

FTC TRENDS IN CONSUMER PROTECTION

Margaret Krawiec, Ivan Schlager,** Neepa Mehta,† Keyawna Griffith,‡ and Lotus Ryan§*

The Federal Trade Commission (FTC or Commission) has continued to aggressively enforce consumer protection laws under President Trump's administration. Indeed, while the number of enforcement actions at many major federal agencies decreased significantly during the Trump administration, enforcement activity at the Commission held steady. While we expect the FTC to continue at a similar pace in 2019, significant recent leadership changes at the Commission have created some degree of uncertainty. Specifically, all five of the FTC's current commissioners assumed their positions in 2018.¹ Additionally, the

* Litigation partner in Skadden's Washington, D.C. office. She has represented clients in connection with U.S. Department of Justice investigations, state attorney general investigations, investigations by various congressional committees, matters before federal agencies and complex civil litigation. Ms. Krawiec has notable experience handling consumer protection investigations conducted by both the Federal Trade Commission and state attorneys general offices.

** Head of Skadden's National Security practice in Washington, D.C. He provides counsel on structuring, negotiating and documenting transactions to address regulatory issues including approval by the Committee on Foreign Investment in the United States (CFIUS). He also has assisted in the development of successful regulatory and legislative strategies for a number of major M&A transactions.

† Litigation and consumer financial services associate in Skadden's Washington, D.C. office. She represents clients in actions/investigations involving the Consumer Financial Protection Bureau, Office of the Comptroller of the Currency, and U.S. Department of Justice, as well as state attorneys general and financial regulators.

‡ Litigation associate in Skadden's Washington, D.C. office.

§ Litigation attorney in Skadden's Washington, D.C. office.

¹ The FTC welcomed five new Commissioners in 2018: Joseph J. Simons, who was sworn in on May 1, 2018 as Chairman, Noah Joshua Phillips, Rohit Chopra, and Rebecca Kelly Slaughter, who were sworn in on May 2, 2018, and Christine S. Wilson, who was sworn in on September 26, 2018. *Commissioners*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/commissioners>.

new director of the FTC's Bureau of Consumer Protection has generated some controversy given his extensive conflicts of interest based in part on his prior position as a partner at a large law firm.² Given this unprecedented level of turnover at the top, companies should closely monitor the FTC's consumer protection enforcement efforts to see what issues and industries are of particular interest to the new commissioners and consumer protection director.

Although these leadership changes may influence FTC direction, it is likely that the FTC will continue to focus on the practices underlying the agency's top consumer complaints, such as imposter scams, improper debt collection practices, and identity theft. We also expect the FTC to continue to focus on practices that harm vulnerable populations, such as the elderly, students, and military families.

We also expect more transparency from the Commission regarding the direction of its enforcement efforts, as the FTC recently began sharing aggregated consumer complaint data from its Consumer Sentinel Network on a quarterly basis rather than on an annual basis.³ Further, the FTC held a number of recent hearings identifying, among other things, consumer protection priorities going forward. For example, we expect additional data security and consumer privacy initiatives as a result of the FTC's ongoing Hearings on Competition and Consumer Protection in the 21st Century relating to new technologies and developments, including potential changes to the FTC's investigative and law enforcement processes.⁴ In June 2018, the FTC announced hearings to consider "whether broad-based changes in the

² According to financial disclosure documents, Andrew Smith is not allowed to participate in investigations or cases involving 121 companies. *See* Freedom of Information Act (FOIA) Appeal Letter from Heather Hipsley, Deputy Gen. Counsel, Fed. Trade Comm'n, to Remington Gregg, Counsel for Civil Justice and Consumer Rights, Pub. Citizen, Inc. (Nov. 30, 2018), available at https://www.citizen.org/sites/default/files/andrew_smith_foia_appeal_response_11_30.pdf.

³ Press Release, Fed. Trade Comm'n, FTC is Making Consumer Complaint Data More Accessible (Oct. 16, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/10/ftc-making-consumer-complaint-data-more-accessible>.

⁴ Press Release, Fed. Trade Comm'n, FTC Announces Hearings on Competition and Consumer Protection in the 21st Century (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st> (on file with Fed. Trade Comm'n).

economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy.”⁵ The first hearing took place in September 2018, additional hearings followed, and more are expected in 2019.⁶ Of note, the FTC held a hearing on data security on December 11-12, 2018, and a hearing on consumer privacy will be held on April 9-10, 2019.⁷

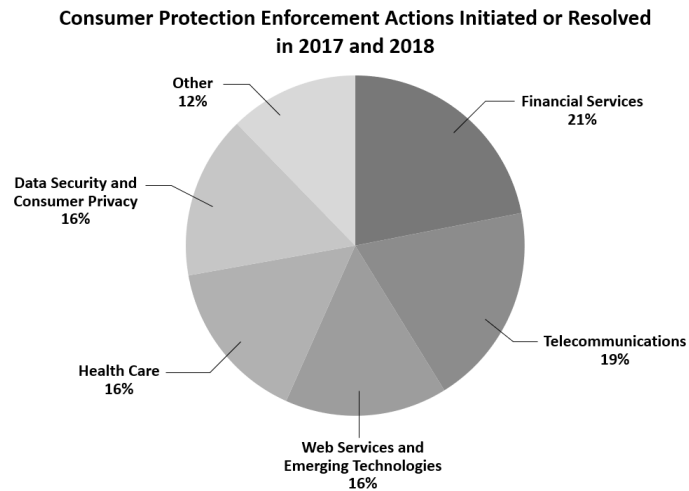
Looking ahead, and as discussed below, we expect the FTC to focus significant enforcement, regulatory, and public outreach efforts in five industries or markets: financial services, web services and emerging technologies, data security and consumer privacy, telecommunications, and health care. Indeed, the FTC initiated or resolved approximately 187 actions alleging violations of the prohibition against unfair or deceptive acts or practices and other statutory violations in 2017 and 2018, and 88% of these matters were from these five industries.⁸

⁵ *Id.*

⁶ *Hearings on Competition and Consumer Protection in the 21st Century*, FED. TRADE COMM’N, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>, (on file with Fed. Trade Comm’n).

⁷ *Id.*

⁸ Relevant actions for this article include cases from the FTC’s website that were identified by press releases, court documents, and administrative documents as having been filed or settled in 2017 or 2018. Due to limitations in the website’s functionality, this article does not purport to include all relevant actions. Further, we have categorized the cases into these five industries based on our review and analysis of the underlying actions. Because several actions arguably overlap industries, we classified the cases based on our assessment of their primary allegations. For example, actions categorized in the telecommunications industry primarily involve telemarketing schemes, although cases with telemarketing allegations appear in all industries.



- ***Financial Services.*** The financial services industry faced significant FTC scrutiny, with the Commission pursuing the most consumer protection actions in this industry and among the highest monetary judgments. We expect the FTC to continue to try to distinguish itself from the Consumer Financial Protection Bureau (CFPB) as it pursues enforcement actions against nonbank financial services companies, such as debt relief providers and payday lenders as well as payment processors and money transfer companies.
- ***Web Services and Emerging Technologies.*** We expect the FTC to continue to focus on online businesses and deceptive practices in online advertising, such as practices that might confuse consumers by blending news, entertainment, and editorial content. The Commission is also expected to closely monitor internet service providers (ISP) after the Federal Communication Commission (FCC) rolled back its net neutrality rules. Fraud in emerging technologies, such as cryptocurrency, will also be a major focus.
- ***Data Security and Consumer Privacy.*** The FTC will likely continue to position itself as the primary enforcer in connection with data security and consumer privacy issues. Indeed, the Commission has been vocal in public statements that it wants to enhance its enforcement and regulatory powers in this area, including by lobbying for federal data security/breach notification and privacy legislation enforced by the

Commission. We expect the FTC to continue its public outreach and education efforts in this area as well.

- **Telecommunications.** Illegal telemarketing robocalls continue to top the FTC's complaints, so we expect the FTC to spend significant resources to address these and other telemarketing scams. We also expect the FTC to continue to both partner with the FCC on initiatives in this area and lobby to eliminate the common carrier exemption under the FTC Act.
- **Health Care.** The FTC has been particularly concerned with addressing false or unsubstantiated health claims in connection with various products and services, such as treatments for serious illnesses and personal care products. We expect the FTC to continue to focus on these issues in 2019, particularly deceptive advertising in new formats and media.

Recent enforcement activity and indicators of expected future activity in each of these areas are summarized in more detail below.

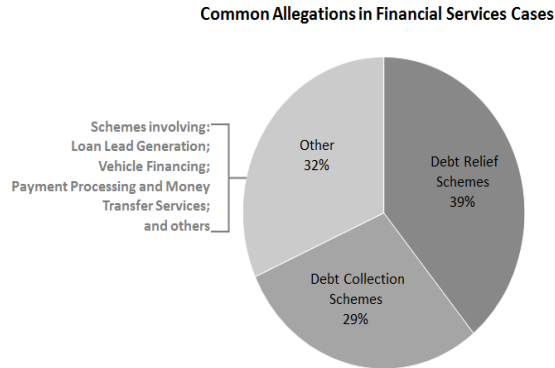
I. FINANCIAL SERVICES

Enforcement. The FTC pursued the most consumer protection actions and obtained among the highest monetary judgments in the financial services industry. The Commission initiated or resolved approximately forty-one actions in 2017 and 2018 against nonbank entities that provide financial services, including companies that facilitate financial transactions. Thirty-nine cases were litigated in court, with California and Florida among the most common jurisdictions. The FTC partnered with state attorneys general in six financial services actions. The Commission particularly focused on debt collection and relief operations, which represented about 70% of the actions in this industry. In addition to companies, the FTC pursued enforcement actions against eighty-five individuals.

CASE TYPE	STATE AG PLAINTIFFS	COMMON JURISDICTIONS	INDIVIDUALS NAMED	COMMON STATUTORY VIOLATIONS
<ul style="list-style-type: none"> • 39 Litigated • 2 Administrative 	<ul style="list-style-type: none"> • 6 Cases Total: • 3 State AG of FL • 2 State AG of NY • 1 State AG of IL 	<ul style="list-style-type: none"> • 9 C.D. CA • 4 S.D. FL • 3 W.D. NY • 3 N.D. IL • 3 N.D. CA • 3 E.D. TX • 3 District of AZ 	<ul style="list-style-type: none"> • 85 Total, including: • Owners • Managers • Directors • CEOs • Officers • Presidents • Vice Presidents • Members • Principal • Registered Agent • Managing Attorneys • (overlap among positions) 	<ul style="list-style-type: none"> • 40 15 U.S.C. § 45(a) (Unfair or deceptive acts or practices) • 15 Telemarketing Sales Rule (16 C.F.R. Part 310)

Most of these actions alleged violations of Section 5 of the FTC Act. Of particular note:

- The Commission pursued sixteen actions against debt relief businesses—ten targeting student loans and four targeting mortgages.
- The FTC initiated or resolved twelve actions involving debt collection schemes, of which nine involved companies that allegedly pursued collection of debts that the consumers did not owe, so-called “phantom debts,” or debts that the defendants had no authority to collect.
- Five actions involved deceptive claims about the cost of financing vehicles.
- Four actions involved companies that aided so-called fraudsters by knowingly or blindly processing their payments. Two of these matters involved prominent money transfer companies that allegedly failed to take necessary steps to identify and report potential fraudulent and money-laundering activities on their platforms.
- One action involved claims that companies sold personal information on loan applications as “leads” to different entities without consumers’ knowledge or consent.



Of the approximately thirty-two financial services cases that the FTC resolved or partially resolved in 2017 and 2018:

- The FTC reached settlements agreements with some or all defendants in twenty-seven cases. The FTC prevailed against the other defendants on summary judgment, default judgment, or a combination of the two.
- The FTC obtained monetary judgments in all but one of these cases, ranging from roughly \$127,000 to \$586 million. Some judgment amounts were partially suspended due to inability to pay and other factors.
 - Twenty-nine of these judgments required equitable monetary relief, intended for consumer redress and the necessary expenses to administer the redress fund.
 - In two cases, civil penalties of \$700,000 and \$2 million were imposed.
- Companies were required to comply with several injunctive provisions going forward, such as refraining from deceptively advertising financial services.
- In about approximately half of the financial services cases, defendants were banned outright from engaging in certain debt relief, debt collection, telemarketing, and payment processing activities.

Significant FTC actions included the following:

Debt relief services: Nearly 40% of the financial services actions initiated or resolved in 2017 and 2018 involved companies offering debt relief services—most of which involved student debt or mortgage relief. Consistent with its focus on vulnerable populations, the FTC, in October 2017, announced “Operation

Game of Loans,” the first coordinated federal-state initiative focused on deceptive student loan debt relief practices.⁹ As part of this effort, the FTC and state attorneys general filed at least thirty-six actions across the country, including ten brought by the FTC. Defendants in these cases allegedly charged illegal upfront fees, made false promises to reduce or forgive student loan debt, and pretended to be affiliated with the government or loan servicers in violation of the FTC Act and often the FTC’s Telemarketing Sales Rule.

- For example, in October 2017, the FTC and the State of Florida, after prevailing on summary judgment, obtained a \$35 million monetary judgment against operators of a student loan debt relief enterprise that allegedly tricked consumers into paying unlawful upfront fees.¹⁰
- The same month, the FTC settled with a student debt relief enterprise that allegedly pretended to be affiliated with the U.S. Department of Education and forced consumers to pay illegal upfront fees. The settlement required a \$23 million judgment, which was eligible for partial suspension.¹¹

The FTC also pursued numerous actions against mortgage relief and other debt relief operations. Notably, the FTC and the State of Florida obtained an \$85 million judgment—of which the government was expected to collect \$35 million in assets—against telemarketers who allegedly sold phony debt relief and credit improvement products which left consumers with “debts unpaid, their accounts in default, and their credit scores lower.”¹²

⁹ Press Release, Fed. Trade Comm’n, FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams, (Oct. 13, 2017), available at <http://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown> (hereinafter “Operation Game of Loans Press Release”).

¹⁰ Fed. Trade Comm’n et al. v. Student Aid Center, Inc. et al., No. 1:16-cv-21843-CIV-MORENO (S.D. Fla. Aug. 31, 2017) (order granting summary judgment); Operation Game of Loans Press Release, *supra* note 9.

¹¹ Fed. Trade Comm’n v. American Student Loan Consolidators, LLC et al., No. 17-cv-61862-CIV-GAYLES (S.D. Fla. Nov. 30, 2017) (stipulated final order granting monetary judgment); Press Release, Fed. Trade Comm’n, FTC Settlements Will Ban Student Loan Debt Relief Operators From Engaging in Debt Relief Services (Dec. 7, 2017), available at <https://www.ftc.gov/news-events/press-releases/2018/12/ftc-settlements-will-ban-student-loan-debt-relief-operators>.

¹² Fed. Trade Comm’n v. Jeremy Lee Marcus et al., No. 17-cv-60907-CIV-MORENO (S.D. Fla. Apr. 12, 2018) (proposed stipulated order for permanent injunction); Press Release, Fed. Trade Comm’n, Debt Relief

Defendants also were banned from selling debt relief products and telemarketing.

Debt collection practices: Almost 30% of the financial services cases in 2017 and 2018 involved debt collection. The FTC continued the efforts of 2015's "Operation Collection Protection," in which the FTC coordinated with law enforcement authorities across the country to target unlawful debt collection practices and enforce the Fair Debt Collection Practices Act.¹³

- For example, the FTC obtained a default judgment of over \$4.1 million against defendants who allegedly sold fake payday loan debt portfolios. The defendants were banned from handling certain sensitive financial information.¹⁴
- In a settlement with the FTC and the Illinois Attorney General, operators of a fake debt operation that allegedly required consumers to pay debts they did not owe were subject to a \$47 million judgment (subject to partial suspension after the surrender of approximately \$9 million of assets). The defendants also were permanently banned from debt collection activities.¹⁵

Vehicle financing: The Commission also targeted companies that allegedly misled consumers about the costs of financing vehicles.

Scammers Settle with FTC and Florida; Will Submit \$35 Million in Assets for Consumer Redress (Apr. 12, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/04/debt-relief-scammers-settle-ftc-florida-will-submit-35-million>.

¹³ Press Release, Fed. Trade Comm'n, FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown Against Abusive Debt Collectors (Nov. 4, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce>.

¹⁴ Default Judgement, Fed. Trade Comm'n v. Tucker et al., No. 2:16-cv-02816-JAR-JPO (D. Kan. Sept. 20, 2017); Press Release, Fed. Trade Comm'n, FTC Obtains Court Order Against Scheme that Sold Fake Payday Loan Debt Portfolios (Oct. 17, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/10/ftc-obtains-court-order-against-scheme-sold-fake-payday-loan-debt>.

¹⁵ Stipulated Final J. & Order for Permanent Inj. & Other Equitable Relief, Fed. Trade Comm'n v. Stark Law, LLC et al., No. 1:16-cv-03463 (N.D. Ill. Oct. 27, 2017); Press Release, Fed. Trade Comm'n, FTC Settlements Ban Chicago-area Phantom Debt Collector from the Debt Collection Business and from Selling Debt Portfolios (Nov. 1, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/11/ftc-settlements-ban-chicago-area-phantom-debt-collector-debt>.

- For example, in March 2017, nine auto dealerships agreed to pay more than \$3.6 million to resolve the FTC's allegations that they, among other things, "used deceptive and unfair sales and financing practices, deceptive advertising, and deceptive online reviews."¹⁶
- Additionally, in February 2017, a large ride-sharing technology company agreed to pay \$20 million to settle charges that it "misled prospective drivers about the terms of its vehicle financing options" and exaggerated income potential in certain cities.¹⁷
- In 2018, the FTC charged auto dealerships in Arizona and New Mexico with falsifying consumer's income and down payments on vehicle financing applications. Litigation is ongoing in this matter. This is the FTC's first action against auto dealers for falsifying income.¹⁸

Payment Processing and Money Transfer Companies: The FTC also has focused on payment processing and money transfer practices that can facilitate fraud. In testimony before two House Oversight and Government Reform Subcommittees, the FTC identified "[o]ne critical component of the FTC's efforts to fight fraud and illegal robocalls is challenging those unscrupulous payment processors that help fraudsters process payments in violation of the FTC Act."¹⁹ The FTC has separately commented

¹⁶ Stipulated Order for Permanent Inj. and Monetary J. As To Settling Defendants, Fed. Trade Comm'n v. Universal City Nissan, Inc. et al., No. 2:16-cv-07329-CAS(AJWx) (C.D. Cal. Mar. 22, 2017); Press Release, Fed. Trade Comm'n, Los Angeles-Based Sage Auto Group Will Pay \$3.6 Million to Settle FTC Charges (Mar. 14, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/03/los-angeles-based-sage-auto-group-will-pay-36-million-settle-ftc>.

¹⁷ Stipulated Order for Permanent Inj. and Monetary J., Fed. Trade Comm'n v. Uber Technologies, Inc., No. 3:17-cv-00261-JST (N.D. Cal. Feb. 2, 2017); Press Release, Fed. Trade Comm'n, Uber Agrees to Pay \$20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims (Jan. 19, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited>.

¹⁸ Complaint, Complaint for Preliminary and Permanent Injunction and Other Equitable Relief, Fed. Trade Comm'n v. Tate's Auto Center of Winslow, Inc. et al., No. 3:18-cv-08176-DJH (D. Ariz. Jul. 31, 2018); Press Release, Fed. Trade Comm'n, FTC Charges Auto Dealerships in Arizona and New Mexico with Falsifying Consumers' Information on Financing Documents (Aug. 1, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/08/ftc-charges-auto-dealerships-arizona-new-mexico-falsifying>.

¹⁹ Press Release, Fed. Trade Comm'n, FTC Testifies before Two House Oversight and Government Reform Subcommittees About the Agency's Work

that “[s]topping companies that assist and facilitate fraud is a top FTC priority.”²⁰ As part of this effort, the FTC pursued actions against two credit card laundering schemes as well as two prominent money transfer companies that failed to detect fraud on their platforms.

- In 2017, a global money services business agreed to pay \$586 million to settle claims by the FTC and Department of Justice (DOJ) that the company did not implement effective anti-fraud policies and procedures and failed to act promptly against agents who were complicit in fraudulent transfers.²¹
- Likewise, in 2018, a money transfer company agreed to pay \$125 million to resolve allegations that it failed to comply with a 2009 FTC order and a 2012 DOJ deferred prosecution agreement requiring it to implement a fraud prevention program.²²

Other Actions: Other notable actions in the financial services industry included:

- A 2017 settlement with a loan lead generation company and its chief executive officer in which they agreed to a judgment of approximately \$104 million, suspended due to inability to pay, to resolve allegations that they sold

to Combat Payment Processors Who Facilitate Fraud, (July 26, 2018), available at <http://www.ftc.gov/news-events/press-releases/2018/07/ftc-testifies-two-house-oversight-government-reform-subcommittees>.

²⁰ Press Release, Fed. Trade Comm’n, FTC Settlement Puts a Stop to Money Mule Who Profited from India-Based IRS and Other Scams (Feb. 15, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/02/ftc-settlement-puts-stop-money-mule-who-profited-india-based-irs>.

²¹ Stipulated Order for Permanent Inj. & Final J., Fed. Trade Comm’n v. The Western Union Co., No. 1:17-cv-110 (M.D. Pa. Jan. 20, 2017); Press Release, Fed. Trade Comm’n, Western Union Admits Anti-Money Laundering Violations and Settles Consumer Fraud Charges, Forfeits \$586 Million in Settlement with FTC and Justice Department (Jan. 19, 2017), available at <http://www.ftc.gov/news-events/press-releases/2017/01/western-union-admits-anti-money-laundering-violations-settles>.

²² Stipulated Order for Compensatory Relief & Modified Order for Permanent Inj., Fed. Trade Comm’n v. Moneygram Int’l, Inc., No. 1:09-cv-6576 (N.D. Ill. Nov. 8, 2018); Press Release, Fed. Trade Comm’n, MoneyGram Agrees to Pay \$125 Million to Settle Allegations that the Company Violated the FTC’s 2009 Order and Breached a 2012 DOJ Deferred Prosecution Agreement (Nov. 8, 2018), available at <http://www.ftc.gov/news-events/press-releases/2018/11/moneygram-agrees-pay-125-million-settle-allegations-company>.

consumers' sensitive data "to virtually anyone willing to pay for the leads."²³

- A complaint against an online lender for "falsely promising consumers they would receive a loan with 'no hidden fees,' when, in actuality, the company deducted hundreds or even thousands of dollars in hidden up-front fees from the loans."²⁴

Looking Ahead. The FTC has recently struggled to position itself in this industry because it shares concurrent jurisdiction with the CFPB over many nonbank financial services companies under various federal statutes and regulations. However, continued significant scrutiny from the FTC is expected in the financial services sector in five key ways.

First, Thomas Pahl, who was acting director of the FTC's Bureau of Consumer Protection until April 2018, indicated that the FTC would target fraudulent financial practices, not only in the FTC's traditional wheelhouse—such as debt collection, debt relief, and payday lending—but also practices "that support the ecosystem of fraud," such as money-transfer companies, payment processors, and loan lead generators.²⁵

Second, based on the FTC's comments and recent enforcement actions, we also expect the FTC to pursue enforcement actions where the FTC is the "main federal agency enforcer," such as under Section 5 of the FTC Act, and where the FTC has significant enforcement expertise, such as debt collection and debt relief.²⁶

Third, we expect the FTC to coordinate with the CFPB with respect to its enforcement activities against nonbank

²³ Stipulated Order for Permanent Inj. & Monetary J., Fed. Trade Comm'n v. Blue Global, LLC, and Christopher Kay, No. 2:17-cv-2117-ESW (D. Ariz. July 5, 2017); Press Release, Fed. Trade Comm'n, FTC Halts Operation That Unlawfully Shared and Sold Consumers' Sensitive Data (July 5, 2017), available at <http://www.ftc.gov/news-events/press-releases/2017/07/ftc-halts-operation-unlawfully-shared-sold-consumers-sensitive>.

²⁴ -Am. Compl., Fed. Trade Comm'n v. LendingClub Corp., No. 3:18-cv-02454 (N.D. Cal. Apr. 25, 2018); see also Press Release, Fed. Trade Comm'n, FTC Charges Lending Club with Deceiving Consumers (Apr. 25, 2018), available at <http://www.ftc.gov/news-events/press-releases/2018/04/ftc-charges-lending-club-deceiving-consumers-0>.

²⁵ Thomas B. Pahl, *The Future of Financial Services Enforcement at the FTC*, AM. BAR ASS'N, (Sept. 19, 2018), www.americanbar.org/groups/business_law/publications/blt/2017/09/08_pahl/

²⁶ *Id.*

entities. Mr. Pahl noted that the FTC would “allocate its enforcement resources” in part based on the “nature and scope of the CFPB’s activities.”²⁷ The FTC and CFPB entered into a Memorandum of Understanding in 2012 to allow the agencies to coordinate to prevent inconsistent standards and duplication of efforts. Based on Mr. Pahl’s comments and the FTC’s recent enforcement actions, we expect the FTC, as a general matter, to defer to the CFPB for matters against “larger market participants” (based on annual receipts) in certain industries, such as debt collection, where the CFPB can subject such entities to supervision and examination in addition to enforcement.²⁸

Fourth, the FTC also is likely to focus on emerging financial technologies that impact consumers and financial products and services, such as marketplace lending and blockchain technology. We expect the FTC to work closely with the CFPB to evaluate these new technologies and create guidelines for the industry.

Finally, as with other industries, we expect the FTC to continue to focus on fraudulent practices that cause the greatest monetary harm and practices that target vulnerable groups such as military consumers, students, non-English speakers, the elderly, and small businesses.

II. WEB SERVICES AND EMERGING TECHNOLOGIES

Enforcement. We expect the FTC to continue to position itself as a leader in overseeing web services and emerging technologies. The twenty-nine web services and emerging technologies actions comprise about 16% of the enforcement actions that the FTC initiated or resolved in 2017 and 2018. Most of the actions were litigated in court as opposed to an administrative process, with Nevada and California the most common jurisdictions for litigation. Three cases involved state attorneys general from Georgia, Minnesota, and Nevada. The web services and emerging technologies actions included various internet and mobile application-based businesses, including copycat government websites, online secondary schools, business coaching and other income generation operations, cryptocurrency, as well as online marketers of fake documents, lingerie, and hotel rooms. The FTC brought actions against

²⁷ *Id.*

²⁸ *Id.*

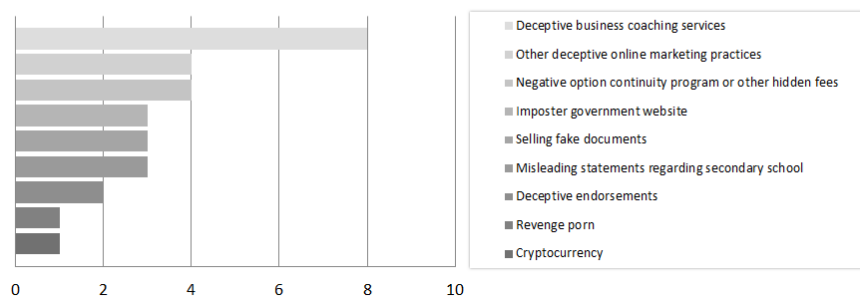
individuals in twenty-five actions, including seventy-one individuals.

CASETYPE	STATE AG s	COMMON JURISDICTIONS	INDIVIDUALS NAMED	COMMON STATUTORY VIOLATIONS
<ul style="list-style-type: none"> • 26 Litigated • 3 Administrative 	<ul style="list-style-type: none"> • 3 Cases Total: • 1 State AG of GA • 3 State AG of MN • 2 State AG of NV 	<ul style="list-style-type: none"> • 4 District of NV • 3 C.D. CA 	<ul style="list-style-type: none"> • 71 Total, including: • Owners • Managers • Directors • Presidents • CEOs 	<ul style="list-style-type: none"> • 28 15 U.S.C. § 45(a) Unfair or deceptive acts or practices) • 4 Restore Online Shoppers' Confidence Act (15 U.S.C. §§ 8403 - 8404)

The most common allegations included making false income promises to consumers regarding online business coaching and related services, misrepresenting the legitimacy of online secondary programs, enrolling consumers in negative option continuity programs without their consent or otherwise charging hidden fees, selling fake documents (enabling identity theft), and operating copycat government websites to obtain fees or personal data from consumers.

Most of the actions involved claims under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. The Commission sought injunctions and restraining orders under 15 U.S.C. § 53(b) in approximately twenty-six cases. For example, the FTC enjoined practices such as posting pictures and personal information without consent on a revenge porn website and inducing consumers to pay for unordered internet services under Section 53(b).

Common Allegations in Web Services and Emerging Technologies Cases



Of the approximately twenty-six actions that the FTC resolved or partially resolved in 2017 and 2018:

- The FTC settled with some or all defendants in twenty-four actions. Courts granted the Commission's motions for default judgment in two cases, summary judgment in one case, and a post-trial judgment in one case.
- The FTC obtained monetary judgments in twenty-two cases, ranging from approximately \$15,000 to over \$318 million, with some amounts suspended for inability to pay and other factors. Of these, the court ordered civil penalties in two cases and the rest required equitable relief including consumer redress.
- Companies were subject to various types of injunctive provisions going forward, such as requirements to make accurate claims about earnings potential and educational program certifications and prohibitions against using consumers' personal information for profit.
- In eleven actions, the defendants were banned from practicing in various sectors of the web industry such as selling business coaching services.

Notable cases in 2017 and 2018 included:

- A settlement resolving the FTC's first-ever complaint against social media influencers. The FTC alleged that the influencers failed to disclose that they jointly owned an online gambling service that they endorsed to their social media network and paid other well-known influencers to endorse as well.²⁹ While no monetary relief was required, the influencers agreed to provide clear and conspicuous disclosures of affiliations between endorsers and products going forward.³⁰

²⁹ Decision and Order, *In re CSGOLOTTO, Inc. et al.*, No. C-162-3184 (Nov. 28, 2017); Press Release, Fed. Trade Comm'n, *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers* (Sept. 7, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.

³⁰ Press Release, Fed. Trade Comm'n, *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, (Sept. 7, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.

Notably, on the same day as this settlement, the FTC also issued a press release cautioning influencers that the FTC had sent ninety educational letters and twenty-one follow-up "warning" letters to influencers regarding disclosure of "material connection" to marketers and advising that the FTC had updated

- Two settlements totaling \$9.5 million and \$1 million (both of which were eligible for partial suspension after surrendering certain assets), with the operators of online “high schools” that allegedly misled consumers that their programs were properly accredited.³¹ The defendants were also banned from marketing or selling academic degree programs.
- A settlement involving operators of a copycat government website that agreed to pay \$2.2 million to resolve allegations they falsely implied association with the U.S. Citizenship and Immigration Service while offering immigration services for a fee.³²
- A settlement involving “a massive internet marketing and business coaching scheme” that required a \$318 million monetary judgment (eligible for partial suspension upon payment of \$33,400) for allegedly making false income promises.³³ The defendant was banned from marketing and selling business coaching and investment opportunity products and services.³⁴

Looking Ahead. We expect the FTC to continue to focus on online scams and deceptive practices in online advertising.

its endorsement guide to provide detailed instruction for social media platforms. *see* Lesley Fair, *Three FTC actions of interest to influencers*, FTC BUSINESS BLOG (Sep. 7, 2017) available at <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers>.

³¹ Stipulated Final Order For Permanent Inj. And Settlement Of Claims As To Defs. Capitol Network Distance Learning Programs, LLC, Capital Network Digital Licensing Programs, LLC, And Nicholas Pollicino, In Re Capitol Network Distance Learning Programs, LLC, No. 2:16-cv-00350-DJH (D. Ariz. Feb. 13, 2017); Press Release, Operators of Online ‘High Schools’ Settle FTC Charges That They Misled Tens of Thousands Consumers with Fake Diplomas (Feb. 10, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/02/operators-online-high-schools-settle-ftc-charges-they-misled-tens>.

³² Stipulated Final Order for Permanent Inj. and Monetary J., Fed Trade Comm’n v. Forms Direct, Inc., No. 4:18-cv-06294-JSW (N.D. Cal. Dec. 7, 2018); Press Release, Fed. Trade Comm’n, American Immigration Center Settles with FTC on Government Imposter Allegations (Oct. 16, 2018) available at <https://www.ftc.gov/news-events/press-releases/2018/10/american-immigration-center-settles-ftc-government-imposter>.

³³ Order, In Re MOBE LTD., No. 6:18-cv-00862-RBD-DCI (M.D. FL Dec. 6, 2018); Press Release, Fed. Trade Comm’n, Defendant in Fraudulent Business Coaching Scheme Settles with FTC (Dec. 10, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/12/defendant-fraudulent-business-coaching-scheme-settles-ftc>.

³⁴ *Id.*

The FTC has expressed concern with online advertising that is confusing to consumers (such as the “blending” of advertising with news, entertainment, editorial, or educational content). Although an issue across industries, it appears to be most prevalent in the marketing of web services. The FTC has noted that it will closely examine “consumer protection issues raised by sponsored content, ‘native’ advertising that looks like surrounding non-commercial content, and endorsements.”³⁵ We also expect the FTC to continue to focus on multilevel marketing, including so-called “pyramid schemes” or “business and income opportunities” that emphasize recruiting more participants rather than selling goods or services based on consumer demand. Another expected area of focus is fraud in emerging technologies, such as cryptocurrency.

The FTC also is expected to investigate and take enforcement actions against ISPs regarding their broadband services in light of the FCC’s December 2017 Restoring Internet Freedom Order.³⁶ The Order—which controversially rolled back the FCC’s net neutrality rules—returns jurisdiction to the FTC to regulate the conduct of ISPs, which the FCC had previously classified as common carriers. The FTC has stated that it will “monitor consumer complaints about ISPs, and will take appropriate action against deceptive ISP advertising or other unfair or deceptive ISP practices.”³⁷

III. DATA SECURITY AND CONSUMER PRIVACY

Enforcement. The FTC has spent significant resources addressing consumer protection issues in consumer privacy and data security, having initiated or resolved approximately twenty-nine data security actions in 2017 and 2018. More than half of the actions were administrative enforcement actions. The FTC brought six actions in conjunction with state attorneys general. Relevant actions targeted companies across many industries including online technology support, smart televisions, electronic toys, background screening, cybersecurity software, online

³⁵ FTC Fiscal Year 2018 Agency Financial Report, *infra* note 68 at 30.

³⁶ Press Release, Fed. Trade Comm’n, FTC, FCC Outline Agreement to Coordinate Online Consumer Protection Efforts Following Adoption of The Restoring Internet Freedom Order (Dec. 11, 2017) available at <http://www.ftc.gov/news-events/press-releases/2017/12/ftc-fcc-outline-agreement-coordinate-online-consumer-protection>.

³⁷ FTC Fiscal Year 2018 Agency Financial Report, *infra* note 68 at 27.

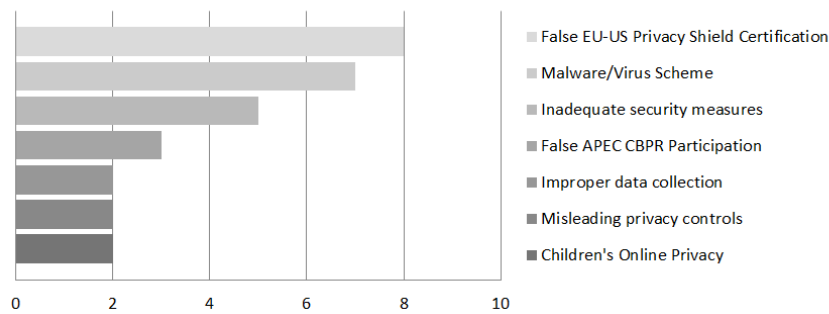
training services, data analytics, ride-sharing, talent management and recruitment services, and cloud-based technology platform services. The Commission pursued actions against individuals in seven of the twenty-nine cases, naming twenty-eight individuals overall.

CASE TYPE	INJUNCTIONS	STATE AG s	INDIVIDUALS NAMED	COMMON STATUTORY VIOLATIONS
<ul style="list-style-type: none"> • 17 Administrative • 12 Litigated 	<ul style="list-style-type: none"> • FTC obtained permanent bans in 5 matters • All involved computer virus and malware schemes 	<ul style="list-style-type: none"> • 6 Cases Total: • 2 State AG of FL • 1 State AG of PA • 1 State AG of CT • 1 State AG of AL • 1 State AG of NJ • 1 State AG of OH 	<ul style="list-style-type: none"> • 28 Total, including: • Owners • Officers • Managers • Directors • Members • Partners • Registered Agent • (overlap among positions) 	<ul style="list-style-type: none"> • 26 15 U.S.C. § 45(a) (Unfair or deceptive acts or practices) • 2 Children's Online Privacy Protection Act • 2 Privacy of Consumer Financial Information (15 U.S.C. §§ 6801-6803)

The FTC pursued most of the data security and consumer privacy actions under Section 5 of the FTC Act. Specifically, the Commission alleged that companies provided false warnings of viruses and malware infecting computers in seven actions, collected data without consumer knowledge or consent in two actions, and failed to take steps to address known and preventable security flaws in five actions.

The Commission also targeted companies that claimed to be certified under certain privacy certifications. For example, the FTC pursued eight actions alleging false claims of certification under the EU-U.S. Privacy Shield, which allows companies to transfer consumer data from the European Union to the United States. Similarly, the Commission pursued three actions alleging companies made deceptive statements regarding their participation in the Asia-Pacific Economic Cooperation (APEC) Cross Border Privacy Rules (CBPR), which is a voluntary enforceable program that allows personal information to flow freely across APEC member borders.

Common Allegations Data Security and Consumer Privacy Cases



Of the approximately twenty-seven actions that the FTC resolved in 2017 and 2018:

- The Commission resolved twenty-five actions by settlement. The remaining two actions were resolved partially by settlement and partially by default judgment.
- Monetary judgments were required in approximately ten actions, ranging from around \$35,000 to over \$27 million, with some amounts were suspended due to inability to pay and other factors. Civil penalties were ordered in four cases, including a \$915,940 civil penalty to a state agency. The remaining cases required monetary equitable relief, with the money to be used for consumer redress and related expenses.
- Companies were subject to various injunctive provisions going forward, including requirements to apply the Privacy Shield protections to personal information collected and to create and implement comprehensive privacy programs.
- Defendants in six cases were subject to outright bans, including bans from marketing or promoting any technical support products and telemarketing activities. These cases all involved computer virus and malware schemes.

Some of the FTC's notable consumer privacy and data security actions in 2017 and 2018 included:

- An expanded settlement with a large ride-sharing technology company resolving allegations that the company failed to secure customer data, failed to monitor employees' access to customer data, and failed to disclose a data breach to consumers or the FTC for more than a year.³⁸ Under the settlement, which did not include a monetary judgment, the company would be subject to civil penalties if it fails to report future breaches.³⁹

³⁸ Decision & Order, *In re Uber Tech., Inc.*, No. C-5662 (Oct. 25, 2018); Press Release, Fed. Trade Comm'n, *Federal Trade Commission Gives Final Approval to Settlement with Uber* (Oct. 26, 2018) available at <http://www.ftc.gov/news-events/press-releases/2018/10/federal-trade-commission-gives-final-approval-settlement-uber>.

³⁹ Press Release, Fed. Trade Comm'n, *Federal Trade Commission Gives Final Approval to Settlement with Uber* (Oct. 26, 2018) available at <http://www.ftc.gov/news-events/press-releases/2018/10/federal-trade->

- A settlement with a multinational computer manufacturer to resolve FTC and state allegations that the company preloaded computers with software that “compromised security protections in order to deliver ads to consumers” by allowing the software to access consumer information without consumers’ notice or consent.⁴⁰
- A settlement with an electronic toy manufacturer and its U.S. subsidiary to resolve allegations that they collected children’s personal information through an application without providing notice to parents or obtaining parental consent as required by the Children’s Online Privacy Protection Act, and also failed to take reasonable steps to protect such information.⁴¹ The company agreed to pay a civil penalty of \$650,000. This was the FTC’s first children’s privacy and security case involving internet-connected toys.
- A settlement with one of the largest manufacturers and sellers of internet-connected “smart televisions,” requiring a \$2.5 million judgment (including \$915,940 in civil penalties to the State of New Jersey), which is eligible for partial suspension when the defendant pays \$1.5 million to the FTC and \$700,000 to the State of New Jersey. This settlement resolved allegations “that [the defendant] installed software on its TVs to collect viewing data on 11 million consumer TVs without consumers’ knowledge or consent” and then sold the

commission-gives-final-approval-settlement-uber..

⁴⁰ Agreement Containing Consent Order, *In re Lenovo Inc.*, No. 152 3134 (Dec. 20, 2017); Press Release, Fed. Trade Comm’n, *Lenovo Settles FTC Charges it Harmed Consumers With Preinstalled Software on its Laptops that Compromised Online Security* (Sept. 5, 2017), available at <http://www.ftc.gov/news-events/press-releases/2017/09/lenovo-settles-ftc-charges-it-harmed-consumers-preinstalled>.

⁴¹ Pl.’s Unopposed Mot. for Entry of the Stipulated Order, *United States of Am. v. VTech Elec. Ltd.*, No. 1:18-cv-114 (N.D. Ill. Jan. 8, 2018); Press Release, Fed. Trade Comm’n, *Electronic Toy Maker VTech Settles FTC Allegations That it Violated Children’s Privacy Law and the FTC Act* (Jan. 8, 2018), available at <http://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated> (on file with Fed. Trade Comm’n).

data to third parties along with certain demographic data for targeted advertising purposes.⁴²

- A non-monetary settlement with a leading payment processing company to resolve allegations that it failed to disclose that funds used in its peer-to-peer payment service “could be frozen or removed based on the results of [its] review of the underlying transaction” and that it misled consumers about “the extent to which they could control the privacy of their transactions” and “the extent to which consumers’ financial accounts were protected by ‘bank grade security systems.’”⁴³

In 2017, the FTC pursued its first cases enforcing the EU-U.S. Privacy Shield framework, which replaced its predecessor in 2016.⁴⁴ Between 2017 and 2018, the Commission settled eight actions to resolve allegations of false EU-U.S. Privacy Shield certification claims. All eight companies agreed not to misrepresent their compliance with government sponsored privacy and security programs.

Looking ahead. We expect the FTC to continue to actively enforce and regulate consumer privacy and data security. Indeed, in a recent comment to the Department of Commerce, the FTC noted that it should “continue to be the primary enforcer of laws related to information flows in markets, whether under the existing privacy and security framework or under a new framework.”⁴⁵ The FTC also has called for federal data security

⁴² Stipulated Order for Permanent Inj. & Monetary J., Fed. Trade Comm’n v. VIZIO, Inc., No. 2:17-cv-758 (D.N.J. Feb. 6, 2017); Press Release, Fed. Trade Comm’n, VIZIO to Pay \$2.2 Million to FTC, State of New Jersey to Settle Charges It Collected Viewing Histories on 11 Million Smart Televisions without Users’ Consent (Feb. 6, 2017), www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it (on file with Fed. Trade Comm’n).

⁴³ Agreement Containing Consent Order, In re PayPal, Inc., No. 162 3102 (May 23, 2018); Press Release, PayPal Settles FTC Charges that Venmo Failed to Disclose Information to Consumers About the Ability to Transfer Funds and Privacy Settings; Violated Gramm-Leach-Bliley Act (Feb. 27, 2018), available at <http://www.ftc.gov/news-events/press-releases/2018/02/paypal-settles-ftc-charges-venmo-failed-disclose-information>.

⁴⁴ Press Release, Three Companies Agree to Settle FTC Charges They Falsely Claimed Participation in EU-US Privacy Shield Framework (Sep. 8, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/three-companies-agree-settle-ftc-charges-they-falsely-claimed>.

⁴⁵ Fed. Trade Comm’n, Comment Letter on the Matter of Developing the Administration’s Approach to Consumer Privacy, Before the National

and breach notification legislation and privacy legislation.⁴⁶ In recent testimony, however, the FTC noted that its “deterrent capability” in this area was limited by the lack of civil penalties under Section 5 of the FTC Act, the FTC’s main enforcement statute.⁴⁷ The FTC also observed that the agency lacked “authority over non-profits and over common carrier activity, even though the acts or practices of these market participants often have serious implications for consumer privacy and data security,”⁴⁸ and that the agency lacked authority to issue implementing rules under the Administrative Procedure Act for privacy and data security generally.⁴⁹ We expect the FTC to continue to lobby for expanded authority with respect to privacy and data security, and for federal data security/breach notification and privacy legislation enforced by the Commission.

On the enforcement front, we expect the FTC to continue to actively investigate high-profile companies’ privacy practices and data breaches.⁵⁰ We also expect the FTC to continue to dedicate substantial efforts to gathering information from stakeholders regarding consumer privacy and data security issues. For example, the FTC held public hearings on December 11-12, 2018, regarding data security and plans to hold a similar hearing on consumer privacy on April 9-10, 2019.⁵¹ In addition, on June 27, 2019, the FTC will hold its annual PrivacyCon for the fourth year in a row to explore privacy and security issues relating to emerging technologies, such as artificial intelligence,

Telecommunications & Information Administration, at 18 (Nov 9 2018) www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf, [hereinafter “November 9, 2018 NTIA Testimony”].

⁴⁶ *Id.* at 20.

⁴⁷ November 27, 2018 FTC Prepared Statement, *infra* note 69, at 7.

⁴⁸ *Id.*

⁴⁹ November 8, 2018 NTIA Testimony, *supra* note 46, at 18-19.

⁵⁰ *See, e.g.*, Press Release, Fed. Trade Comm’n, Statement by the Acting Director of FTC’s Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices, (Mar. 26, 2018), available at <http://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

⁵¹ Press Release, Fed. Trade Comm’n, FTC Announces Sessions on Consumer Privacy and Data Security As Part of its Hearings on Competition and Consumer Protection in the 21st Century, (Oct. 26, 2018), available at <http://www.ftc.gov/news-events/press-releases/2018/10/ftc-announces-sessions-consumer-privacy-data-security-part-its>.

virtual reality, and internet-connected devices.⁵² We also expect identity theft to remain an important topic for the FTC in 2019, particularly given that the issue ranks among the top consumer complaints to the FTC in recent years.⁵³

IV. TELECOMMUNICATIONS

Enforcement. In recent Congressional testimony, the FTC noted that consumers' number one complaint to the FTC was illegal telemarketing robocalls, which are calls delivering a prerecorded message.⁵⁴ Indeed, the FTC received more than 3.7 million robocall complaints in fiscal year 2018 and, as of November 2018, had pursued 136 enforcement actions to target these practices.⁵⁵

In 2017 and 2018, the FTC initiated or resolved thirty-six telecommunications actions. The Commission litigated all of these cases in court; Florida and California district courts were the most common jurisdictions. State attorneys general partnered with the FTC in five cases, representing thirteen states. Relevant telemarketing actions involved the sale of business coaching services, satellite television, cruises, investment opportunities, office supplies, credit card and interest rate reduction programs, home security installation, online discount clubs, charitable donations, and tax collection services. The FTC pursued actions against individuals in all but two cases, naming 114 total individuals in these actions.

⁵² Fed. Trade Comm'n., PrivacyCon 2019, <https://www.ftc.gov/news-events/events-calendar/privacycon-2019>.

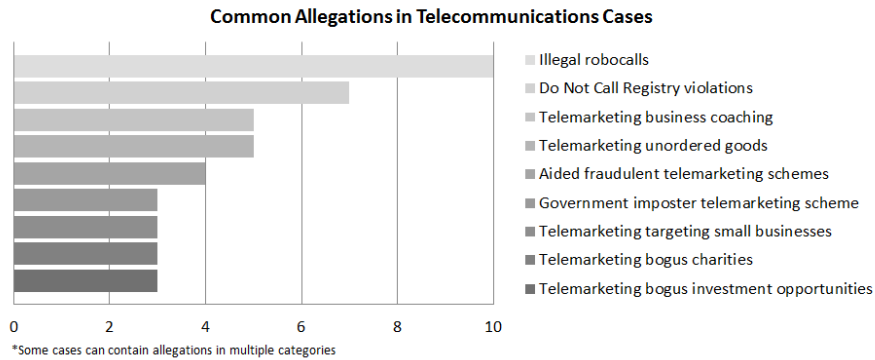
⁵³ Press Release, Fed. Trade Comm'n., Imposter Scams Top Complaints Made to FTC in 2018 (Feb. 28, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/imposter-scams-top-complaints-made-ftc-2018>.

⁵⁴ Fed. Trade Comm'n., *Prepared Statement of the Federal Trade Commission: Oversight of the Federal Trade Commission*, Nov. 27, 2018, www.ftc.gov/system/files/documents/public_statements/1423835/p180101_commission_testimony_re_oversight_senate_11272018_0.pdf.

⁵⁵ *Id.*

CASETYPE	STATE AGs	COMMON JURISDICTIONS	INDIVIDUALS NAMED	COMMON STATUTORY VIOLATIONS
<ul style="list-style-type: none"> • 36 Litigated • 0 Administrative 	<ul style="list-style-type: none"> • 6 Cases and 15 State AGs Total, including: • 4 State AG of FL • 3 State AG of OH • 2 State AG of NC • 1 State AG of CO, IL, IN, KS, MN, MO, MS, NY, OR, TN, and WA 	<ul style="list-style-type: none"> • 7 Cases Total: • 7 M.D. FL • 5 C.D. CA • 4 District of AZ • 3 District of UT • 3 S.D. FL 	<ul style="list-style-type: none"> • 114 Total, including: • Owners • Managers • Directors • Presidents • CEOs • Members • Principals 	<ul style="list-style-type: none"> • 35 15 U.S.C. § 45(a) (Unfair or deceptive acts or practices) • 31 Telemarketing Sales Rule (16 C.F.R. Part 310)

The most common allegations in the FTC’s telemarketing actions included illegal robocalls, illegal tactics to persuade consumers to pay for unordered merchandise, calls to individuals on the Do Not Call Registry, and telemarketing schemes to promote deceptive business coaching services. All of the actions alleged violations of Section 5 of the FTC Act.



Of the approximately twenty-seven actions that the FTC resolved or partially resolved in 2017 and 2018:

- The FTC settled with some or all defendants in twenty-three cases. The remaining cases were resolved in the FTC’s favor through default judgments, summary judgments, and post-trial judgments.
- Approximately twenty-seven cases involved monetary judgments ranging from nearly \$105,000 to over \$280 million, with most eligible for partial or complete suspension based on inability to pay and other factors. In seven actions, companies were required to pay civil penalties ranging from approximately \$105,000 to \$280

million. The other twenty cases required equitable relief, including consumer redress and related expenses.

- Companies were subject to various injunctive provisions, such as refraining from engaging in robocalls, not misrepresenting material facts or past relationships with consumers, and adequately disclosing terms of sales.
- Defendants in twenty-four actions were banned from various industry practices such as participating in telemarketing activities or making robocalls. Of all sectors, telecommunications had the highest percentage of industry bans.

In the largest telecommunications case resolved in this timeframe, the DOJ, on behalf of the FTC, and the states of California, Illinois, North Carolina, and Ohio, prevailed on the merits after a bench trial against a large satellite television provider that allegedly made over sixty-six million calls to numbers on the Do Not Call Registry in violation of the FTC's Telemarketing Sales Rule.⁵⁶ The court ordered \$280 million in civil penalties and statutory damages, including a \$168 million civil penalty award for the federal government—the largest civil penalty awarded for an FTC Act violation.

The FTC partnered with six state attorneys general in pursuing an action against a charity that allegedly directed telemarketers to solicit donations on false promises to fund medical and mental health related services for veterans.⁵⁷ Pursuant to a settlement, the defendants were prohibited from engaging in charitable solicitations, ordered to destroy all information related to donors, and required to pay a \$20.4 million judgment, which was eligible for partial suspension.

⁵⁶ Am. Order for Permanent Inj., *United States v. Dish Network LLC*, No. 3:09-cv-3073 (C.D. Ill. Aug. 10, 2017); Press Release, Fed. Trade Comm'n, Court orders \$280 million from Dish Network, largest ever Do Not Call penalty (June 8, 2017), available at <http://www.ftc.gov/news-events/blogs/business-blog/2017/06/court-orders-280-million-dish-network-largest-ever-do-not>.

⁵⁷ Stipulated Final J. and Permanent Inj. Against Help The Vets, Inc. & Neil G. Paulson, Sr., *Fed. Trade Comm'n v. Help The Vets, Inc.*, No. 6:18-cv-01153 (M.D. Fla. July 18, 2018); Press Release, Fed. Trade Comm'n, FTC and States Combat Fraudulent Charities That Falsely Claim to Help Veterans and Servicemembers (July 19, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-states-combat-fraudulent-charities-falsely-claim-help>.

In another notable case, on behalf of the FTC, the DOJ settled charges against a company accused of misleading consumers by falsely stating that the company was not calling to obtain charitable donations, when in fact it was.⁵⁸ The company agreed to pay a \$250,000 civil penalty and comply with standard recordkeeping and monitoring provisions.

Looking Ahead. Illegal robocalls, particularly imposter scams, continue to top the FTC's list of consumer complaints. Thus, we expect the FTC to continue to dedicate substantial enforcement and other resources to address unwanted robocalls and other telecommunications scams and practices that violate the Telemarketing Sales Rule. Indeed, imposter scams topped the FTC's list of consumer complaints for the first time in 2018, supplanting debt collection complaints which held the top spot for the previous three years.⁵⁹ We also expect the FTC to continue to partner with the FCC on initiatives in this area and continue to lobby to eliminate the common carrier exemption under the FTC Act. The Commission views this exemption as an obstacle to reducing or eliminating illegal robocalls, because a carrier that places, or assists or facilitates, illegal telemarketing may be outside the FTC's jurisdiction.

V. HEALTH CARE

Enforcement. The FTC initiated or resolved approximately twenty-nine actions in 2017 and 2018 against health care companies or companies that market or sell health-related products and services. Most of the FTC's health care actions were litigated in court as opposed to an administrative process. The FTC partnered with state attorneys general in four actions. The Commission's health care actions involved a variety of products and services, including dietary supplements, treatments for serious illnesses (such as cancer, diabetes, and opioid addiction), personal care products (such as wrinkle reduction and anti-aging products), drug treatment, weight-loss and muscle-building products, and insect repellent sprays.

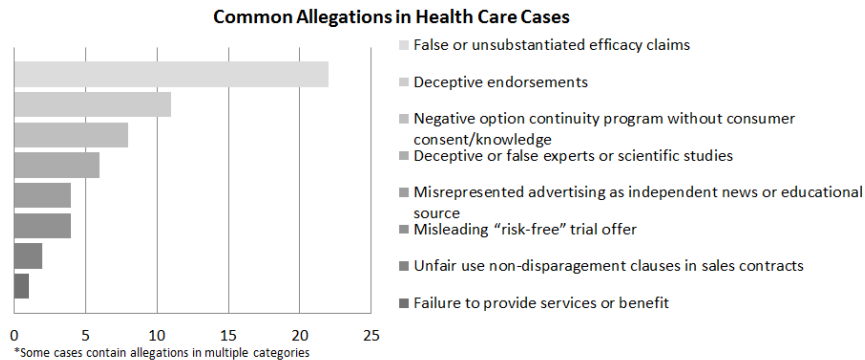
⁵⁸ Stipulated Order for Permanent Inj. and Civil Penalty J., United States v. InfoCision, Inc., No. 5:18-cv-00064-SL (Jan. 11, 2018); Press Release, Fed. Trade Comm'n, InfoCision, Inc. to Pay \$250,000 Penalty for Deceptive Charitable Solicitation Calls (Jan. 10, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/01/infocision-inc-pay-250000-penalty-deceptive-charitable>.

⁵⁹ See *supra* note 54.

Notably, the FTC named individual defendants in all but one case (sixty-two individuals overall), including owners, chief executive officers, presidents, directors, and managers, among others.

CASETYPE	COMMON JURISDICTIONS	STATE AG PLAINTIFFS	INDIVIDUALS NAMED	COMMON STATUTORY VIOLATIONS
<ul style="list-style-type: none"> • 25 Litigation • 4 Administrative 	<ul style="list-style-type: none"> • 4 M.O. FL • 5 C.D. CA • 3 District of ME • 3 N.D. CA 	<ul style="list-style-type: none"> • 4 Cases Total: • 3 State AG of ME • 1 State AG of NY 	<ul style="list-style-type: none"> • 62 Total, including: • Owners • CEOs • Members • Officers • Sole Shareholders • Managers • Directors • Presidents • Principals • (overlap among positions) 	<ul style="list-style-type: none"> • 29 15 U.S.C. § 45(a) (Unfair or deceptive acts or practices) • 21 15 U.S.C. § 52 (Dissemination of false advertisements)

The Commission was particularly focused on addressing false information in connection with various health products and services. Indeed, the majority of health care cases involved false or unsubstantiated health claims. All health care cases alleged violations of 15 U.S.C. § 45(a) (Section 5 of the FTC Act), which prohibits unfair or deceptive acts or practices, and many cases also alleged violations of 15 U.S.C. § 52, which prohibits the dissemination of false advertisements. Common allegations included enrolling consumers in negative option continuity programs without their knowledge or consent (where consumers are subject to recurring charges unless they affirmatively cancel), and failing to provide services, such as charging consumers for comprehensive health insurance but providing only limited benefits. Additionally, the FTC alleged companies misrepresented paid endorsements as impartial when they were not, such as reposting athletes’ endorsements of insect repellent without disclosing that the athletes were paid thousands of dollars to promote the product.



Of the approximately twenty-two actions that the FTC resolved (or partially resolved against some defendants) in 2017 and 2018:

- Nineteen actions were resolved by settlement agreement against some or all defendants. The FTC also obtained default judgments to partially resolve two actions, won on summary judgment in two actions, and obtained a judgment on a contempt motion (for violating a prior order) in one action.
- Approximately seventeen cases involved monetary judgments ranging from about \$120,000 to approximately \$179 million, with some amounts suspended based on inability to pay and other factors. The FTC obtained civil penalties of \$575,000 in one case. The remaining cases required equitable relief, including consumer redress.
- The actions required various types of injunctive relief that prohibited defendants from (1) making representations regarding a product or service without competent and reliable scientific evidence to support efficacy claims, (2) misrepresenting the results of tests, studies, or the ingredients in any product, (3) misrepresenting expert or consumer endorsements, (4) misrepresenting advertising materials or formats, such as leading consumers to believe advertising materials were news or educational sources, (5) subjecting consumers to non-disparagement agreements, and (6) using negative option sales features.
- Defendants in three cases also were subject to bans on certain industry or marketing and sales practices, such as the future sale of any bug repellent or diabetes treatment products.

Notable cases in 2017 involved allegations of false and unsubstantiated health claims, including the following:

- A settlement imposing a \$1.3 million monetary judgment (with agreement to partially suspend judgment upon payment of \$500,000) on three affiliate marketers for allegedly using “illegal spam e-mail, false weight-loss claims, and phony celebrity endorsements to market bogus weight-loss products.”⁶⁰

⁶⁰ Stipulated Order for Permanent Inj. & Monetary J., Fed. Trade Comm’n v. Tacht, Inc., No. 8:16-cv-1397 (M.D. Fla. Mar. 3, 2017); Press

- A settlement imposing a \$32 million monetary judgment (with agreement to partially suspend judgment upon payment of \$2 million) on marketers of a weight-loss system for allegedly misleadingly “advertis[ing] as using ‘breakthrough technology’ and ‘personalized supplements’ to help consumers permanently lose ‘20 to 40+ pounds in 40 days’ without significantly cutting calories.”⁶¹
- A settlement imposing a \$179 million judgment on online marketers (with agreement to partially suspend judgment upon payment of \$6.4 million) to resolve allegations that online marketers “sold more than 40 weight-loss, muscle-building, and wrinkle-reduction products to consumers using unsubstantiated health claims, fake magazine and news sites, bogus celebrity endorsements, and phony consumer testimonials.”⁶² The FTC also alleged that these marketers used deceptive advertising of “free” and “risk-free” trials that “automatically enrolled consumers without their consent in negative option auto-ship programs with additional monthly charges.”

Notable cases in 2018 included the following:

- A settlement with the operator of a string of clinics that marketed and sold intravenously injected therapy products, such as iV Cocktails, that purportedly treated serious diseases like cancer, multiple sclerosis, and congestive heart failure.⁶³ Significantly, the FTC

Release, Fed. Trade Comm’n, FTC Settlement Bars Spam Email Marketing, Baseless Weight-Loss Claims by Diet-Pill Operation (Mar. 17, 2017), <http://www.ftc.gov/news-events/press-releases/2017/03/ftc-settlement-bars-spam-email-marketing-baseless-weight-loss> (on file with Fed. Trade Comm’n).

⁶¹ Stipulated Final J. & Order for Permanent Inj. & Other Equitable Relief, Fed. Trade Comm’n v. NutriMost LLC, No. 2:17-cv-509 (W.D. Pa. Apr. 20, 2017); Press Release, Fed. Trade Comm’n, Marketers of ‘NutriMost Ultimate Fat Loss System’ Settle FTC Charges (Apr. 21, 2017), <http://www.ftc.gov/news-events/press-releases/2017/04/marketers-nutrimost-ultimate-fat-loss-system-settle-ftc-charges> (on file with Fed. Trade Comm’n).

⁶² Stipulated Order for Permanent Inj. & Monetary J. Against All Defs., Fed. Trade Comm’n v. Tarr Inc., No. 3:17-cv-2024 (S.D. Cal. Nov. 14, 2017); Press Release, Fed. Trade Comm’n, Internet Marketers of Dietary Supplement and Skincare Products Banned from Deceptive Advertising and Billing Practices (Nov. 15, 2017), <http://www.ftc.gov/news-events/press-releases/2017/11/internet-marketers-dietary-supplement-skincare-products-banned> (on file with Fed. Trade Comm’n).

⁶³ Decision and Order, A & O Enterprises Inc., No. 172 3016 (Feb. 21,

stated that this was its first action against a marketer and seller of iV Cocktails for making deceptive and unsupported health claims.

- Three \$92 million settlements, eligible for partial suspension, with three individuals and 59 companies alleged to have operated a deceptive negative option scheme by offering consumers an initial trial offer for tooth whiteners and other personal care products at a low price and then charging them about \$200 a month if they did not cancel.⁶⁴
- A settlement with an advertising agency that ran allegedly deceptive radio ads for weight-loss products.⁶⁵ The agency agreed to pay a \$2 million judgment, which is among the largest judgments the FTC has ever obtained against an advertising agency.
- A judgment of over \$40 million, holding marketers in contempt for violating a 2008 order by continuing to make unsubstantiated claims to market dietary supplements for weight loss.⁶⁶

Looking Ahead. The FTC is expected to continue to address deceptive advertising of health care and related products, including new formats and new media, such as mobile

2019); Press Release, Fed. Trade Comm'n, FTC Brings First-ever Action Targeting "iV Cocktail" Therapy Marketer (Sept. 20, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/09/ftc-brings-first-ever-action-targeting-iv-cocktail-therapy>.

⁶⁴ Stipulated Permanent Inj. And Other Equitable Relief As To Def. Blair McNea And All Corporate Defs., Fed. Trade Comm'n v. RevMountain, LLC, No. 2:17-cv-02000-APG-GWF (D. Nev. Apr. 10, 2018); Press Release, Fed. Trade Comm'n, FTC Obtains Court Orders Banning Marketer from Negative-Option Sales (April 16, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-obtains-court-orders-banning-marketer-negative-option-sales>.

⁶⁵ Proposed Order for Permanent Inj. and Monetary Judgment, Fed. Trade Comm'n v. Marketing Architects, Inc., No. 2:18-cv-00050-NT (D. Me. Feb. 5, 2018); Press Release, Advertising Firm Barred from Assisting in the Marketing and Sale of Weight-Loss Supplements Deceptively Pitched to Consumers (Feb. 6, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/02/advertising-firm-barred-assisting-marketing-sale-weight-loss>.

⁶⁶ Order, Fed. Trade Comm'n v. Nat'l Urological Group, Inc. et al., No. 1:04-cv-03294-CAP (N.D. Ga. Oct. 10, 2017); Press Release, U.S. District Court Rules in FTC's Favor, Imposes \$40 Million Judgment Against Weight-Loss Supplement Marketers for Order Violations (Oct. 16, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/10/us-district-court-rules-ftcs-favor-imposes-40-million-judgment>.

applications, games, videos, and social media. As with web services and emerging technologies, the FTC is particularly concerned with social media influencers and their endorsements of various products, which arguably have more serious consumer protection implications for health care products and services. Further, the Commission has identified “disease prevention and treatment claims, claims aimed at baby boomers, seniors, and military members, and claims exploiting emerging health threats” as priorities.⁶⁷ We also expect the FTC to continue to scrutinize negative option continuity programs as well as cases “challenging false and unsubstantiated health claims, including those targeting older consumers, consumers affected by the opioid crisis, and consumers with serious medical conditions.”⁶⁸ The Commission is particularly concerned with these practices because “[w]hen consumers with serious health concerns fall victim to unsupported health claims, they may put their health at risk by avoiding proven therapies and treatments.”⁶⁹

VI. OTHER CONSUMER PRODUCTS/SERVICES

Enforcement. The Commission initiated or resolved approximately twenty-three additional actions that do not fit into the above five industries. Nine of these actions were litigated in court and fourteen were pursued administratively. State attorneys general joined the Commission in two cases, representing Florida and Missouri. The cases involved an array of products and services, such as paint, car dealerships, hockey pucks, mattresses, labor law posters, hats, pulley block systems, and water filtration systems. The FTC named individuals in eight actions, with approximately twenty individuals named in total.

⁶⁷ Fiscal Year 2018 Agency Financial Report at 30, Fed. Trade Comm’n, (Nov. 13, 2018), https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2018/ftc_agency_financial_report_fy2018_1.pdf [hereinafter “FTC Fiscal Year 2018 Agency Financial Report”].

⁶⁸ Prepared Statement of the Federal Trade Commission: Oversight of the Federal Trade Commission at 9, from Joseph J. Simons, Fed. Trade Comm’n, (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423835/p180101_commission_testimony_re_oversight_senate_11272018_0.pdf[hereinafter “November 27, 2018 FTC Prepared Statement.”]

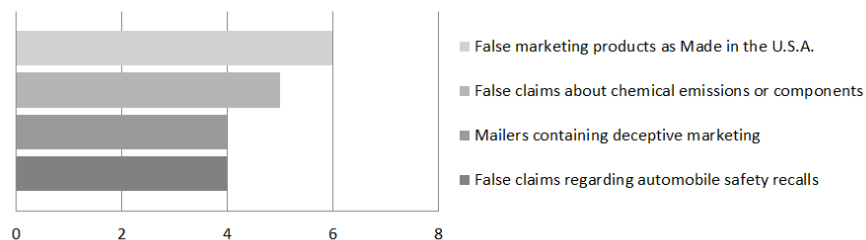
⁶⁹ *Id.* at 10.

CASE TYPE	STATE AG s	INJUNCTIONS	INDIVIDUALS NAMED	COMMON STATUTORY VIOLATIONS
<ul style="list-style-type: none"> • 9 Litigated • 14 Administrative 	<ul style="list-style-type: none"> • 2 Cases Total: • 1 State AG of MO • 1 State AG of FL 	<ul style="list-style-type: none"> • 2 Cases in which defendants are subject to outright bans, 3 companies and 4 individuals 	<ul style="list-style-type: none"> • 20 Total, including: • Presidents • Owners • CEOs • Directors • Managers • Officers • (overlap among positions) 	<ul style="list-style-type: none"> • 23 15 U.S.C. § 45(a) (Unfair or deceptive acts or practices)

All twenty-three cases alleged violations of Section 5 of the FTC Act. The Commission was particularly focused on addressing deceptive advertising and false claims made in connection with these various products. Common allegations included:

- Falsely marketing products as being produced in the United States in six cases.
- Misinforming consumers about safety recalls, such as sending fake safety recalls to induce consumers to come to the dealership, and failing to sufficiently disclose that some used vehicles were subject to unrepaired safety recalls, in three cases.
- False claims regarding chemical emissions or chemical components in five cases.

Common Allegations in Other Consumer Products/Services Cases



Of the approximately twenty cases that the FTC resolved in 2017 and 2018:

- Nineteen cases were partially or fully resolved through settlements with some or all defendants. The FTC also obtained a default judgment in one case and won on summary judgment in another case.
- Six cases involved monetary judgments ranging from roughly \$500,000 to over \$4 billion, with some amounts suspended based on inability to pay and other

factors. All six cases required equitable relief (to be used primarily for consumer redress).

- Companies were subject to injunctive provisions including the requirement not to make unsubstantiated, deceptive, or misleading claims about their products or services.
- Defendants in two cases were banned outright from their industries—promoting prizes through mass mailings and promoting inventions.

Although the majority of these cases did not involve monetary judgments, two actions required significant monetary judgments:

- In 2017, a court finalized a settlement between a large automobile manufacturer and the FTC and private plaintiffs, requiring a monetary judgment of up to \$4 billion (with the company expected to ultimately pay up to \$1.2 billion for consumer redress programs) in connection with 3.0 liter vehicles. This is in addition to an approximately \$10 billion consumer redress fund required as part of a 2016 FTC settlement, which involved 2.0 liter vehicles. Both settlements resolve allegations that the company misled consumers when it promoted “clean diesel” vehicles by using illegal emission defeat devices that could conceal high emissions during government tests.⁷⁰
- A settlement with operators of an invention promotion business to resolve allegations of “deceiving consumers and suppressing complaints about the company by using threats of criminal prosecution against dissatisfied customers.”⁷¹ The defendants were

⁷⁰ Am. Second Partial Stipulated Order for Permanent Injunction & Monetary J., *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, & Products Liability Litig.*, MDL No. 2672 (N.D. Cal. May 17, 2017); Press Release, Fed. Trade Comm’n, Federal Judge Approves FTC Order for Owners of Certain Volkswagen, Audi, and Porsche 3.0 Liter “Clean” Diesels to Receive Refunds (May 17, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/05/federal-judge-approves-ftc-order-owners-certain-volkswagen-audi>; Press Release, Fed. Trade Comm’n, FTC Charges Volkswagen Deceived Consumers with Its “Clean Diesel” Campaign (Mar. 29, 2016), available at <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-charges-volkswagen-deceived-consumers-its-clean-diesel>.

⁷¹ Stipulated Order for Permanent Injunction and Monetary J., *Fed Trade Comm’n v. World Patent Mktg., Inc.* (S.D. FL May 16, 2018); Press Release, Fed Trade Comm’n, FTC Halts Invention Promotion Scheme Charged With

required to pay a \$25.9 million judgment that is eligible for partial suspension.

CONCLUSION

We expect the FTC to aggressively enforce the consumer protection laws in 2019. As always, companies offering consumer products and services should review the FTC's annual and quarterly consumer complaint reports from the agency's Consumer Sentinel Network that highlight the top categories of consumer complaints, such as imposter scams, debt collection, and identity theft. These complaints influence the FTC's enforcement and regulatory direction. Companies are also well-advised to review the FTC's recent enforcement actions and maintain strong compliance management systems to proactively address practices that may present enhanced enforcement or other legal risk.

Bilking Millions of Dollars from Consumers (Mar. 14, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-halts-invention-promotion-scheme-charged-bilking-millions>.