

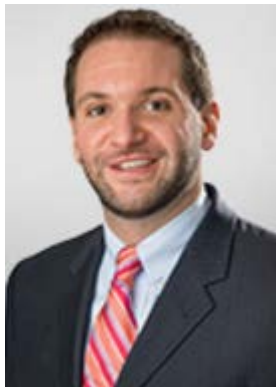
FTC 101:

Advertising Disputes & Litigation Nuts & Bolts Series

October 28, 2016



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FTC Structure

- Headed by 5 Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term
- One Commissioner chosen by President to act as Chairman
- No more than three Commissioners can be of the same political party
- Organized into three bureaus: Competition, Consumer Protection, and Economics
- Bureau of Consumer Protection responsible for enforcing consumer protection laws, including by preventing unfair, deceptive or fraudulent trade practices

Current FTC Commissioners



Edith Ramirez

Chairwoman

Sworn in: April 5, 2010

Designated Chairwoman: March 4, 2013

[Biography](#) | [Speeches, Articles, & Testimony](#) | [Twitter](#)



Maureen K. Ohlhausen

Commissioner

Sworn in: April 4, 2012

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Terrell McSweeney

Commissioner

Sworn in: April 28, 2014

[Biography](#) | [Speeches, Articles, & Testimony](#) | [Twitter](#)

The Commission

Competition

Consumer Protection

Advertising
Practices

Enforcement

Financial
Practices

Marketing
Practices

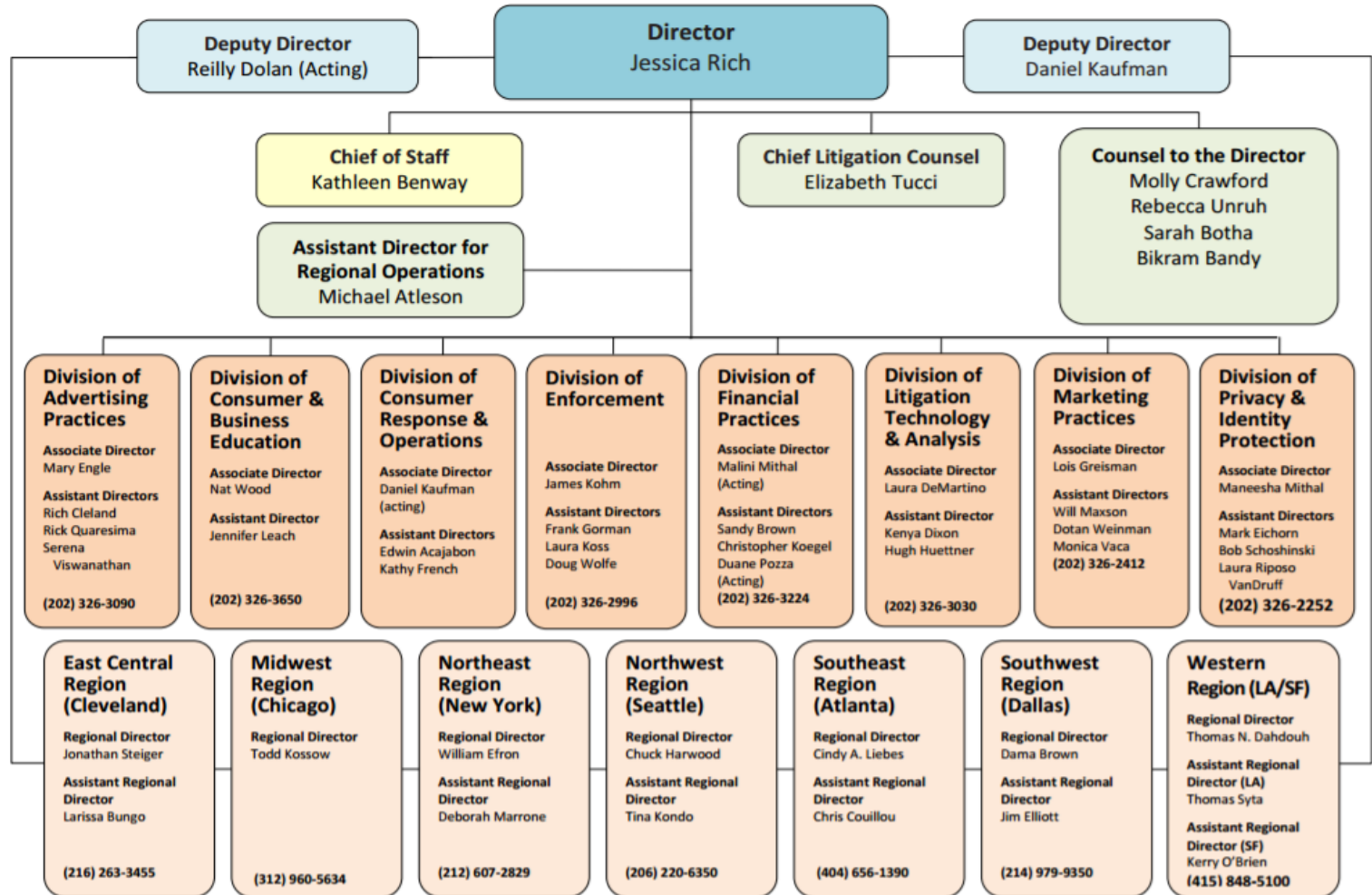
Privacy &
Identity
Protection

Regions

**Federal Trade Commission
Bureau of Consumer Protection**

Updated 10/06/16

File a Complaint
ftc.gov/complaint
877-FTC-HELP



The FTC Act

- The FTC is an independent law enforcement agency with a broad mandate to stop deceptive and unfair practices in commerce.
- The FTC Act, 15 U.S.C. § 41 *et seq.*:
 - Section 5 prohibits unfair or deceptive acts or practices, and
 - Section 12 prohibits false advertising likely to induce the purchase of foods, drugs, and devices.

FTC Act, Section 5

- When is an ad unfair?
 - It causes or is likely to cause substantial consumer injury (physical or economic);
 - Which is not reasonably avoidable by consumers themselves;
 - And is not outweighed by benefits to consumers or to competition.
- When is an ad deceptive?
 - A representation, omission, or practice;
 - That is likely to mislead consumers acting reasonably under the circumstances;
 - And that representation, omission, or practice is material to consumers.



Consumer Financial
Protection Bureau



National Association *of* Attorneys General

FTC Cooperation Agreements and MOUs with Other Agencies and International Entities

Cooperation Agreements

All FTC cooperation agreements can be classified as either U.S. interagency agreements or international agreements.


Displaying 1 - 20 of 46

Memorandum of Understanding on Consumer Protection Between the Federal Trade Commission and the Federal Communications Commission

DATE: November 2015

MATTER NUMBER: P974405

RELATED RELEASE: [FTC and FCC Sign Memorandum of Understanding For Continued Cooperation on Consumer Protection Issues](#)

 [Memorandum of Understanding on Consumer Protection Between the Federal Trade Commission and the Federal Communications Commission \(48.7 KB\)](#)

Memorandum of Understanding On Consumer Protection Matters Between The State Administration for Industry and Commerce of The People's Republic of China and the Federal Trade Commission of the United States of America

Memorandum of Understanding On Consumer Protection Matters Between The State Administration for Industry and Commerce of The People's Republic of China and the Federal Trade Commission of the United States of America

DATE: June 2007

RELATED RELEASE: [FTC Signs Memorandum of Understanding with China's Consumer Protection Agency](#)

 [Text of the Memorandum of Understanding \(34.42 KB\)](#)

FTC and CFPB Interagency Cooperation Agreement

Interagency Cooperation Agreement and MOU: Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission To Ensure Effective Cooperation To Protect Consumers, Prevent Duplication of Efforts, Provide Consistency, and Ensure A Vibrant Marketplace For Consumer Financial Products and Services

DATE: March 2015

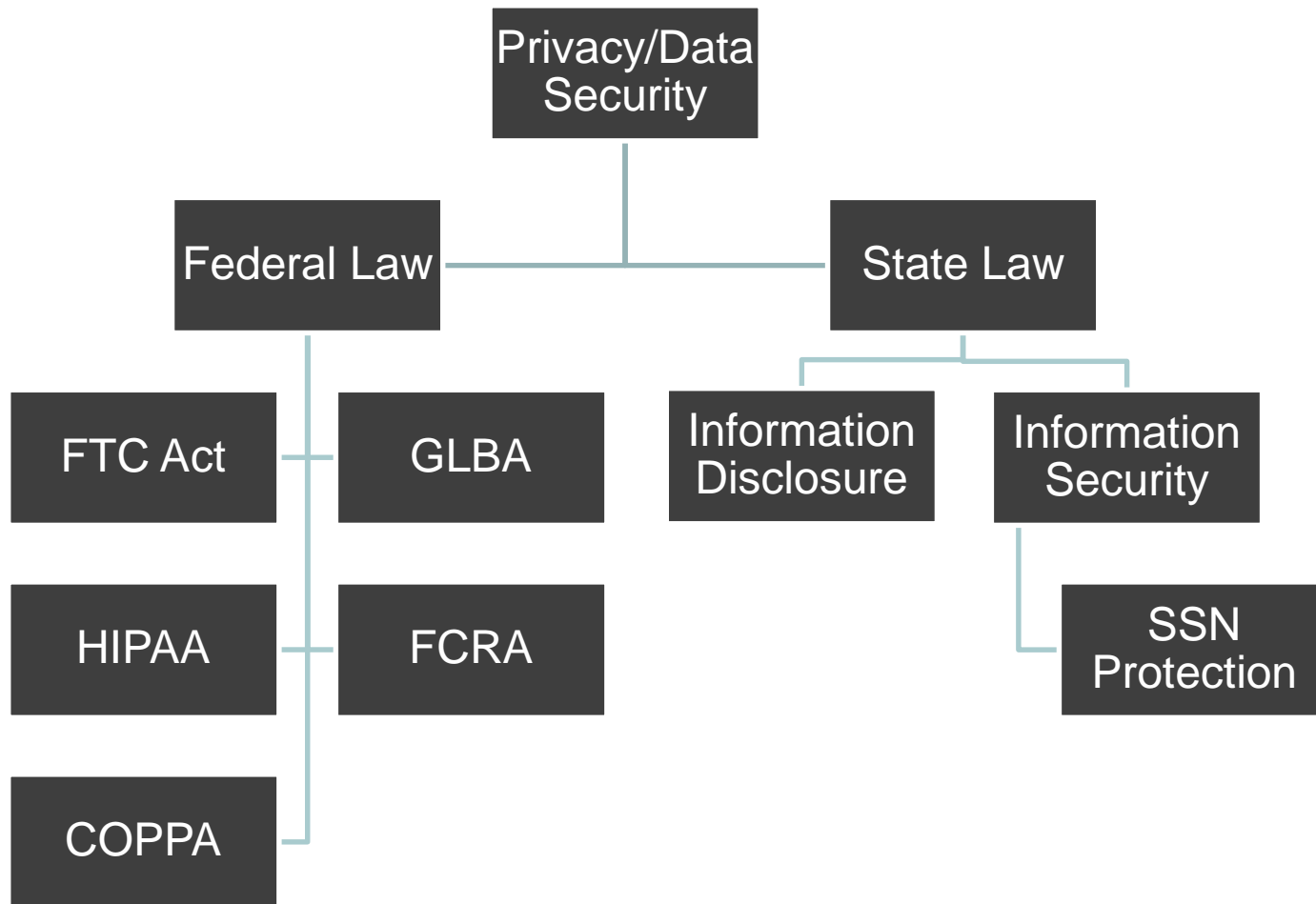
Representative FTC Policy Statements and Guides

- Policy Statement on Deception
- Policy Statement on Unfairness
- Policy Statement Regarding Advertising Substantiation
- Enforcement Policy Statement on Food Advertising
- Statement of Policy Regarding Comparative Advertising
- Enforcement Policy Statement on U.S. Origin Claims
- Guides for the Use of Environmental Marketing Claims (Green Guides)
- Dietary Supplements: An Advertising Guide for Industry
- Guides Concerning the Use of Endorsements and Testimonials

FTC Act – Privacy

- No single law governs privacy and data security in the United States
- Examples:
 - Section 5 – Prohibits deceptive or unfair acts or practices generally
 - Fair Credit Reporting Act (FCRA) – Protects privacy of consumer reports
 - Gramm-Leach-Bliley Act (GLBA) – Protects nonpublic personal financial information
 - Children’s Online Privacy Protection Act (COPPA) – Gives parents control over types of information that websites can collect from their children under age 13

Patchwork of Privacy/Data Security Laws



FTC Rulemaking Authority

- Section 18 of the FTC Act provides authority for FTC to prescribe:
 - “interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce”
 - “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce

FTC Rulemaking Authority

- Section 18 added by the Magnuson-Moss Warranty-FTC Improvement Act of 1975
 - Rulemaking previous initiated under Section 6(g), subsequently limited to rulemaking in connection with unfair methods of competition
- Added rulemaking procedures beyond APA, enhanced process due to affected industry members, provided for judicial review of a rule's legality, and authorized Commission to seek civil penalties for rule violations

FTC Rulemaking Authority

- Congress later curtailed FTC rulemaking authority by including some carve-outs in response to controversial rulemakings:
 - “The Commission shall not have any authority to promulgate any rule in the children’s advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.”
 - “The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”

Selected FTC Rules

- Business Opportunity Rule, 16 CFR Part 437
- Care Labeling Rule, 16 CFR Part 423
- Cooling Off Rule, 16 CFR Part 429
- Deceptive Pricing Rule, 16 CFR Part 233
- Disposal of Consumer Report Information and Records, 16 CFR Part 682
- Franchise Rule, 16 CFR Parts 436 and 437
- Mail, Internet, or Telephone Order Merchandise Rule, 16 CFR Part 435
- Safeguards Rule, 16 CFR Part 314
- Telemarketing Sales Rule, 16 CFR Part 310
- Textile Fiber Rule, 16 CFR Part 303

FTC Investigative Authority

- May issue informal information requests or use compulsory process
- Primary method of compulsory process in CP matters: Civil Investigative Demand (CID) under Section 20 of the FTC Act
 - Added under FTC Improvements Act of 1980
 - Authorized “[w]henver the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section [45 \(a\)\(1\)](#) of this title), or to antitrust violations”

FTC Investigative Authority – CIDs

- CID may require production of materials, oral testimony, the filing of written reports or answers to questions, or any combination thereof. 15 U.S.C. Sec. 57b-1(c)(1)
- Recipients can seek an extension of time to comply with a CID and/or seek to arrange a timetable for responses
- Recipients of a CID may file a petition for an order by the Commission modifying or setting aside the CID within 20 days of service

FTC Investigative Authority – CIDs

- CIDs will generally be enforced unless shown to be:
 - Too vague or indefinite
 - Overly broad or burdensome
 - Irrelevant to the investigation
 - Outside the scope of the FTC's authority

FTC Investigative Authority – Annual or Special Reports

- Section 6(b) of the FTC empowers FTC to prescribe:
 - annual or special reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing
- Need not relate to a specific law enforcement purpose

FTC Enforcement Authority

- Two primary types of CP enforcement:
 - Administrative enforcement under section 5(b) of the FTC Act
 - Judicial enforcement under section 13(b) or section 19 of the FTC Act
- Certain entities exempt from enforcement
 - Banks, savings and loan institutions, and federal credit unions
 - With some caveats, common carriers and non-profits

Administrative Enforcement

- Administrative complaints filed by the Commission and adjudicated before an ALJ
- Commission staff prosecute case as “complaint counsel” before ALJ
- Respondent has 14 days from the date the complaint is served to file an answer
- ALJ issues “initial decision” setting forth findings of fact and conclusions of law
- Decision becomes effective 60 days after service and terminates 20 years from date of issuance

Judicial Enforcement

- More regularly, the FTC brings an action in federal court seeking injunctive or other equitable relief under Section 13(b)
- Section 13(b) added in 1973, originally expected to be used primarily for merger enforcement
- Beginning in the early 1980s, the Commission began relying on the provision to seek various kinds of monetary equitable relief
 - FTC not typically authorized to seek exemplary or punitive damages

Judicial Enforcement – Types of Relief Sought

- Courts have held that Section 13(b) authorizes “any ancillary relief necessary to accomplish complete justice”
- FTC may seek:
 - Consumer redress
 - Disgorgement
 - Fencing-in provisions to prevent future violations
 - Provisions must be reasonably related to the alleged violation and not excessively stifle lawful conduct
 - BUT FTC has successfully sought expansive injunctive provisions including banning respondents from an entire industry permanently or for specified periods of time

Typical FTC Order Requirements

- Fencing-in provisions related to violations of FTC Act or other FTC-enforced statutes
- Compliance monitoring
- Compliance reporting
- Recordkeeping
- Order acknowledgments

Enforcing Final Orders

- FTC authorized to seek civil penalties for violations of final orders and FTC rules
- FTC can seek civil contempt for violation of federal court orders

International Investigation and Enforcement Issues

- SAFE WEB Act authorizes FTC to exercise jurisdiction over foreign commerce that either
 - causes or is likely to cause reasonably foreseeable injury within the United States; or
 - involves material conduct occurring within the United States.” 15 U.S.C. § 45(a)(4)(A).
- FTC typically only brings enforcement actions with clear nexus to U.S. conduct or consumer harm
- Also authorized to share confidential information with foreign law enforcement agency subject to certain safeguards

Notable Recent Cases



Notable Recent Cases



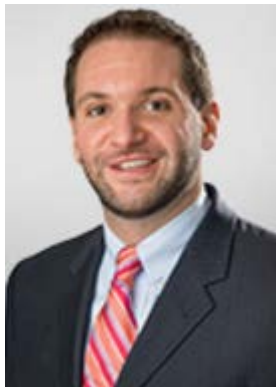
Notable Recent Cases

The Amazon logo, featuring the word "amazon" in a bold, black, lowercase sans-serif font. Below the text is a curved orange arrow that starts under the letter 'a' and points to the right, ending under the letter 'n'.

QUESTIONS?



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