



# Generating Leads Legally: Regulatory and Litigation Quick Hits

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**Daniel S. Blynn**  
Partner | +1 202.344.4619 | [dsblynn@Venable.com](mailto:dsblynn@Venable.com)

**Alexandra Megaris**  
Partner | +1 212.370.6210 | [amegaris@Venable.com](mailto:amegaris@Venable.com)

**Jonathan L. Pompan**  
Partner | +1 202.344.4383 | [jlpompan@Venable.com](mailto:jlpompan@Venable.com)

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## Welcome and Our Presenters

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## Daniel S. Blynn



**Daniel S. Blynn**

Partner | Washington, DC  
+1 202.344.4619  
[dsblynn@Venable.com](mailto:dsblynn@Venable.com)

Dan Blynn focuses his practice on false advertising and telemarketing litigation, and complex consumer class actions in federal and state courts. Dan assists clients with advertising substantiation investigations, and inquiries from the Federal Trade Commission (FTC) and state attorneys general. He also counsels clients on a variety of advertising and telemarketing-related matters. Dan's clients include trade associations, Fortune 100 companies, dietary supplement companies, marijuana companies, energy companies, home security companies, staffing services companies, cable news networks, calling and text messaging platform providers, and many other large and small businesses.

He regularly represents clients in telemarketing, false advertising, and regulatory litigation brought under the Telephone Consumer Protection Act (TCPA), Federal Trade Commission Act, Lanham Act, Telemarketing Sales Rule (TSR), and state consumer protection laws. He also defends against putative consumer class actions in state and federal courts. In addition, Dan represents clients in competitor challenges before the Better Business Bureau's National Advertising Division (NAD) self-regulatory body. He has significant experience with electronic discovery and has successfully argued in favor of substantial narrowing of civil discovery and investigative demands from regulators.

Dan is regularly recognized by numerous organizations as one of the leading consumer protection defense attorneys in the country, and often speaks and writes on telemarketing and advertising law issues. In early 2022, the Florida legislature cited Dan's commentary regarding the state's telemarketing law in the legislative history underlying proposed amendments to the Florida Telephone Solicitation Act.

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## Alexandra Megaris



**Alexandra Megaris**

Partner | New York - Rockefeller Center  
+1 212.370.6210  
[amegaris@Venable.com](mailto:amegaris@Venable.com)

Alex Megaris focuses on complex regulatory investigations and government enforcement matters involving state attorneys general, the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), state regulatory agencies, and the U.S. Congress.

Alex also works closely with Venable's government affairs team in advocating for clients before these agencies. She has extensive experience with consumer protection laws, such as state unfair, deceptive and abusive practices (UDAAP) laws, the FTC Act, the Consumer Financial Protection Act, the FTC's Telemarketing Sales Rule, and product-specific regulations, including those regulating credit reporting, loan servicing, and debt collection.

Alex has recent experience providing strategic advice and counsel to high-profile political ventures, including a high-net-worth individual exploring federal office and a presidential campaign. Through these experiences and her government litigation and investigations work, Alex brings a legal, business, and crisis-management sensibility to her clients, their management, and boards, offering thoughtful, creative, and pragmatic solutions to often thorny issues to help them manage their legal and reputational risks.

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## Jonathan L. Pompan



**Jonathan L. Pompan**  
Partner and Chair, Consumer  
Financial Services Group |  
Washington, DC  
+1 202.344.4383  
[jpompan@Venable.com](mailto:jpompan@Venable.com)

Jonathan is chair of the firm's Consumer Financial Services Practice Group. His practice focuses on providing comprehensive legal advice and regulatory advocacy to a broad spectrum of clients before the CFPB, FTC, state Attorneys General, and regulatory agencies. Jonathan regularly advises and advocates for FinTech related companies before federal and state government agencies.

Jonathan's experience includes standing up and advising on several consumer financing programs by retailers and bank partners. In addition, defends FTC and CFPB investigations, including obtaining the successful termination of an investigation through a closing letter, and examination preparation and appeals. In addition, he provides ongoing compliance and general counseling advice to multiple retailers, consumer lenders, debt buyers and collectors, and advertising lead generators, and has been at the forefront of representing companies in state licensing, and federal supervisory examinations.

Jonathan is a frequent speaker and author on legal and regulatory issues of significance to providers of consumer financial products and services, advertisers and marketers, and related trade organizations.

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## Today's Webinar

- Introduction
- Legal and regulatory landscape for customer acquisition
- TCPA compliance & litigation developments
- Federal and state regulatory developments
  - Recap of key legal requirements
  - General pitfalls and sources of scrutiny
  - Consumer financial services in the crosshairs
- Strategies for enhancing compliance and avoiding legal pitfalls
- Q&A

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# Legal and Regulatory Landscape for Customer Acquisition

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## Multiple Sources of Federal and Regulatory Scrutiny



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## A Few Highlights...

### Federal Trade Commission

- New Chair Lina Khan
- Negative Option Marketing Enforcement Policy
- FTC Safeguards Rule
- Resurrection of its penalty offense authority? (education/student loans, endorsements and testimonials)
- Scrutiny of “dark patterns.”
- A focus on individual liability, and investors
- Confluence of consumer protection and antitrust (echoed by Chopra at CFPB)



### Consumer Financial Protection Bureau

- New Director Rohit Chopra and staffing changes at the Bureau
- Big announcements, taking on tech, taking on FDIC, promoting competition, and more
- Guidance to staff re engaging with former employees, and heightened scrutiny
- Part of joint federal / state task force on fair lending / anti-discrimination
- High interest in use of AI, big data, and more - relevant to lead generation
- Individual liability
- Move to expand supervision and examination over higher risk nonbanks



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## TCPA Compliance & Litigation Developments

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## Federal and State Regulatory Developments

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### 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

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## 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.



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## 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. Sitesearch*)
- Confidential Phone Records  
(*FTC v. Accusearch*)
- Debt Portfolios  
(*FTC v. Cornerstone*, *FTC v. Bayview Solutions*)

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# 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



**FTC Amends Complaint against Lending Club**  
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**UPDATE**  
October 20, 2016

**WASH.** | Bureau of Consumer Protection | Credit and Finance

The Federal Trade Commission has amended its complaint against LendingClub Corporation, an online marketplace lender. The Commission's original complaint accused the lender of padding their loans with its hidden fees.

According to the FTC's original complaint, filed in April 2016, Lending Club made promotional loans that it says were a special loan amount with "no hidden fees," when, in actuality, the company loaded borrowers' accounts with a variety of fees and charges before the loan. The FTC now alleges that lending club borrowers have not been notified of these fees and are not being able to track their loan accounts, which is against the law. The FTC also alleges that lending club borrowers have not been notified of their debt collection practices, which is against the law.

The amended complaint adds further detail about the scope of the fees assessed by Lending Club, alleges that the lender has not provided adequate information about the lender's debt collection practices, and alleges that the lender has not provided adequate information about its debt collection practices.

The Commission also alleges that the lender has not provided adequate information about its debt collection practices, and that the lender has not provided adequate information about its debt collection practices.

**NOTE:** The Commission has a complaint when it has "cause to believe" that the law has been violated and it expects the Commission that proceeding in the public interest. The Commission will determine whether it should file a lawsuit in the United States District Court for the Northern District of California on October 22, 2016.

The Federal Trade Commission wants to provide consumers with prompt and accurate information about the lender's debt collection practices, and to provide consumers with prompt and accurate information about the lender's debt collection practices.

**CONTACT INFORMATION**  
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**Online Student Loan Refinance Company SoFi Settles FTC Charges, Agrees to Stop Making False Claims About Loan Refinancing Savings**  
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**UPDATE**  
October 20, 2016

**WASH.** | Bureau of Consumer Protection | Consumer Protection | Advertising and Marketing | Credit and Finance | Credit and Loans

Online student loan refinance SoFi has agreed to stop representing how much money online loan borrowers have saved or will save from refinancing their loans with its company, in order to settle Federal Trade Commission charges that it deceptively advertised inflated savings to prospective borrowers.

If a complaint against SoFi Finance, Inc. and subsidiary SoFi Lending Corp., the FTC alleged that since at least April 2015, the lender promoted false statements about loan refinancing savings to borrowers, and that the lender's statements were false and misleading.

The lender had a huge problem: many students and graduates across the country, said FTC Chairman Jon Simon. Lenders who offer refinancing options must be clear and provide that savings. "The consumer was supposed to save money, but not the way."

According to the FTC, one online SoFi ad claimed, "Refinancing student loans saves \$2,388 in savings," while another ad told lenders to "Get a loan on your student loans. Average savings \$2,388."



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# FTC Workshop on Lead Generation



**"Follow the Lead" Workshop**  
STAFF PERSPECTIVE | SEPTEMBER 2016

**Introduction**

Online lead generation is nearly ubiquitous in the modern marketplace, connecting consumers who are interested in goods or services with the merchants or providers who can offer them. But because lead generators often operate behind the scenes in complex ways, consumers and many businesses may know little about what they do and how they do it.

As the nation's consumer protection agency, the Federal Trade Commission ("FTC") has broad jurisdiction over lead generators, whether they are generating leads for a lender, an educational institution, or a company offering another good or service. Using this authority, the agency has brought law enforcement actions against unscrupulous actors in the lead generation industry. For example, the FTC has sued lead generators that lured consumers with promises of extremely low fixed rate mortgages, or free refinancing, but then sold consumers' information to entities that did not actually offer these deals. The FTC also has sued payday loan lead generators that sold consumers' sensitive bank account information to non-lenders who simply debited charges directly from consumers' accounts without authorization.

Given the complexity of the industry, on October 30, 2015, the FTC hosted a public workshop, entitled "Follow the Lead" ("Workshop"), at which a variety of experts and stakeholders discussed online lead generation practices and key consumer protection issues raised by those practices. This Staff Perspective summarizes and reflects upon that discussion, the associated public comments, and other information gathered through law enforcement and experts. In particular, we detail the mechanics of online lead generation and potential benefits and concerns associated with lead generation for both businesses and consumers.

**Follow the Lead**  
 An FTC Workshop on Lead Generation

FTC BUREAU OF CONSUMER PROTECTION | FTC.GOV



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## 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.

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## 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

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## 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

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**INSERT SLIDES ON CFPB**

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**Other Federal and State Regulatory  
Consumer Protection Priorities**

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**Strategies for Enhancing Compliance and  
Avoiding Legal Pitfalls**

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## 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.

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## Questions?



**Daniel S. Blynn**

Partner  
+1 202.344.4619  
[dsblynn@Venable.com](mailto:dsblynn@Venable.com)



**Alexandra Megaris**

Partner  
+1 212.370.6210  
[amegaris@Venable.com](mailto:amegaris@Venable.com)



**Jonathan L. Pompan**

Partner  
+1 202.344.4383  
[jpompan@Venable.com](mailto:jpompan@Venable.com)

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## All About Advertising Law

Regulatory and Litigation Developments for Advertisers and Marketers

### Managing Wireless Technologies from Both Ends: FCC Considers Receiver Regulation

By Laura Stefan on April 27, 2022  
POSTED IN COMMUNICATIONS, REV. TECHNOLOGIES

As the world moves toward the rollout of fifth-generation, or 5G, wireless technology, the numbers of devices operating in many locations have grown exponentially. The Federal Communications Commission manages the commercial use of the radiofrequency spectrum – those invisible airways on which consumer and commercial wireless devices and networks operate. More wireless devices demand more use of the radio spectrum, leading the FCC to consider how to manage the spectrum more efficiently.

To that end, for the first time in two decades the agency may consider whether and how it may regulate receivers, which is the part of a wireless system that takes in transmissions of communications (e.g., voice, data). Poorly performing receivers make for inefficient spectrum use, limiting the FCC's ability to cram more users into existing spectrum bands (a finite resource).

Last year, the design of receivers [made national news](#) as the airline industry publicized concerns with possible interference to aircraft altimeters. An FCC decision to auction spectrum on an adjacent band to cellular carriers created

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## Consumer Financial Services Practice Digest



Advertising Law News and Analysis

March 31, 2022

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**The FTC Moves Its Attention to a For-Profit Medical School**

Last week, the Federal Trade Commission filed a complaint in the Northern District of Illinois against the Saint James School of Medicine, an Illinois-based for-profit medical school, charging its Cambium medical programs deceived consumers with fake student success rates and offers to finance students' attendance with illegal lending contracts.

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**Latest CFPB Lawsuit Sheds Light on Digital Dark Patterns**

A lawsuit filed by the CFPB against a national credit reporting agency provides some insight into the types of website features and designs that regulators like the Consumer Financial Protection Bureau and Federal Trade Commission will target. As we covered previously, digital dark patterns—or website design, features, and interfaces used to allegedly deceive, steer, and manipulate users—are a priority for both rulemaking and enforcement actions by the FTC.

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Consumer Financial Services Practice Digest

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**Legal and Regulatory Developments**

**Repeat Offenders, Beware!** CFPB Director Announces Enforcement Strategy; Takes Shot at Financial Services Regulators of the Past

CFPB Director Rohit Chopra has signaled that he is ready to take on corporate reoffenders in the financial services industry. He gave the University of Pennsylvania Program on Regulation's 14th [Annual Distinguished Lecture](#), "The Future of Consumer Financial Services," on March 23, 2022. Chopra offered his thoughts about the measures CFPB and other agencies could take to curb repeat violators of financial services laws.

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**CFPB Bulletin on UDAPs That Impede Consumer Reviews**

The Consumer Financial Protection Bureau (CFPB) issued a [consumer bulletin](#) regarding potentially illegal practices related to consumer reviews. The bulletin seeks to promote reviews about financial products and services that accurately reflect consumer opinions and experiences. The guidance also warns that practices like posting fake reviews or using techniques that forbid customers from publishing an honest review may be a UDAP under the Consumer Financial Protection Act (CFPA).

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