

Defending Against Multi-Front Investigations

What to Do When the FTC, CFPB, and State Attorneys General Have Opened Parallel or Joint Investigations

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Agenda

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 - Concurrent Public Enforcement of Consumer Protection Statutes
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Federal and State Authority

“Unfair and Deceptive Acts and Practices” at the Federal and State Level

FTC – Section 5 of the FTC Act

- The **Federal Trade Commission (FTC) enforces Section 5 of the FTC Act**, along with other sector specific laws and rules, including the Children’s Online Privacy Protection Act, Restore Online Shoppers Act, Health Breach Notification Rule, Gramm-Leach-Bliley Act, and others.
- **15 U.S.C. § 45** – Section 5 of the FTC Act prohibits “**unfair or deceptive acts or practices in or affecting commerce**” (UDAP)
 - Engaging in practices that the FTC deems as unfair or deceptive can result in a large-scale investigation of an organization.
- FTC’s remedies limited by the Supreme Court decision in *AMG*.

CFPB - Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- The Consumer Financial Protection Bureau (CFPB) **oversees financial products and services offered to consumers** and enforces the Dodd-Frank Wall Street Reform Act, along with other financial sector-specific laws.
- **12 U.S.C. § 5536** – Section 1036 of the Dodd-Frank Act prohibits “**unfair, deceptive, or *abusive***” acts and practices (UDAAP) in connection with any transaction or offering to a consumer for a consumer financial product or service.
 - The CFPB is authorized to conduct investigations to determine whether entities have violated this prohibition.
- The CFPB can obtain “**any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law,**” including restitution, disgorgement or compensation for unjust enrichment, and civil monetary penalties (which can go either to victims or to financial education).

State UDAP Statutes

- States have similarly prohibited “unfair and deceptive acts and practices” under **UDAP statutes**, sometimes called “**Little FTC Acts.**”
 - State attorneys general are responsible for enforcing their state UDAP laws, and some UDAP statutes permit private rights of act.
- Similar to the FTC, **state attorneys general can bring an action on behalf of consumers** within the state based on consumer complaints or independent investigations.
- Unlike the FTC, state attorneys general can **typically seek both injunctive relief and monetary relief** for a first-time offense.

Federal and State Authority

Antitrust Authority

Federal Authority

- The **FTC and Department of Justice share federal jurisdiction** over antitrust enforcement through the FTC Act, the Clayton Act, and the Sherman Antitrust Act.
 - **Substantive Antitrust Statutes**
 - **Section 1 Sherman** – unlawful restraints of trade
 - **Section 2 Sherman** – monopolization and attempted monopolization
 - **Section 7 Clayton Act** – mergers and acquisitions
 - **15 U.S.C. § 45(a)** – Section 5(a) of the FTC Act **prohibits “unfair methods of competition,”** which include any conduct that would violate the Sherman Antitrust Act or the Clayton Act.
 - An FTC investigation can be **triggered by premerger notification filings, correspondence from consumers or businesses, congressional inquiries, or media articles.**

State Authority

- States can enforce federal antitrust laws.
- States typically interpret and apply their respective laws in a fashion similar to that of federal laws.

Federal and State Authority

Concurrent Public Enforcement of Federal Consumer Protection Statutes

Overview of Concurrent Enforcement

- Some federal statutes provide for **concurrent public enforcement of consumer protection** by granting state attorneys general and state regulators **the authority to enforce** provisions of the law in federal and state courts and **investigate** alleged violations of the law.
- Such laws include:
 - Restore Shoppers Online Confidence Act (15 U.S.C. § 8405)
 - Telephone Consumer Protection Act (47 U.S.C. § 227(g))
 - Fair Credit Reporting Act (15 U.S.C. § 1681s(c))
 - CAN-SPAM Act (15 U.S.C. § 7706(f))
- Congress granted this authority in part to **assist enforcement by “resource constrained” agencies.**

Types of Authority

- Some federal statutes (ex. Dodd-Frank) grant state attorneys general and state regulators **investigative authority**.
 - Section 1042 of the Dodd-Frank Act **empowers state attorneys general and regulators to investigate** state-chartered or state-licensed entities for alleged UDAAPs.
- Certain statutes grant state attorneys general and state regulators **enforcement authority** to enforce federal law through 1) injunctions to curb certain practices and 2) suits on behalf of state citizens for monetary relief.
 - 47 U.S. Code § 227(g) – The TCPA allows state attorneys general to **seek monetary relief** on behalf of state citizens and **enjoin the conduct** of alleged violators.
- In some instances, federal statutes require state attorneys general to **seek approval from federal regulators before taking action**.
 - 15 U.S. Code § 1681s – The FCRA requires state attorneys general to **notify the FTC or other appropriate federal regulators before taking action** under this law. The FTC may at its discretion intervene in the action.

Concurrent Enforcement in Practice

- **Critics' fears** that concurrent enforcement would lead to inconsistent enforcement across states, or a flood of state lawsuits has **not been borne out in practice**.
- A 2011 study of state enforcement of concurrent enforcement statutes revealed **only 104 cases where state attorneys general asserted claims under this authority**, with the bulk of claims taking place under two telemarketing statutes.
- Why might this be the case?
 - Limited remedies for states
 - State UDAP statutes
 - Strategy

Recent Developments

Recent Developments

- **Rohit Chopra, the current CFPB director, has publicly advocated for state attorneys general to use concurrent enforcement authority.**
 - In a December 2021 speech before the National Association of Attorneys General, Director Chopra stated the **CFPB was seeking to “promote” state attorney general enforcement** of certain consumer protection laws, particularly where **“federal protections are stronger than state statutes.”**
 - Director Chopra also stated the **CFPB is considering ways states could “get more out of” remedies** available under the Consumer Financial Protection Act, including civil penalties.
- The Supreme Court in *AMG Capital Management v. FTC* **held the FTC could not seek equitable monetary relief** under Section 13(b) of the FTC Act.
 - This ruling **does not apply to state AGs who may pursue disgorgement, restitution, or civil penalties** based on similar state claims.
 - Potential for multistate actions with the FTC taking lead.

Examples of Parallel/Joint Investigations and Settlements

Data Privacy & Security

- **Case Study: Equifax**

- **FTC-Led Settlement (2019)** – Equifax settled with the FTC, CFPB, and 50 U.S. states and territories over allegations stemming from the 2017 data breach that affected 147 million people. Indiana and Massachusetts did not join this settlement.
- **Indiana Settlement (2019)** – Equifax settled with the Indiana AG for \$19.5 million.
- **Massachusetts Settlement (2020)** – Equifax settled with the Massachusetts AG for \$18.2 million.

- **State AG Coalitions**

- **Target (2017)** – 47 states and the District of Columbia settled with Target for \$18.5 million over allegations stemming from a 2013 data breach.
- **Home Depot (2020)** – Home Depot settled with 46 state attorneys general for \$17.4 million over allegations stemming from a 2014 data breach.

Advertising

- **State AG and the FTC Coordination**
 - **Next-Gen (2019)** – The FTC and Missouri attorney general settled with Next-Gen, Inc. and related defendants, which sent mailers informing consumers they had “won” but would need to pay a fee to collect a prize. The settlement included \$21 million in cash plus personal property and liquidation of the companies.
 - **Allstar Marketing Group (2015)** – The FTC settled with Allstar Marketing Group, a direct-marketing company, over allegations stemming from its “buy one get one free” promotions. At the same time the FTC settled, the New York AG announced a separate state case stemming from the same allegations.

Consumer Finance

- ***Consumer Financial Protection Bureau et al. v. MoneyGram International Inc. et al.*** (2022) – The CFPB and New York attorney general jointly sued MoneyGram for violating federal laws and regulations.
- **RCG (fka Richmond Capital Group)** (2020) – The FTC and New York attorney general filed separate lawsuits, in federal and state court, respectively, on the same date, against a group of companies and their principals that provided merchant cash advances to small businesses. In settlement with FTC, banned from industry.
- **“Operation Game of Loans”**
 - In 2017, the FTC along with 11 state attorneys general and the District of Columbia announced “Operation Game of Loans,” a coordinated federal-state law enforcement initiative targeting student loan debt relief products.
 - This initiative included 36 actions by the FTC, state attorneys general, or a combination of the two.
- **State AG Coalition**
 - **PHH Mortgage Corporation** (2018) – 49 state attorneys general settled with PHH Mortgage Corporation for \$30.4 million. Unlike in prior national settlements, the national government was *not* a party.

Antitrust

- Microsoft
- Google
- Facebook
- T-Mobile/Sprint merger

Common Challenges – Parallel Investigations

- Distinct Subject Matters and Focus
- Inconsistent Requests for Information
- Competing Timelines
- Client Considerations

Considerations – Parallel Investigations

- Personalities and People Matter
- State AG driven? Federal agency driven? Or both?
- Multi-state or a smaller number of state AGs?
- Level of cooperation, if any?

Considerations – Settlements

- Seeking a master settlement or keeping separate
- Timing
- Press
- Settlement process for state AGs v. federal agencies

Questions?

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