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MITIGATE CONSUMER LITIGATION RISK BY WATCHING THE FTC: FIVE GOOD REASONS

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2017 already has been, and surely will continue to be, a year of great change. Regulatory agencies are re-envisioning their mandates. Many have or soon will have new leadership. And advocacy groups for consumers are mobilized.

Some of the regulatory changes may favor retail businesses. But others may continue to bring increased scrutiny and require more transparency with consumers. What can retail businesses do to help mitigate their risk and understand the headwinds they may be facing? One thing that may be helpful would be to monitor the Federal Trade Commission (FTC)'s website. Why? Five good reasons.

1. **Consumers are going to the FTC website. You should know what your customers are learning.**

The Consumer Information section of the site offers a breadth of information, including tabs for Money & Credit, Homes & Mortgages, Health & Fitness, Jobs & Making Money, and Privacy, Identity & Online Security. In addition, the website offers certain targeted at risk populations detailed information tailored to address their respective concerns. Older Adults and Military Families have their own tabs. As do advocate groups like Financial Educators, Consumer Advocates, and the NAACP.

If the FTC is highlighting your business products, you should know. You should consider whether the FTC is indicating your products present consumers heightened risk. Even if, however, your business products are not specifically mentioned, there is benefit in seeing the consumer marketplace and your products through the regulators' lens. Most important, by understanding that lens, you may be able to refine your customer service, product quality, or marketing posture to differentiate your business as a responsible actor in the marketplace.

1. **The FTC is gathering complaints from consumers. You should see the topics the FTC identifies.**

The FTC offers guidance on how to submit a consumer complaint and collects detailed information. While businesses cannot see the complaint information itself on the website, businesses can be aware of the FTC's specific guidance and procedures relating to consumer complaint submission.

Seven consumer complaint topics are provided in the complaint assistance tab: (1) Identity Theft, (2) Scams & Rip Offs, (3) Unwanted Telemarketing Text or Spam, (4) Mobile Devices/Telephones, (5) Internet Services/On-line Shopping or Computers, (6) Jobs & Money Making, (7) Credit and Debt. Each major category has multiple suggested sub-topics. For example the Internet services/ On-line Shopping topics has four sub-topics. Highlighted sub-topic problems include: a) merchandise ordered over the internet, b) shipping or refund services provided by the company, and c) children's online privacy, among others.

The complaint submission process involves FTC initial data collection such as (i) how much did you pay?, (ii) how did you pay?, and (iii) how did the company first contact you? In addition, the FTC offers certain drop down problems that may apply: (i) received merchandise late, (ii) never received merchandise, (iii) was not notified of late shipment, (iv) did not receive prompt refund, and/or (v) did not receive correct refund.

Even if a consumer cannot slot into one of the provided topics, the "Other" topic includes 8 more suggested product types or industries. Working your way through these complaint in-take procedures could elucidate for your business compliance and risk managers potential process breakdowns and customer service risks and prioritize corrective action to minimize customer complaints.

1. **The FTC is telling consumers what types of "scams" exist. You should confirm your business practices are not akin to any identified "scam."**

Were you aware that the FTC has a Scam Alerts blog? Posts over the past six months, for example, have involved phone scams, fake apps, gift cards and more. The right hand column of the blog page has "Browse Scams by Topic" containing a list of 30 scam topics, such as Free Trials, Mystery Shopper, Online Scams, and Shopping, among other topics.

Do you follow the FTC Twitter feed? Are you a friend on the FTC Facebook page? These social media tools provide real time information that the FTC wants consumers and business to know.

1. **The FTC communicates with other agencies. Together their collective scope and directives may impact your business.**

For example, in February 2017, the FTC provided required reports on certain activities to the Consumer Financial Protection Bureau (CFPB). The FTC's reports provide insight into issues being monitored and potential areas of risk for businesses.

One report (issued February 3, 2017) addresses Regulation B (12 CFR Part 1002) and ECOA (the Equal Credit Opportunity Act, 15 USC §1591). The report highlights, among other issues, on-going concerns over big data collection and usage practices, auto purchase and finance practices, fraud in the African-American and Latino communities, and demographics changes which impact marketing practices.

A second report (issued February 13, 2017) addresses the Fair Debt Collection Practices Act (15 USC §1692). The report highlights enforcement activity relating to "phantom debt" collection, text messaging collection activities, credit reporting, and other fraudulent activity.

1. **The FTC is offering tips to businesses too.**

Take advantage of the FTC's tips for businesses. Recent topics have included a) made in the USA standards, b) scientific value claims, and others. The FTC categorizes the Business Center to include sections on consumer privacy, children's privacy, data security, endorsements, health claims, online advertising and marketing. According to the FTC's FDCPA report, the Business Blog had 3.4 million page views in 2016 and more than 58,000 email subscribers. Shouldn't you and your business be among those? Your industry competitors may be.

The Commission Actions section of the website reflects enforcement activity taken by the FTC and other announcements/ pronouncements. Even if your business is not watching all of the above consumer complaint and advocacy material, it is critical you take notice of the enforcement actions. Once enforcement actions results are made public, many regulators consider the business community to be on notice. In subsequent enforcement actions regarding similar conduct, such notice and pragmatic opportunity to have addressed the issue may impact the tenor of potential FTC redress and penalties.

Conclusion: Mitigate unfair practices class action litigation risk

As a class action defense litigator representing businesses, it is critical to discern how regulator statements, supervision and enforcement may drive potential liability, including new potential unfair deceptive acts and practices ("UDAP") plaintiffs' class action litigation claims. Keeping our finger on the pulse also helps businesses understand trends and evolving standards. The UDAP standards tend to migrate over time, with new practices or regulatory mandates in one industry often raising the bar for others. For example, consumer clarity and transparency requirements developed in the financial services space may tend to inform interpretations about consumer transparency in other products and services.

While recent years have brought positive developments regarding consumer arbitration enforceability, class action waivers and other unconscionability interpretation issues remain in flux. Staying focused on operations quality and transparency, as well as customer experience should help businesses mitigate litigation and reputation risk. Some business folks do not care much for litigators, but we are trained to identify the root causes of problems and to create effective economical solutions. Businesses can help themselves as outlined above, and hopefully by doing so will alleviate the need for a litigator.

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