

FTC Enforcement Actions: How to Prevent and Defend Them in 2020 and Beyond

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Agenda

- FTC's Enforcement Priorities
- Preventing an FTC Action
- Defending FTC Actions



FTC's Enforcement Priorities

The FTC's Focus

- Financial injury
 - “Challenging illegal practices that hit people in the wallet is the FTC’s bread and butter.”
- Privacy and data security
 - Ensure that your company is honoring its data security promises and taking reasonable steps to safeguard the information in its possession.
- Automatic renewal / continuity programs
 - <https://www.bbb.org/article/investigations/18929-subscription-traps-and-deceptive-free-trials-scam-millions-with-misleading-ads-and-fake-celebrity-endorsements>

The FTC's Focus

- Health claims
 - Cases involving allegedly false or misleading health claims
 - Warning letters to companies selling CBD products
- FinTech
 - Mobile payments, virtual currencies, payment processors, online lenders, crowdfunding
- Lead generators and affiliate marketers

The FTC's Focus

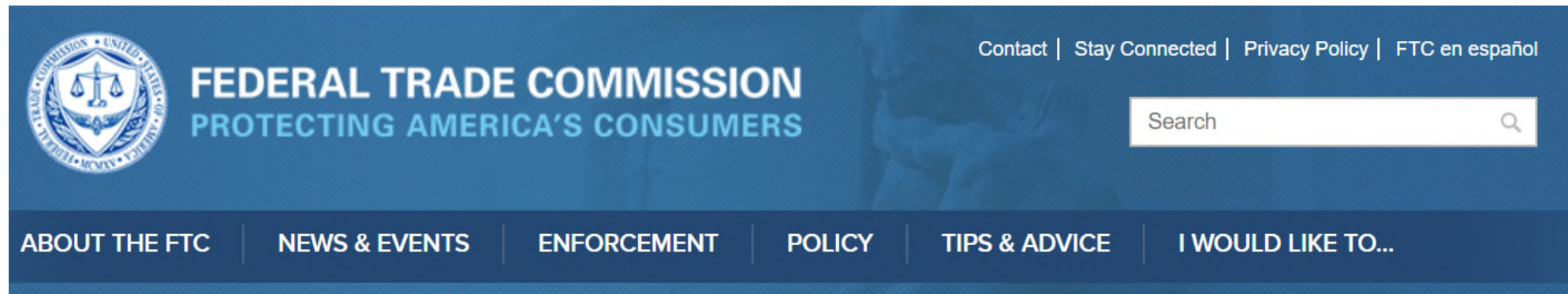
- Consumer reviews
 - Actions alleging that companies create and post fake reviews
 - Consumer Review Fairness Act lawsuits challenging “confidentiality” or “non-disparagement” clauses that threatened consumers with financial penalties for posting negative reviews
- Telemarketing
 - Violations of the Telemarketing Sales Rule
 - Do Not Call Violations
- Social Influencers
 - FTC issued guidance for social influencers:
 - https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf

The FTC's Focus

- Advertising aimed at the elderly
- Advertising aimed at children
 - Children's Online Privacy Protection Act
- Business opportunity / work-from-home programs
 - FTC closely scrutinizes business coaching and earnings claims
- Multilevel marketing programs

FTC's Statements about Enforcement Priorities

- <https://www.ftc.gov/news-events/blogs/business-blog/2020/01/ftc-consumer-protection-year-review-offers-2020-vision-your>
- https://www.ftc.gov/system/files/documents/public_statements/1545285/appropriations_committee_testimony_092519.pdf



The screenshot shows the top navigation bar of the Federal Trade Commission website. On the left is the FTC logo, a circular seal with a scale of justice and the text 'FEDERAL TRADE COMMISSION • UNITED STATES OF AMERICA'. To the right of the logo is the text 'FEDERAL TRADE COMMISSION' in white and 'PROTECTING AMERICA'S CONSUMERS' in light blue. Further right are links for 'Contact | Stay Connected | Privacy Policy | FTC en español'. Below these links is a search bar with the word 'Search' and a magnifying glass icon. At the bottom of the header is a dark blue navigation bar with white text for 'ABOUT THE FTC', 'NEWS & EVENTS', 'ENFORCEMENT', 'POLICY', 'TIPS & ADVICE', and 'I WOULD LIKE TO...'. The background of the header features a faint image of a person's hands.

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FTC consumer protection year in review offers 2020 vision for your business

By: Lesley Fair | Jan 8, 2020 9:26AM

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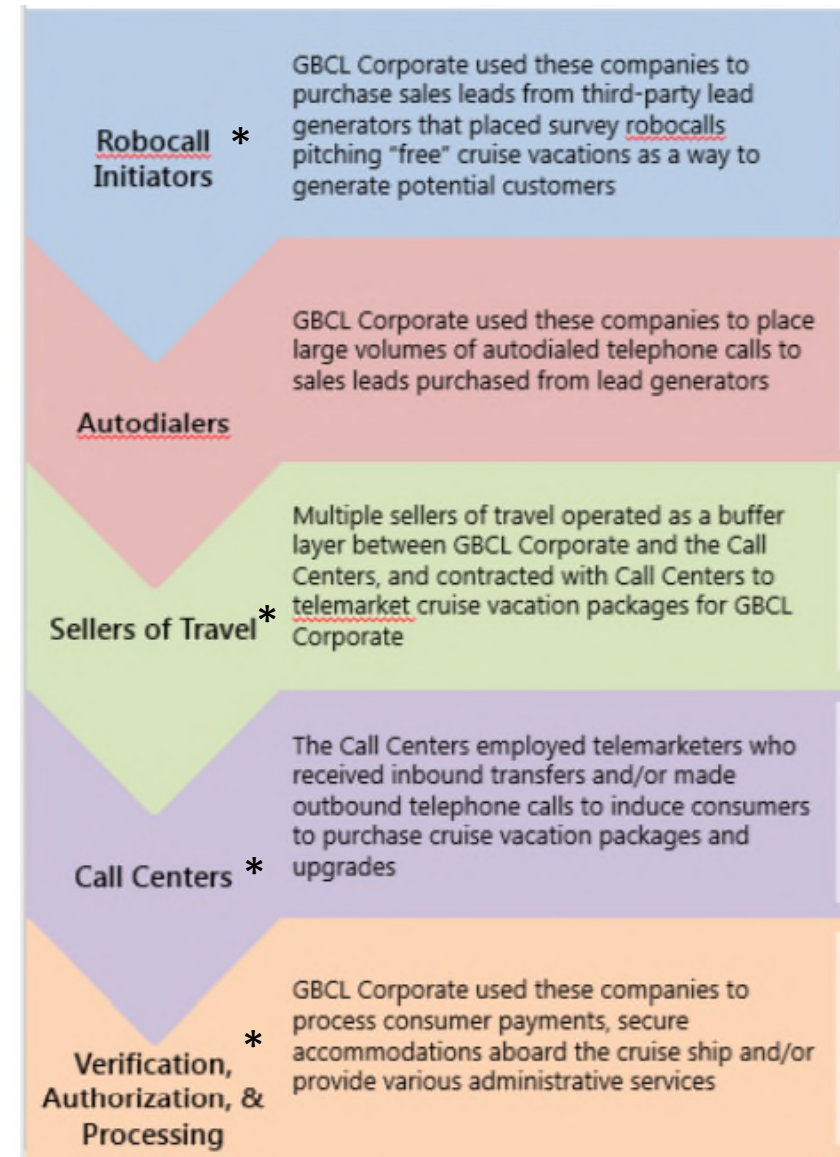
FTC v. Grand Bahama Cruise Line LLC

Case No. 6:20-cv-0052 (M.D. Fla.)

- FTC settled charges with three individuals and a telephone call center that allegedly assisted Grand Bahama Cruise Line LLC to make allegedly illegal robocalls.
- The FTC alleged that the defendants made or facilitated millions of illegal calls pitching free cruise vacations, and the FTC also alleged:
 - Starting in 2014, defendants operated their own in-house call center, employing telemarketers to contact consumers nationwide, and hired various call centers to sell cruise vacation packages.
 - GBCL’s telemarketing operation bought call lists from lead generators that conducted illegal survey robocalls to identify potential customers.
 - Defendants never scrubbed their lists against the national Do Not Call (DNC) Registry, called phone numbers on the DNC Registry, called consumers who asked not to be called, and failed to transmit accurate caller ID information, in violation of the agency’s Telemarketing Sales Rule.

FTC v. Grand Bahama Cruise Line LLC

- Allegations in FTC’s complaint
- (* indicates defendants)
- The FTC targeted companies that the FTC alleged were “*acting alone or in concert with others*” and as part of a “common enterprise.”



FTC v. Grand Bahama Cruise Line LLC

- The proposed settlement against the settling defendants (call centers and individuals) ban them from robocalling, including assisting others in making robocalls, and from violating the TSR.
 - Impose judgments totaling more than \$7.8 million, partially suspended due to inability to pay.
- The FTC will litigate in federal court against Grand Bahama Cruise Line and six other defendants, who have not agreed to settle.
- According to Andrew Smith, Director of the FTC’s Bureau of Consumer Protection: *“This case shows the FTC’s sustained effort to tackle illegal robocall operations that bombard consumers with unsolicited calls... **It also demonstrates that anyone who provides substantial assistance to illegal robocall operations may be liable for substantial civil penalties.**”*

FTC v. Success by Media Holdings

Case No. 2:20-cv-0047 (D. Ariz)

- The FTC filed a lawsuit and obtained a temporary restraining order and asset freeze against Success By Health, alleging that it operated a pyramid scheme that used false promises of wealth and income to entice thousands of consumers to join.

- The FTC alleges:
 - Defendants’ product, an instant coffee called “MycoCafe,” which contains a mushroom advertised to provide health benefits, is sold to consumers as part of a pyramid scheme.
 - Defendants falsely advertised that the program would provide “financial freedom.” In reality, less than 2% of participating consumers received more money from the defendants than they paid to them, and that those who did averaged less than \$250 per month.
 - The defendants have taken more than \$7 million from consumers.

FTC v. Success by Media Holdings **Case No. 2:20-cv-0047 (D. Ariz)**

- Allegations (continued):
 - Training materials show that affiliates were pressured first and foremost to recruit more affiliates.
 - However, the company’s “Four Steps to Success” did not include any advice on selling the company’s product, but instead prioritized spending lots of money on products and recruiting others to “duplicate” the same spending and recruiting.
 - Allegedly advertised that members could earn more than \$1 million each month in sales commissions, but the marketing materials failed to disclose that to achieve that level of commissions, an affiliate would have to recruit more than 100,000 affiliates working underneath them, the vast majority of whom would lose money.
 - When affiliates did try to sell the product to other consumers, they found themselves in competition with the company itself.

Settlements regarding Privacy Shield

- FTC settled claims with companies that allegedly falsely stated they were certified under the EU-U.S. Privacy Shield framework, which enables companies to transfer consumer data legally from European Union countries to the United States.
 - *In the Matter of Trueface.ai*
 - *In the Matter of LotaData, Inc.*
 - *In the Matter of EmpiriStat*
 - *In the Matter of Thru, Inc.*
 - *In the Matter of DCR Workforce, Inc.*
 - *In the Matter of Medable, Inc.*

FTC v. Mortgage Solutions FCS, Inc.

Case No. 4:20-cv-0110 (N.D. Cal.)

- The FTC settled charges with a mortgage broker after the FTC alleged that it violated the Fair Credit Reporting Act (FCRA) and other laws by revealing personal information about consumers in response to negative reviews posted on the review website Yelp.
- The alleged that the defendant responded to consumers who posted negative reviews on Yelp by revealing their credit histories, debt-to-income ratios, taxes, health, sources of income, family relationships, and other personal information. Several responses also revealed reviewers' first and last names, according to the complaint.

FTC v. Mortgage Solutions FCS, Inc.

- The FTC alleges that defendants also violated the FTC Act and the Gramm-Leach-Bliley Act by failing to implement an information security program until September 2017 and by not subsequently testing the program.
- As part of the settlement, defendants will pay a \$120,000 penalty and are prohibited from misrepresenting their privacy and data security practices, misusing credit reports, and improperly disclosing personal information to third parties.
 - Defendants must also implement a comprehensive data security program designed to protect the personal information they collect and obtain third-party assessments of their information security program every two years.



Preventing an Enforcement Action

Types of Enforcement Actions

- Civil Investigative Demand (CID) / Access Letter / Subpoena
- Administrative Proceeding
- Lawsuit
 - Complaint
 - Complaint with Preliminary Injunction
 - Complaint with *ex parte* Temporary Restraining Order / Asset Freeze

Preventing an FTC Enforcement Action

- Establish, implement and monitor compliance programs.
 - General practices concerning truthful advertising.
 - Create policies to comply with vertical-specific requirements.
 - Maintain documented substantiation.
 - Create policies to comply with channel-specific requirements.
 - CAN-SPAM
 - Call center compliance and Telemarketing Sales Rule
 - Do Not Call
 - Affiliate marketing
 - Social influencers
- Review advertising and sales funnels, including customer service policies and scripts.
- Document compliance with applicable laws and rules.
 - Appropriate documentation can be helpful in an investigation and litigation.

Preventing an FTC Enforcement Action

- Ensure compliance when third parties advertise and market on your behalf.
 - Establish policies for compliance for third-party lead generators and affiliate marketers.
 - Implement onboarding procedures.
 - Monitor third parties' activities and take remedial action when necessary.
 - Ignorance is not a defense!
- Stress-test compliance programs through secret shopping.
- Stay on top of new developments in the law, industry standards, and the FTC's expectations.
 - Watch the FTC's website and blog.



Preventing an FTC Enforcement Action

- Promptly address customer complaints.
 - Liberally refund dissatisfied customers, and make dissatisfied customers whole.
 - Identify trends in customer complaints – those indicate problematic issues.
- Track refunds and chargebacks.
 - Are there trends in refunds and chargebacks?
 - Customers who made purchases from a specific online funnel or who originated from a specific lead generator
- Conduct online research of complaints and reviews.
- Respond to Better Business Bureau (BBB) and state attorney general (AG) complaints.
 - The FTC communicates with the BBB and state AGs.

Preventing an FTC Enforcement Action

- National Advertising Division of the Better Business Bureaus (NAD)
 - The National Advertising Division monitors national advertising and enforces high standards of truth and accuracy.
 - NAD brings cases on its own as part of its routine monitoring, and competitors can bring challenges before NAD.
 - NAD will refer advertisers to the Federal Trade Commission in certain circumstances.
- Respond to requests from NAD and cooperate with the NAD.



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The Advertising Self-Regulatory Council (ASRC)
has merged into BBB National Programs, Inc.



Defending an FTC Action

Defending an FTC Action

- Evaluate the merits of the case in light of reported decisions and FTC precedent (consent judgments and FTC guidance).
- Look for opportunities for an early resolution.
- Work with retained counsel and the FTC.

Section 13 of the FTC Act

Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final would be in the interest of the public –

The Commission...may bring suit in a district court of the United States to enjoin any such act or practice.

Section 13 of the FTC Act

- Arguments that the FTC does not have jurisdiction to sue in federal court.
 - For a federal court to have jurisdiction, the FTC must allege that the defendant “is violating, or is about to violate”, any provision of law enforced by the Federal Trade Commission.
 - The FTC cannot file a lawsuit for past conduct.

***FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019)**

- Background: The FTC sought a permanent injunction and restitution for Shire’s allegedly unfair methods of preventing generic drug competition. Shire had ceased its allegedly illegal conduct five years before the FTC sought an injunction.
- The district court granted Shire’s motion to dismiss for the FTC’s failure to meet section 13(b) requirement that the violation is in process or imminent.
- The Third Circuit affirmed, and noted the alleged conduct ceased years prior to the FTC’s complaint:
 - To file suit under section 13(b), the agency must include specific allegations that a defendant “is violating or about to violate” a law enforced by the FTC based on the plain language of the statute.
- “[I]s about to violate’ means something more than a past violation and likelihood of recurrence.”

Section 13 of the FTC Act

- Arguments that the FTC does not have jurisdiction to sue for monetary redress under section 13(b). Under section 13(b):
 - The Commission...may bring suit in a district court of the United States **to enjoin any such act or practice.**
 - The FTC can obtain injunctive relief under section 13(b) but not other forms of monetary relief.

***FTC v. Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2019)**

- According to the FTC, Credit Bureau Center automatically enrolled consumers in a \$29.94 monthly subscription for a credit-monitoring service without proper notice, allegedly violating several consumer protection laws. The FTC sued under section 13(b) and sought a permanent injunction and restitution. The district court granted both requests.
- The Seventh Circuit affirmed the district court's judgment, except for the restitution award.
- The Seventh Circuit held that the FTC does not have authority to obtain restitution under section 13(b) because the plain language of the statute provides only for injunctive relief.
- The Seventh Circuit reversed its previous interpretation of section 13(b) in *Amy Travel* that held the statute authorized a court to issue equitable monetary relief.

***Kokesh v. SEC*, 137 S. Ct. 1635 (2017)**

- The Securities and Exchange Commission sued Kokesh for federal securities laws violations. The district court ruled in favor of the SEC and ordered Kokesh to pay \$34.9 million for “ill-gotten gains causally connected” to Kokesh’s violations. The Tenth Circuit affirmed.
- The Supreme Court reversed the decision, and held the SEC’s disgorgement remedy constitutes a penalty, which makes it subject to the five-year statute of limitations in 28 U.S.C. § 2462.
- The Court explained that SEC disgorgement is a penalty because: (1) the SEC and courts used disgorgement “as a consequence for violating public laws”; (2) it is used for punitive purposes; and (3) SEC disgorgement is often not compensatory.
- But, “[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings.”

Liu v. SEC, 18-1501

(U.S. Supreme Court granted certiorari)

- Petitioners are challenging the authority of the SEC to seek disgorgement of funds illegally obtained from investors.
- Petitioners raised more than \$27 million from investors, claiming they would use the funds to build and operate a cancer treatment center. A district court in the Central District of California determined that the couple kept about \$8.2 million for themselves and never obtained permits to build the cancer center. The district court ordered disgorgement of the entire amount that had been raised from investors, imposed civil penalties equal to the \$8.2 million the couple had personally received from the project, and permanently enjoined them from future solicitations of the type that triggered this prosecution.
- Petitioners appealed to Ninth Circuit, pointing to the U.S. Supreme Court's statements in *Kokesh v. SEC* and argued that the district court lacked the power to order disgorgement. The Ninth Circuit affirmed the restitution award.

Liu v. SEC, 18-1501

- Petitioners appealed to the Supreme Court, arguing that the SEC has legal authority to obtain only injunctive relief, equitable relief or civil monetary penalties in court, but not the right to obtain disgorgement of the full amount taken in from investors.
- The FTC and SEC have obtained disgorgement from federal courts under the theory that disgorgement is a form of equitable relief.
- The *Kokesh* decision stopped short of barring the SEC from obtaining disgorgement, but it did state that disgorgement did not appear to fall into any category of remedies that should be available to the SEC, writing “Disgorgement does not simply restore the status quo; it leaves the defendant worse off.”

Declaratory Judgments

- Companies under investigation affirmatively sue the Federal Trade Commission.
- Complaints request declaratory judgments that the companies' activities did not violate the laws alleged by the FTC.
- Complaints request declaratory relief concerning the FTC's structure, creation and enforcement of new rules, and the FTC's interpretation of laws and rules.

Axon Enterprise v. FTC, Case No. 2:20-cv-0014 (D. Ariz., filed Jan. 3, 2020)

- On January 3, the FTC issued an administrative complaint challenging Axon's consummated acquisition of its body-worn camera systems competitor VieVu, LLC. Before the acquisition, the companies competed to provide body-worn camera systems to metropolitan police departments across the United States.
- According to the complaint, Axon's May 2018 acquisition reduced competition in an already concentrated market because before their merger, Axon and VieVu competed to sell body-worn camera systems that were particularly well suited for large metropolitan police departments.
- Axon filed a lawsuit in federal court challenging the FTC's constitutionality and seeking a declaratory judgment that the company did not violate the law.

Nerium International, LLC N/K/A Neora, LLC v. FTC (N.D. Ill. filed Nov. 1, 2019)

- Challenge of FTC’s enforcement authority.
- Alleges the FTC has improperly created and reinterpreted the law on multilevel marketing companies (MLMs) without undergoing the proper legislation or rulemaking procedures, in order to effectively outlaw MLMs.
 - According to the complaint, the FTC created a new test for a pyramid scheme, which “was not only improperly adopted without Congressional action or through proper FTC rulemaking” but also “is vague, ambiguous, and incapable of being objective analysis.”
- The complaint asks the court to declare that Nerium is not an unlawful pyramid scheme, the FTC’s current interpretation of the FTC Act regarding pyramid schemes adopts an arbitrary and capricious standard that is not supported by evidence or prior law and thus is not a valid exercise of the FTC’s power, among other relief.
 - FTC filed a lawsuit against Nerium in the District of New Jersey and is opposing the declaratory judgment action.

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