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**FTC Enforcement Unmasked:
An Insiders' Primer On The Anatomy Of An
FTC Matter And A Critical Look At Potential
Agency Overreach**

Nikhil Singhvi
Covington & Burling

Nina Frant
US Chamber of Commerce

- Anatomy of an FTC Matter
- Recent FTC Initiatives re: Data Privacy/Security and Potential Overreach

Anatomy of an FTC Matter

- Targeting
- Investigation
- Closing/Settlement/Litigation

Targeting

- Media coverage
- Outreach to the FTC
- FTC investigations
- Enforcement referrals
- Insider tips
- Consumer complaints



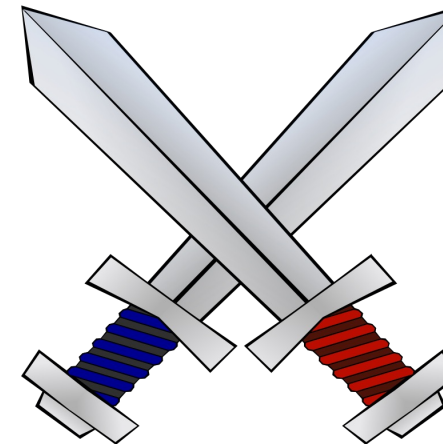
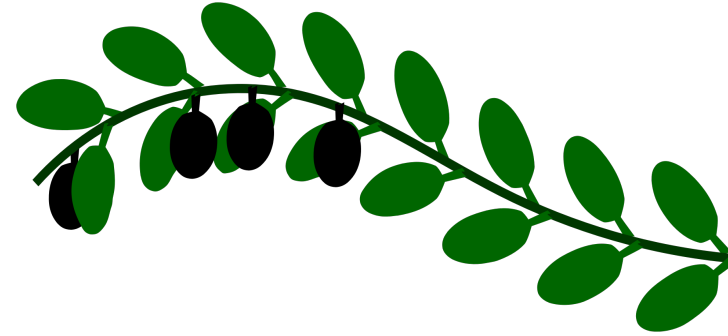
Investigation

- First Party, Ex Parte, or Third Party?
- Preliminary injunction or TRO
- Civil Investigative Demand – Components
 - Document Requests
 - Interrogatories
 - Investigational Hearings
- Civil Investigative Demand – Negotiations
 - Modify specifications, and applicable time period
 - Defer investigational hearings
 - Negotiate ESI terms
 - Negotiate production timeline
 - Tolling Agreement



Settlement/Litigation

- Staff advocacy
- Consent negotiations
- Meeting with Bureau of Consumer Protection
- Meetings with Commissioners
- Closing and closing letters
- Settlement – Consent order
- Litigation



Recent Initiatives/ Potential Agency Overreach



- Recent FTC setbacks
- Policy Statements and Related Enforcement Matters
- Notices of Penalty Offense
- Novel Applications of Law
- Discrimination as Unfairness

Recent FTC Setbacks

- Limits to monetary redress
- Challenges to adjudicative proceedings
- Compressed investigative timelines

Policy Statements and Related Enforcement Matters

- FTC has announced numerous policy statements on consumer protection issues often at Open Commission Meetings
 - Codifies Chair Khan's agenda
- Often the first step in signaling enforcement priorities or rulemaking priorities
- Examples of Policy Statements
 - Negative Option Marketing Policy Statement
 - Breaches by Health Apps and Other Connected Devices
 - Unfair Methods of Competition Policy Statement

Notices of Penalty Offense

- Resurrected enforcement tool, post-AMG
- Notice of Penalty Offense for Tax Preparation Companies
 - *Beneficial Corp.* (1973) holding vs. Notice “holdings” (2023)
 - Aggressive agency cover letter appending notice
 - Calls out potential violations
 - Introduces consent requirement
 - States expansive definition of confidential data



Aggressive GLB Interpretation

- It shall be a violation of this subchapter for any person to obtain or attempt to obtain, or cause to be disclosed or attempt to cause to be disclosed to any person, [customer information of a financial institution](#) relating to another person ... by making a false, fictitious, or fraudulent statement or representation to a customer of a financial institution. 15 USC § 6821(a),(2).
- The term “customer information of a financial institution” means any information maintained by or for a financial institution which is derived from the relationship between the financial institution and a customer of the financial institution and is identified with the customer. 15 USC § 6827(b).
 - Credit card number?
 - Bank account number?
 - Bank routing number?
 - Photo identification?
 - SSN?

Aggressive GLB Interpretation

Richmond Capital

- “While Defendants indicate they solicit consumers’ financial information, including their **bank account routing number, account number, and log-in credentials** to provide and service the merchant cash advance, such sensitive consumer information is regularly used to withdraw funds beyond what customers are told in the contract that they are obligated to pay.” ¶ 13
- Financial institutional information cited includes **“bank account numbers, routing numbers, log-in credentials, and the identity of authorized signers of bank accounts”** ¶ 53

In *Richmond Capital*, Defendants are alleged to have logged in to customers’ bank accounts to withdraw more than the authorized amount (i.e., impersonating the financial institution customer).

Celsius Network

- “To use Celsius’s products and services, consumers had to sign up for a Celsius account and **provide personal information like social security number and a copy of a government-issued identification**. Only after registering could consumers transfer cryptocurrency from their own digital wallet into their Celsius account and gain access to various services. In many instances, Celsius obtained consumers’ bank account information, and when consumers transferred cryptocurrency to the Celsius platform, Celsius gained access to identifying information for the wallet from which the cryptocurrency was sent.” ¶ 70
- “The customer information of a financial institution that Defendants obtain or attempt to obtain includes **consumers’ bank account numbers and cryptocurrency wallet addresses**.” ¶ 110

Voyager

- “Once in the Voyager App, consumer must provide personal identifying information and link their bank account or off-site cryptocurrency wallet to the platform to be able to purchase or transfer cryptocurrency.” ¶ 21
- “The customer information of a financial institution that Defendants obtain or attempt to obtain includes **consumers’ identity information, bank account numbers, routing numbers, and cryptocurrency wallet addresses**.” ¶ 54.

In *Celsius* and *Voyager*, are Defendants alleged to have made false statements to induce customers to transfer assets, but Defendants are not alleged to have ***accessed*** the customers’ accounts at other institutions (as occurred in *Richmond*).

Unfairness/Discrimination

- FTC Commissioners have made numerous statements about the need to address bias and discrimination in privacy and data security
- Recent cases expand unfairness authority to cover discrimination
 - **Napleton Automotive** – Discrimination against Black customers was a violation of ECOA
 - **Passport Honda** – Discrimination against Black and Latino customers was a violation of both ECOA and the FTC Act
 - **Rhineland Auto Center** – Discrimination against Native American customers was a violation of both ECOA and the FTC Act
- CFPB recently lost litigation regarding its revisions to its Supervision and Examinations Manual to make clear that discrimination is “unfair” under Dodd Frank

Questions?

Nikhil Singhvi

Of Counsel
Covington & Burling

Nina Frant

Vice President for Consumer Policy
U.S. Chamber of Commerce