL ABOUT ADVERTISING LAW

REGULATORY & LITIGATION DEVELOPMENTS FOR ADVERTISERS AND MARKETERS

FTC Hints It's Feeling the Buzz

BY LEONARD L. GORDON AND MATTHEW S. RENICK ON MARCH 26, 2019

Last September, the National Advertising Division ("NAD") published a decision assessing whether the editorial content surrounding an affiliate link constituted "national advertising" requiring substantiation. At issue were two statements in a BuzzFeed "shopping guide," in which the author tested and recommended various skincare products. The NAD reviewed BuzzFeed's internal procedures with respect to the editorial content and the affiliate link and determined it did not constitute "national advertising" and was therefore outside the NAD's jurisdiction.

But how would the FTC treat editorial content surrounding an affiliate link? The NAD acknowledged that the "FTC . . . does not directly address whether the act of placing an affiliate link next to content about the related product renders the content 'advertising' that requires substantiation." The FTC recently ended its silence. In her remarks at the NAD West Coast Conference earlier this month, [Mary K. Engle](#), the associate director of the FTC's Division of Advertising Practices, indicated that the FTC would follow the same analysis the NAD conducted to determine whether "advertising" includes the editorial content surrounding an affiliate link.

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Advertising Law News and Analysis

March 21, 2019

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Definitely Not "Winning": Scammers Pay Millions to FTC and Missouri Attorney General for Running Deceptive Prize Scheme

In February 2018, the FTC teamed up with the Missouri attorney general's office in [filing a complaint against a prize promotions company](#) and others that allegedly operated a large-scale deceptive prize scam targeting the elderly. A little more than a year later, the FTC and the Missouri AG's office [announced that they reached a settlement](#) to the tune of \$30 million. The settlement is comprised of \$21 million in cash, and the remainder will be made up by liquidating assets owned by the individual defendants, such as luxury vacation homes, a yacht, a Bentley automobile, and other personal property. The full judgment, which will become due immediately if the defendants are found to have misrepresented their financial condition, amounts to \$114.7 million.


[Read More](#)

Gluten-Free and Natural Food Claims – Unpacking the U.S.-UK Differences

[Alex Koff](#) sat down for two recent video discussions with Katie Vickery, from the UK law firm Osborne Clarke, on food labeling regulations and claims, and the comparison between the relevant mechanisms in the United States and those in the United Kingdom. In the latest [discussion](#), posted in February 2019, Alex reviewed how gluten-free products are labelled and regulated in the United States. In an earlier [conversation](#), Alex and Katie explored the legal implications of making "natural" claims for products and compared the restrictions and guidance in the U.S. and the UK.

Upcoming Events

GALA's 3rd Annual Advertising Law in the United States & Around the Globe Seminar



Consumer Financial Services Practice Digest

March 22, 2019

FDIC Seeks to Modernize Treatment of Brokered Deposits

The FDIC recently issued [an advance notice of proposed rulemaking](#) inviting public comments on how best to modernize its approach to brokered deposits. Banks and fintech companies alike have been clamoring for the agency to revise its treatment of brokered deposits, and, as we previously discussed, even [Congress has asked the FDIC](#) to "update [the rule] to reflect technological, legal, business model and product range changes."

[Read More](#)

Winter 2019 Supervisory Highlights

The CFPB published its second issue of the agency's Supervisory Highlights (winter 2019) on March 12, 2019. The *Winter 2019 Supervisory Highlights* mark the first published under Director Kathy Kraninger, and the second issuance since the departure of former Director Cordray. The current issue appears to be in keeping with the sentiment first expressed by former Acting Director Mick Mulvaney, that the Bureau would enforce the laws as written, but not push the envelope.

[Read More](#)

First HFSC Appearance for CFPB's New Director

The recently confirmed CFPB Director Kathy Kraninger testified before the House Financial Services Committee (HFSC) on March 7, 2019. Kraninger's appearance fulfilled the Dodd-Frank Act's mandate that the CFPB director testify semi-annually before designated congressional committees regarding semi-annual reports that the CFPB must submit to those committees. In her first appearance before the HFSC as director, Kraninger emphasized her desire to foster transparency and accountability within the Bureau and to establish "clear rules of the road," to more effectively prevent harm and work with institutions to promote a culture of compliance. She also stated that "enforcement is not the first tool" the CFPB uses, although she noted that it is the most effective tool in dealing with "those who are not seeking to comply."



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