



Hot Topics in Advertising & Marketing: COVID-19, Financial Services, and More – An ACC Legal Quick Hit

Financial Services Network
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Panelists

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Today's Discussion

- COVID-19: Regulatory impact on financial services industry advertising
- Regulatory outlook at the FTC, CFPB, banking agencies, and states
- Lead generation, influencer, and other emerging marketing methods
- Emerging trends in government investigations, competitor challenges, litigation defense, and more

Practical compliance tips and strategies, including the use of RegTech/AI, the role of compliance staff and lawyers, and real-world examples

Today's Panelists



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COVID-19: Regulatory impact on financial services industry advertising



Regulators Urging Financial Services Sector to Help

- Treasury identifies “Financial Services” as Essential Critical Infrastructure Workforce.
- Federal Regulators providing providers tools to assist households, businesses, and the economy more broadly.
 - Enhanced credit resources - Agencies facilitating the flow of credit to households and businesses, including changes to regulatory and monetary policy.
 - Regulatory relief - Agencies are providing regulatory relief to support efforts to provide financial services to those impacted by the crisis.



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

March 22, 2020

MEMORANDUM FOR FINANCIAL SERVICES SECTOR

FROM: Secretary Steven T. Mnuchin *Steven T. Mnuchin*

SUBJECT: Financial Services Sector Essential Critical Infrastructure Workers

The financial services sector is identified as Critical Infrastructure Sector by the Department of Homeland Security (DHS). The attached DHS guidance, dated, March 19, 2020, identifies the essential critical infrastructure workers during the COVID-19 response emergency, and provides guidance to State and local officials as they work to protect their communities while ensuring continuity of critical functions to public health and safety, as well as economic and national security.

Consistent with the President's guidelines, *"if you work in a critical infrastructure sector, as defined by the Department of Homeland Security, you have a special responsibility to maintain your normal work schedule."* The Essential Critical Infrastructure Workforce for the financial services sector includes workers who are needed to process and maintain systems for processing financial transactions and services, such as payment, clearing and settlement services, wholesale funding, insurance services, and capital markets activities; to provide consumer access to banking and lending services, including ATMs, movement of currency (e.g. armored cash carriers); support financial operations, such as those staffing data and security operations centers; and, key third party providers who deliver core services. These individuals are critical to maintaining safe and efficient financial services and ensuring citizens have access to these services that are necessary to conduct their daily lives.

Companies aligned to the essential critical infrastructure worker definition are expected to maintain their operations and work schedules. Everyone should follow guidance from the Centers for Disease Control and Prevention as well as State and local officials regarding strategies to limit disease spread. We are dedicated to working closely with all of you to ensure the safety of the workforce and ensure the continued operations of the financial services sector in support of our Nation's economy.

Financial Services Regulators

- Virtually every agency has issued some form of the following:
 - Guidance for companies to provide customer assistance
 - Regulatory relief to assist customers
 - Notice that the agency is still enforcing the law
- Areas of focus:

Consumer Financial Protection Bureau:	Mortgage, Student Lending, Credit Reporting, No Action Letters
Federal Trade Commission:	COVID-19 treatments and coronavirus prevention, small business loan, pitches, robocalls, and market collusion
Prudential Banking Regulators:	Payment accommodations, credit reporting, delinquency, examination guidance, disclosures, operational issues
State Attorneys General Offices:	Payment accommodations, foreclosure prevention

Regulators urging financial services sector to help consumers: Are there pitfalls?

- How will providing temporary relief or modifications to your product and services interact with regulatory requirements?
 - Do your products and services match your terms and conditions or terms of service?
 - Different services or product than what was advertised
 - Delayed or deferred payment options – what are the requirements / mandatory or optional
 - Cancellation and/or refund – what are the requirements / mandatory or optional
 - Compliance Management Systems
 - Temporary policies
 - Customer compliant response and monitoring

- **Focus Area:** Services and products that directly impact consumers suffering from COVID-19, protected classes, business-to-business, and CARES Act Payment Protection funding.

Regulators Urging Patience and Assistance

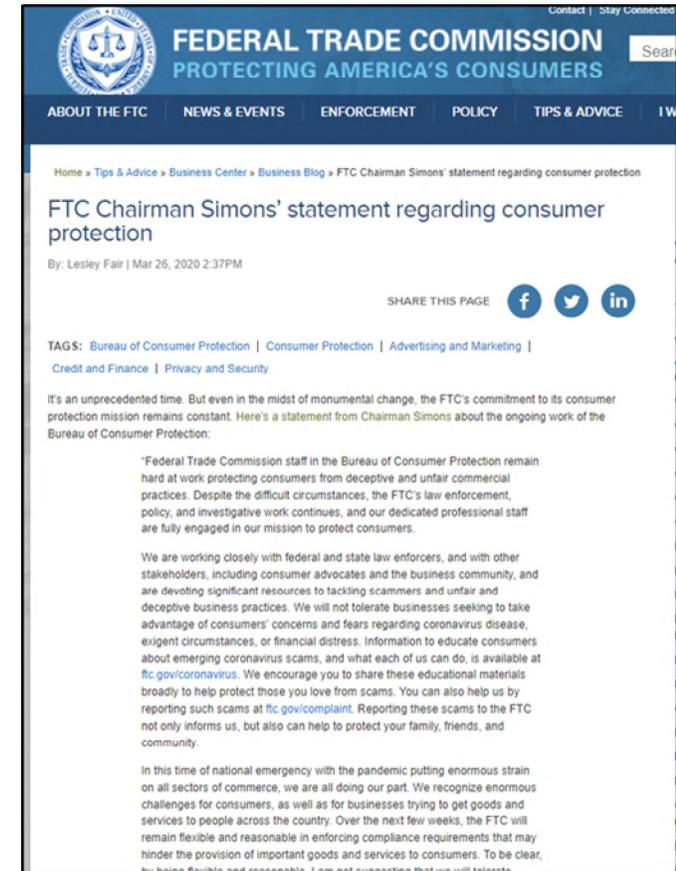
- Key Takeaways

- Businesses must be able to continue serving the financial needs of their customers during this crisis, not just for the customers, but for communities and the overall economy.
- Regulators expect businesses to work with customers impacted by COVID-19 and to make prudent accommodations where possible.
- All actions should be taken with appropriate management oversight and consistent with industry practices and applicable law, including consumer financial protection laws.
- Document the reasons and basis for making any changes.
- Consider reviewing, again, whether the product still meets all required regulatory scrutiny.
- If you are an examined business (supervised nonbanks and service providers), stay in regular communication with your regulators/examiners.

Regulatory outlook at the FTC, CFPB, banking agencies, and the states

The Federal Trade Commission

- **Tips for consumers and businesses**
 - Small Business Lending Tips for owners and lenders—likely to be a focus going forward and immediately after the pandemic.
 - Privacy and data security are still major concerns
 - Children’s Online Privacy Protection Act (COPPA) for online services, including Ed-tech or remote learning.
 - Increased penalties in settlements
- **Warning letters with other agencies re: ads mentioning coronavirus and COVID-19**
 - FTC / FCC related to businesses using robocalls to advertise fraudulent government assistance.
 - FTC / U.S. Food and Drug Administration to businesses advertising coronavirus cures or relief.



FTC Staff Report on Small Business Financing Forum

- The 12-page report provides staff perspectives on key issues discussed at the FTC's May 2019 forum on small business financing, "Strictly Business," including online loans and alternative financing products (Forum).
- The report includes several staff cautions to small business finance providers and their service providers to help them avoid the types of conduct the FTC has alleged to be unlawful.
- The report emphasizes that the FTC has broad jurisdiction over commercial financing under the FTC Act and other laws that prohibit deceptive, unfair, and unlawful practices by small business financing providers and their marketers, servicers, and collectors.
- Perhaps to underscore this point, the staff repeatedly refer to small business borrowers as "consumers" throughout the report, suggesting that they see no difference in the FTC's authority over consumer protection and small business protection.
- **Between the lines:** Given the attention small business financing products are receiving, it would not be surprising if the FTC has open investigations involving small business financing products.

"Strictly Business" Forum

STAFF PERSPECTIVE | FEBRUARY 2020

Introduction

Small businesses act as an important engine in the U.S. economy by providing economic opportunity for entrepreneurs and employment for millions of job seekers. They are also woven into the commercial and social fabric of local communities, offering the goods and services on which consumers rely day-to-day. Like other enterprises, small businesses need financing to operate and grow. While many can obtain loans from traditional lenders, like local banks, in recent years small businesses have increasingly turned to relatively new sources of financing, including online loans,¹ lines of credit, and other alternative products. While these forms of financing offer some potential benefits for small businesses consumers (for example, broadening the availability of credit), they have also raised some consumer protection concerns.

The Federal Trade Commission ("FTC" or "Commission") has broad jurisdiction under the FTC Act and other laws² to stop deceptive, unfair, and other unlawful practices by small business financing providers and their marketers, servicers, and collectors. In recent years, the Commission has used its authority to bring dozens of actions to protect small businesses from frauds, like fake invoice and unordered merchandise scams.³ Additionally, the Commission has worked to stop unlawful conduct in the online lending marketplace by bringing actions against lenders for allegedly deceiving consumers about key aspects of their loans, like up-front fees, consumer savings, and servicing-related features.⁴ The agency remains committed to protecting small businesses, including in the lending marketplace.

In order to further examine recent trends in small business financing, on May 8, 2019, the FTC hosted a public forum, "Strictly Business" (or "Forum").⁵ This event brought together a variety of stakeholders and experts to discuss consumer protection issues associated with this marketplace. This Staff Perspective highlights some of the key issues discussed during the Forum, as well as other information gathered through law enforcement and from existing research. In particular, we provide background on recent trends in the small business financing marketplace, discuss some potential benefits of newer online financing products, and examine some of their risks for small businesses.



Strictly Business:
An FTC Forum on
Small Business Financing

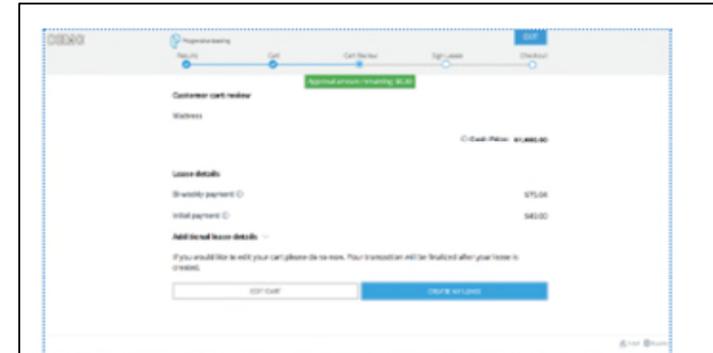
FTC BUREAU OF CONSUMER PROTECTION  FTC.GOV

The Federal Trade Commission

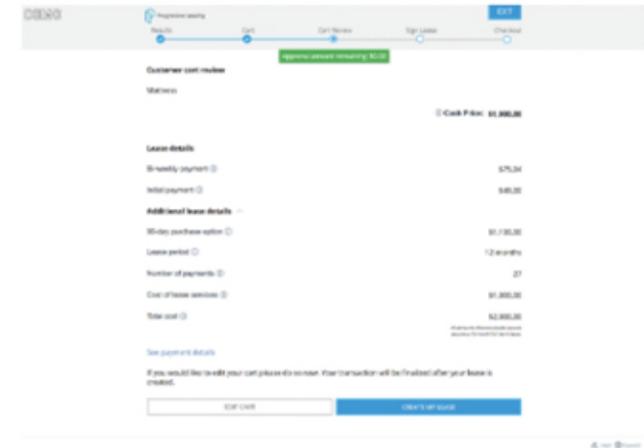
- **Enforcement:** Business kind of as usual
 - Advertising:
 - FTC v. LendingClub – Could be going to trial if SJ doesn't sort it out
 - The intersection of UDAP and TILA and “hidden fees”
 - FTC v. Progressive Leasing
 - FTC will look at companies more than once, digital design of disclosures important, monitor service providers/vendors
 - In the matter of LendEDU
 - UDAP, Regulation E, and TILA
 - FTC v. Lead Express, et al. (Harvest Moon Financial) – Payday lending and tribal enterprise
- **Commissioner disagreements out in the public:** Is it because of work from home?
 - Chairman Simon's decision in a pharmaceutical merger notes that Commissioner Chopra's dissent
 - Had a disregard for facts and law and dismissed the work of the dedicated and hardworking FTC staff
 - Relies on false assertions, misapplication of law, and specious logic
 - Embraces the adage to “never let the truth get in the way of a good story”
 - Speculates versus relying on a rigorous investigation that is grounded in evidence
- **Cases to watch:** Supreme Court Cert Petition regarding 7th Circuit decision that vitiates the FTC's ancillary equitable authority

FTC v. Progressive Leasing

- Rent-to-own payment plans in retail stores
- Alleged misleading marketing of payment plans, e.g., “same as cash,” or “no interest”
- Alleged company was aware of consumer confusion with > 15k complaints in 15-month period
- \$175m settlement for refunds, prohibition on misrep. the cost, terms, or nature of its plans, and must get consumers’ express, informed consent before charging or billing them; monitoring of third party, such as retailers.
- Dissent - Commissioner Rebecca Kelly Slaughter contended that the proposed settlement does not adequately remediate harm or achieve appropriate deterrence. She advocated for (i) higher monetary relief, closer to the total amount Progressive charged consumers over the cash price—in excess of \$1 billion; (ii) individual liability for Progressive’s CEO because he participated directly in the allegedly illegal practices or had authority to control them and because Progressive’s parent company, Aaron’s, had been subject to prior FTC actions; and (iii) charging Progressive with a violation of the Restore Online Shoppers’ Confidence Act (ROSCA).
- **Takeaways:** FTC will look at company more than once; importance of disclosure and digital design; responsibility for third parties, such as retailers (e.g., lead generators for financing)



Screenshot from Progressive purchase process (click image to enlarge)



Screenshot from Progressive purchase process (click image to enlarge)

Consumer Financial Protection Bureau

- Providing guidance and regulatory relief – not just on the phone
 - 2 No Action Letters issued in March (mortgage servicing loss mitigation software and small dollar lending)
- Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic
- Awaiting Debt Collection Final Rule
 - Debt collection rule: Time barred debt allowable with disclosures (open for comment)
- Guidance on mortgage relief options
- Guidance to financial firms during the pandemic (billing error responsibilities and change in account terms w/o notice)
- Housing Assistance website

The CFPB: Still going

- **Enforcement focus:**

- Oversight of vulnerable populations more likely to result in new lawsuits (elderly, servicemembers, students).
- Ongoing litigation will continue dependent on courts and opposing parties.
- Continuing investigations with no in-person contacts – e.g., data requests (CIDs).

- **Recent cases:**

- Cross-selling incentives and account opening issues.
- Advertised mortgages, but provided leads to student loan debt relief companies.
- Credit repair offers and services.
- **Key takeaways:** State what you mean, strengthen and review compliance, analyze customer complaints—don't just answer them.

Federal Prudential Banking and State Regulators

- Agencies will provide appropriate regulatory assistance to affected institutions subject to their supervision.
- Encouraging institutions to work constructively with borrowers and other customers in affected communities.
 - Prudent efforts that are consistent with safe and sound lending practices should not be subject to examiner criticism.
- Expedite, as appropriate, requests to provide more convenient availability of services in affected communities.
- Work with affected financial institutions in scheduling examinations or inspections to minimize disruption and burden. (Joint Press Release, Fed, FDIC, CFPB, CSBS, NCUA, OCC (March 9, 2020))
- CA Department of Business Oversight
 - Likely to continue regulating and take action if absolutely necessary.
 - Settlements with point-of-sale lenders – restitution, fees, and obtain a California Financing Law license.
- NY
 - No new enforcement actions in March 2020.
 - Accommodation to consumers/borrowers in Circular 7.
 - Reminder to funeral homes about consumer rights.



Lead generation, influencer, and other emerging marketing methods

Advertising, Lead Generation, Influencers, and Endorsement Guide

- The FTC and CFPB are watching the use of lead generation
 - If you use affiliate marketing, make sure you know what your advertisers are telling your customers to get them in the door
 - Watch out for free offers, gifts, subscriptions, and competitions
- FTC Advertising Disclosure Guidance for Online Influencers
- Endorsement Guide Update on Horizon



10104	Federal Register / Vol. 85, No. 30 / Friday, February 21, 2020 / Proposed Rules
Regulatory Notices and Analysis	<p>The FAA has determined that this regulatory action involves an established body of regulatory requirements for which incremental and/or repetitive actions are required to keep the regulatory requirements current, is non-controversial and non-polarizing in nature, and is not a "significant regulatory action" under Executive Order 12866. (2) It is not a "significant regulatory action" under DOT Regulatory Policies and Procedures 104.03. (3) It is not a "major rule" under 49 CFR 1.101. (4) It is not a "major rule" under the Regulatory Flexibility Act.</p> <p>Environmental Review</p> <p>This proposal will be subject to an environmental analysis in accordance with FAA Order 1021.1F, "Environmental Impact, Analysis and Procedures" prior to any FAA final regulatory action.</p> <p>List of Subjects in 14 CFR Part 71</p> <p>Airports; Incorporation by reference; Navigation (air)</p> <p>The Proposed Amendment</p> <p>Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:</p> <p>PART 71—REGISTRATION OF CLASS A, B, C, D, AND AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES, AND REPORTING POINTS</p> <p>1. The authority citation for 14 CFR part 71 continues to read as follows:</p> <p>Authority: 49 U.S.C. 10610, 10611, 10612, 10613, 10614, 10615, 10616, 10617, 10618, 10619, 10620, 10621, 10622, 10623, 10624, 10625, 10626, 10627, 10628, 10629, 10630, 10631, 10632, 10633, 10634, 10635, 10636, 10637, 10638, 10639, 10640, 10641, 10642, 10643, 10644, 10645, 10646, 10647, 10648, 10649, 10650, 10651, 10652, 10653, 10654, 10655, 10656, 10657, 10658, 10659, 10660, 10661, 10662, 10663, 10664, 10665, 10666, 10667, 10668, 10669, 10670, 10671, 10672, 10673, 10674, 10675, 10676, 10677, 10678, 10679, 10680, 10681, 10682, 10683, 10684, 10685, 10686, 10687, 10688, 10689, 10690, 10691, 10692, 10693, 10694, 10695, 10696, 10697, 10698, 10699, 10700, 10701, 10702, 10703, 10704, 10705, 10706, 10707, 10708, 10709, 10710, 10711, 10712, 10713, 10714, 10715, 10716, 10717, 10718, 10719, 10720, 10721, 10722, 10723, 10724, 10725, 10726, 10727, 10728, 10729, 10730, 10731, 10732, 10733, 10734, 10735, 10736, 10737, 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12168, 12169, 12170, 12171, 12172, 12173, 12174, 12175, 12176, 12177, 12178, 12179, 12180, 12181, 12182, 12183, 12184, 12185, 12186, 12187, 12188, 12189, 12190, 12191, 12192, 12193, 12194, 12195, 12196, 12197, 12198, 12199, 12200, 12201, 12202, 12203, 12204, 12205, 12206, 12207, 12208, 12209, 12210, 12211, 12212, 12213, 12214, 12215, 12216, 12217, 12218, 12219, 12220, 12221, 12222, 12223, 12224, 12225, 12226, 12227, 12228, 12229, 12230, 12231, 12232, 12233, 12234, 12235, 12236, 12237, 12238, 12239, 12240, 12241, 12242, 12243, 12244, 12245, 12246, 12247, 12248, 12249, 12250, 12251, 12252, 12253, 12254, 12255, 12256</p>

In the Matter of LendEDU, et al.

- Website compares student loans and other financial products
- Alleged misleading marketing that led consumers to believe website provided objective product information, when in fact they provided higher rankings and ratings to companies that paid for placement.
- FTC’s complaint alleged operators of LendEDU.com falsely claimed that the website provided “objective,” “accurate,” and “unbiased” information about consumer financial products, such as student loans, personal loans, and credit cards. Specifically, LendEDU misrepresented that the information on its website was not affected by compensation from advertisers. Also, alleged made-up consumer reviews.
- \$350k settlement and prohibition on making the alleged misreps.
- **Takeaways:** Disclose material connection, and endorsements; disclosure and placement of influence of compensation on content or other material connections; disclosure and placement of any material connection between endorser and advertiser.

**Top 9 Companies for Student Loan Refinancing:
In-Depth Reviews**

1. SoFi

SoFi Reduce your payment and interest rate. Members save \$22,359 in 15 minutes! VISIT SITE >>

- ✓ Refinance and consolidate both federal and private student loans
- ✓ Rates as low as 2.89% for variable rates
- ✓ Rates as low as 3.25% for fixed rates
- ✓ 5, 7, 10, 15, 20 year repayment terms
- ✓ No application fees, origination fees, or pre-payment fees
- ✓ Unemployment protection is available
- ✓ Easy application process

2. Earnest

earnest You could save a boat load. Customers save \$21,810 on average! VISIT SITE >>

- ✓ Refinance and consolidate both federal and private student loans
- ✓ 5 - 20 year repayment terms
- ✓ Variable rates as low as 2.57%
- ✓ Fixed rates as low as 3.25%
- ✓ Data-driven customer evaluation helps you get qualified
- ✓ Zero application fees, origination fees, or pre-payment fees

3. LendKey

LendKey You deserve a better student loan. Average client saves \$16,657! VISIT SITE >>

LendEDU's Allegedly Paid-For Student Refinancing Rankings

Mortgage – Foreclosure Relief

- Federal Agency Guidance to suspend foreclosures and evictions for at least 60 days.
 - Actions by Department of Housing and Urban Development (HUD) and Federal Housing Finance Agency (FHFA) for government program and GSE Loans.
 - Federal programs implementing special forbearance programs for borrowers affected by COVID-19 crisis, with hardship forbearance up to 12 months.
- Other actions to mitigate foreclosures and evictions by private market and various regulators.
 - Private lenders and investors implementing similar measures by FHFA and HUD.
 - Consumer Financial Protection Bureau (agency in charge of administering and enforcing federal mortgage servicing and loss mitigation rules) issued statement in support of foreclosure suspension and offered to work with affected borrowers through complaint portal.
 - State and local governments instituting their own protective measures.

Mortgage and Consumer Loan Origination

- FHFA also announced accommodations for GSE underwriting requirements relating to employment verifications and appraisals.
 - Ability to substitute email, paystubs, or bank records showing recent deposit for verbal employment verification.
 - More flexible appraisal requirements to reduce need for appraisers to conduct in-home inspections.
- Federal Reserve will purchase as much as \$200 billion in mortgage-backed securities to bolster the secondary mortgage market and provide liquidity.
 - Fed also announced the creation of the Term Asset-Backed Securities Loan Facility to back the flow of credit to households and businesses.
 - Facility will support the issuance of asset-backed securities backed by student loans, auto loans, credit card loans, and Small Business Administration-guaranteed loans, which will offer some relief to those borrowers.



**Emerging trends in government investigations, competitor challenges,
litigation defense, and more**

Self-Regulatory Associations: NAD

- Competitor challenges related to the following have been handled in the past few months:
 - Use of consumer testimonials where the experience has not been shown to be typical.
 - Must disclose the generally expected performance in the depicted circumstances or limited applicability of the endorsing consumer's experience.
 - Follow the FTC Endorsement Guides.
 - Cost disclosures related to subscription billing must follow ROSCA and UDAAP
 - Disclosure must be in close proximity to the offer.
 - One party refused to participate in self-regulatory challenge, so referred to the FTC.

Practical Tips During COVID-19 Crisis

- Everything is online and digital now.
 - Monitor all federal and state guidance related to how to handle in-person process items that are now occurring online.
 - Review your advertisements and monitor vendors.
 - Update terms and conditions for any product changes.
 - Review compliance with all regulatory laws, especially those related to online issues.
 - E-sign
 - TILA, TISA, RESPA, EFTA, etc.
 - GLBA / privacy and data security
 - UDAAP / UDAP
 - BSA / AML as relevant
 - Work with customers and be as reasonable as possible.
 - Analyze customer complaints and issues for trends.
 - Document all issues, decision making, and outcomes.

COVID-19 Resources

Explore our collection of timely and relevant alerts, webinars, and news.

VENABLE



www.Venable.com/COVIDCFS

www.Venable.com/covid-19

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Questions?

Questions and Additional Information

Read more at www.Venable.com/cfs/publications



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