

## How FTC Is Stepping Up Its Consumer Protection Efforts

By **Jonice Gray Tucker, Amanda Lawrence and Christopher Robins**  
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Recent changes in agendas and leadership at the federal level are prompting companies offering financial products and services to question what consumer protection enforcement will look like on the road ahead. There has been significant discussion about the increasing role of state regulators, including state attorneys general, and what they may do to fill the perceived void that may be left by agencies like the Consumer Financial Protection Bureau. Many state regulators have indicated that they are ready to step up enforcement, and a number already are doing so. This does not mean, however, that the industry should shift its focus exclusively to the states.

The Federal Trade Commission, which once dominated the playing field on many consumer protection issues, should be carefully watched. Prior to the bureau's inception, the FTC took a series of enforcement actions that significantly reshaped mortgage servicing,[1] well before the CFPB codified its rules.[2] However, passage of the Dodd-Frank Act[3] and creation of the CFPB made the FTC's role in the federal consumer protection landscape seem uncertain at times for companies offering financial products and services. Under Dodd-Frank, the FTC retained its authority to enforce numerous consumer protection laws, and to enforce CFPB rules applicable to entities within the FTC's jurisdiction[4] — including most providers of financial services that are not banks, thrifts or federal credit unions. Yet, on certain issues, the FTC seemed to cede enforcement authority to the CFPB, which also acquired many of the commission's most seasoned consumer protection lawyers.

The FTC appears poised to reclaim a more active role in consumer enforcement in connection with financial products and services. The bipartisan commission is now at full strength with five members, and includes Rohit Chopra, who previously was student loan ombudsman at the CFPB. Financial services companies subject to FTC jurisdiction and their service providers should be aware of potential consumer protection enforcement priorities for 2018 and beyond.

**Consumer Protection Agenda Under Chairman Joseph Simons**



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The FTC has escalated enforcement over the past year in a number of areas that are relevant to financial services companies and their service providers. While continuing to bring enforcement actions under its general unfair or deceptive acts or practices, or UDAP, authority, the FTC appears to have focused its consumer protection agenda on: (1) privacy and data security; (2) debt collection; (3) fintech companies, especially those focusing on lending and payment-related issues; and (4) the treatment of military personnel and families. It has also brought cases utilizing a third-party liability theory, demonstrating that it is willing to hold companies liable for the actions of its service providers.

### ***Privacy and Data Security***

FTC Chairman Joseph Simons told Congress in July that “privacy and data security top the list of [its] consumer protection priorities.”[5] The FTC has brought more than 500 such cases, and over the course of the past year has taken actions related to data breaches, privacy violations under the Gramm-Leach-Bliley Act, and international privacy frameworks.

The FTC has brought privacy and data security cases against or is currently investigating a number of companies for:

- Allegedly failing to reasonably secure sensitive consumer data stored in the cloud.[6]
- Allegedly misleading consumers into completing loan applications and selling those applications, which included consumers’ personal data, to unscrupulous third parties.[7]
- Data breaches.[8]

The FTC also has brought several recent enforcement actions related to the GLBA’s privacy provisions, which it had regularly enforced prior to the creation of the bureau. A recent case against TaxSlayer (November 2017) and a matter involving Venmo (May 2018) may signal a recommitment to challenging such conduct.

The FTC also has been actively enforcing the EU-U.S. Privacy Shield Framework, which was designed to facilitate trans-Atlantic transfers of personal data. While the Privacy Shield Framework is a voluntary mechanism, the FTC is responsible for enforcing its provisions for any organizations that commit to complying with it. The FTC has brought over 45 cases enforcing the Privacy Shield, the predecessor Safe Harbor framework, and the Asia Pacific Economic Cooperation Cross Border Privacy Rules framework.[9]

The FTC last year established a privacy and data security task force to “better understand the markets for consumer information, incentives for the various parties in that marketplace, and how to quantify costs and benefits of different actions the FTC or others could take.”[10] The commission said it wanted to “deepen its understanding of the economics of privacy,” which includes “studying consumer preferences and the relationship between access to consumer information and innovation.”[11] It also held an informational injury workshop in December 2017 in which it developed a taxonomy for information injury: loss of opportunity, economic loss, social detriment, and loss of liberty.[12] While the FTC has yet to provide further guidance regarding the types of injury, its mere acknowledgment that injury goes beyond economic loss suggests that it could broaden its assessment of injury.

### ***Debt Collection***

Debt collection accounted for 22.7 percent of the 2.7 million complaints the FTC received in 2017 through its consumer complaint portal.[13] That was the top complaint, and matters related to debt collection not

surprisingly are a priority for the FTC. For example, on Sept. 7, it settled with the operators of a company that allegedly used false claims and threats to get consumers to pay debts, including debts that the company did not have authority to collect or that the people did not owe.[14]

While the conduct in question in this case appears extreme, the FTC could expand its enforcement efforts to include under its jurisdiction entities that employ service providers engaging in illegal conduct. That could entail reviewing vendor management policies, procedures and practices related to debt collection, and pursuing enforcement actions based on a company's failure to monitor a vendor.

In March, the FTC and CFPB announced joint efforts to police debt collectors and issued an annual report to Congress on their collective actions to combat illegal debt collection practices under their shared responsibilities under the Fair Debt Collection Practices Act.[15] The two agencies are likely to pursue greater collaboration on debt collection going forward.

### ***Fintech Companies***

The FTC remains focused on protecting consumers who use various forms of financial technology and ensuring that "market participants offering these exciting new products keep in mind important consumer protection principles as they continue to innovate for consumers' benefit." [16] Of interest to the FTC are mobile payments, with a focus on the Electronic Funds Transfer Act, marketplace lending, cryptocurrencies and money transmitters.[17]

The FTC's recent enforcement action related to Venmo, a payment and social networking application and website that had been acquired just before the action, indicates that fintech companies, especially those in the payments and lending space, may be in the crosshairs of the FTC's broader agenda. The commission alleged that Venmo failed to disclose to users of its peer-to-peer payment service that transfers of funds to external bank accounts were subject to review and could be frozen or removed, and that it misrepresented the extent to which accounts were protected by "bank-grade security systems." [18] The FTC's emphasis in this case is consistent with its more general focus on data privacy and security and sends a strong signal that it is willing to rely on its UDAP authority to protect fintech customers.

The commission has also stated that money transmitters have a responsibility to implement controls and procedures to ensure that criminals are not using their services to defraud consumers. In one example, the FTC alleged that a money transmitter was aware that its system was being used for fraud-induced money transfers, but failed to take measures to detect and prevent such transfers, such as terminating agents and locations involved in high levels of fraudulent transactions or imposing more robust ID requirements to receive transfers.[19] Here again, the FTC is looking to third-party vendor management issues as an avenue to pursue enforcement actions.

The proliferation of cryptocurrency has pushed the FTC to take actions to protect consumers from schemes related to this relatively new medium of exchange. While its efforts to date have focused primarily on consumer education, a recent UDAP enforcement action against a cryptocurrency promoter may be a sign of what is to come. The case involved four individuals that allegedly promoted deceptive moneymaking schemes involving cryptocurrencies through websites, YouTube videos, social media and conference calls.[20] Exchanges, brokers, wallet providers and other participants in cryptocurrency markets should be aware that the FTC is watching carefully.

### ***Military and Veterans***

The FTC also has identified fraud targeting military personnel as a priority.[21] Although the FTC does not have enforcement authority under the Servicemembers Civil Relief Act, it can bring actions under its general UDAP authority, as well as under the authority granted in other statutes — including the Truth in Lending Act, the Electronic Fund Transfer Act, the Fair Credit Reporting Act and the FDCPA. In 2017 alone, the FTC received more than 114,000 consumer complaints from service members, their dependents, military retirees and veterans, with the top complaints related to imposter scams, identity theft and debt collection.[22]

The FTC last year established a military task force and has already brought a number of cases related to debt collection and mortgage debt relief targeting service members and veterans.[23] It also has brought cases alleging deceptive practices in the sale of automobile add-on products.

## **UDAP**

UDAP has been a centerpiece of the FTC's enforcement agenda for years. The FTC has stepped up its UDAP enforcement generally, including actions brought by the FTC in the last year that involve cryptocurrencies and data breaches discussed above.

The FTC has emphasized that ensuring that advertising is truthful and not misleading is one of its core missions. The FTC filed a UDAP-related complaint in April alleging that an online lender's claim that its loans had "no hidden fees" was deceptive because consumers were charged origination fees.[24] This lawsuit may be a precursor to other similar actions that the FTC may take in reviewing advertising and marketing materials.

The FTC also recently has taken UDAP actions in connection with credit cards and student loans. Last December, it filed a complaint alleging that the defendants violated the FTC Act and the Telemarketing Sales Rule by misrepresenting that they could reduce credit card interest rates and save consumers money, and failed to disclose that consumers could pay a range of additional bank fees totaling 1 to 3 percent of their credit card debt.[25] Last October, it announced "Operation Game of Loans," the first coordinated federal-state law enforcement initiative targeting deceptive student loan debt-relief scams.[26]

## **Conclusion**

While consumer protection priorities under the Trump administration are different from those under the Obama administration, this does not mean that all federal enforcement agencies are standing down on these issues.

- The FTC has reiterated its commitment to taking enforcement action in the privacy and data security space, and has brought a number of actions that allege UDAP violations and violations of specific privacy statutes. Companies would be well-served to review their policies, procedures and practices related to data breaches as well as general compliance with privacy laws to ensure that there are no gaps.
- The FTC and the CFPB have identified debt collection as a top enforcement priority. Debt collectors and those who hire third parties to collect debt on their behalf should examine their practices and ask themselves whether they have adequate policies, procedures and practices in place to monitor and rapidly correct infractions, even those by their third-party collectors.
- The FTC appears focused on legal issues related to mobile payments, marketplace lending, cryptocurrencies and money transmitters, and will scrutinize fintech companies if compliance with the spirit and letter of consumer protection is called into question.

- Issues facing service members are a priority for the FTC. Companies serving military consumers should assess their compliance with a host of laws, including SCRA, TILA, EFTA, FDCPA and FCRA — along with a general UDAP review.
- The FTC will continue to utilize its UDAP authority to bring actions. Matters of interest to the FTC include alleged misrepresentations or deception in advertising, as well as fraud. Companies should review their advertising and other consumer-facing materials, as well as origination and servicing practices, for UDAP risk.

In the last year, the FTC brought or settled 109 consumer protection matters and distributed over \$269 million in redress to over 3 million consumers.[27] Financial services companies and their service providers should keep a watchful eye on FTC's enforcement agenda.

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[1] Order Preliminarily Approving Stipulated Final Judgment, U.S. v. Fairbanks Capital Corp. Fairbanks Capital Holding & Basmajian, No. 03-12219 (D. Mass. Nov. 21, 2003), modified by, U.S. v. Select Portfolio Serv., No. 03-12219-DWP (D. Mass. Sept. 4, 2007); Consent Decree, FTC v. EMC Mortgage Corp., No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008).

[2] See generally 12 C.F.R. §§ 1024 and 1026.

[3] Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).

[4] See 15 U.S.C. § 1607(c).

[5] [https://www.ftc.gov/system/files/documents/public\\_statements/1394526/p180101\\_ftc\\_testimony\\_re\\_oversight\\_house\\_07182018.pdf](https://www.ftc.gov/system/files/documents/public_statements/1394526/p180101_ftc_testimony_re_oversight_house_07182018.pdf).

[6] [https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2017-overview-commissions-enforcement-policy-initiatives-consumer/privacy\\_and\\_data\\_security\\_update\\_2017.pdf](https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2017-overview-commissions-enforcement-policy-initiatives-consumer/privacy_and_data_security_update_2017.pdf).

[7] Id.

[8] [https://www.ftc.gov/system/files/documents/public\\_statements/1394526/p180101\\_ftc\\_testimony\\_re\\_oversight\\_house\\_07182018.pdf](https://www.ftc.gov/system/files/documents/public_statements/1394526/p180101_ftc_testimony_re_oversight_house_07182018.pdf).

[9] <https://www.ftc.gov/news-events/press-releases/2018/07/california-company-settles-ftc-charges-related-privacy-shield>.

[10] [https://www.ftc.gov/system/files/documents/public\\_statements/1213893/ohlhausen\\_-\\_ftc\\_at\\_100\\_days\\_5-3-17.pdf](https://www.ftc.gov/system/files/documents/public_statements/1213893/ohlhausen_-_ftc_at_100_days_5-3-17.pdf).

[11] Id.

[12] [https://www.ftc.gov/system/files/documents/public\\_events/1256463/informational\\_injury\\_workshop\\_slides.pdf](https://www.ftc.gov/system/files/documents/public_events/1256463/informational_injury_workshop_slides.pdf).

[13] [https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer\\_sentinel\\_data\\_book\\_2017.pdf](https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf).

[14] <https://www.ftc.gov/news-events/press-releases/2018/09/ftc-settlements-ban-fraudulent-debt-collectors-debt-collection>.

[15] <https://www.ftc.gov/news-events/press-releases/2018/03/BCFP-ftc-report-2017-activities-combat-illegal-debt-collection>.

[16] <https://www.ftc.gov/news-events/media-resources/consumer-finance/financial-technology>.

[17] Id.

[18] <https://www.ftc.gov/news-events/press-releases/2018/02/paypal-settles-ftc-charges-venmo-failed-disclose-information>.

[19] Id.

[20] <https://www.ftc.gov/news-events/press-releases/2018/03/ftc-shuts-down-promoters-deceptive-cryptocurrency-schemes>.

[21] [https://www.ftc.gov/system/files/documents/public\\_statements/1394198/remarks\\_of\\_joe\\_simons\\_announcing\\_task\\_force\\_on\\_market\\_integrity\\_and\\_consumer\\_fraud\\_07-11-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1394198/remarks_of_joe_simons_announcing_task_force_on_market_integrity_and_consumer_fraud_07-11-18.pdf).

[22] Id.

[23] See *FTC v. BAM Financial LLC*, No. 8:15-cv-01672-JVS-DFM (C.D. Cal.) (unlawful collection practices) and *FTC v. Mortgage Investors Corporation of Ohio Inc.*, No. 8:13-cv-1647 (M.D. Fla.) (unlawful telemarketing and advertising of veterans home loan refinance services).

[24] *FTC v. Lending Club Corp.*, No. 3:18-cv-02454 (N.D. Cal. Apr. 25, 2018).

[25] Id.

[26] <https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown>.

[27] <https://www.ftc.gov/news-events/press-releases/2018/01/acting-ftc-chairman-ohlhausen-reports-one-year-agency>;  
[https://www.ftc.gov/system/files/documents/public\\_statements/1267623/pahl\\_niada\\_speech.pdf](https://www.ftc.gov/system/files/documents/public_statements/1267623/pahl_niada_speech.pdf).