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Acting Heads of Federal Agencies and State Attorneys General Discuss Consumer Protection Priorities

The Priorities of the CFPB, FTC, FCC Acting Heads and State Attorneys General Could Significantly Impact Consumer Financial Protection Enforcement Actions

SUMMARY

On May 11, 2021, the acting heads of the Consumer Financial Protection Bureau (“CFPB”), Federal Trade Commission (“FTC”), Federal Communications Commission (“FCC”), and several state attorneys general spoke at the National Association of Attorneys General (“NAAG”) Consumer Protection Spring Conference. The speakers described how their agencies and offices have navigated the COVID-19 pandemic and discussed their consumer protection priorities. Among their top priorities are addressing COVID-related fraud, housing and racial inequity, payday lending and debt collection schemes, robocalls, the “digital divide” and broadband internet accessibility, and healthcare and pharmaceutical costs. Rebecca Kelly Slaughter, the Acting Chair of the FTC, also acknowledged the Supreme Court’s recent *AMG Capital Management* decision that restricted the FTC’s authority to seek equitable monetary relief and noted that, pending a proposed legislative fix, the FTC would seek to partner with state attorneys general who have redress authority, bring more cases via FTC administrative proceedings, and use other tools at the FTC’s disposal.

Although each of the agency heads is currently serving in an acting role, it is likely that their priorities will largely mirror those of any future Senate-confirmed heads of the agencies. For the CFPB, Rohit Chopra’s nomination to be Director is pending before the Senate. President Biden has not announced nominations for the chairs of either the FTC or the FCC.

CONSUMER PROTECTION PRIORITIES

1. *AMG Capital Management* Supreme Court Decision

Last month, a unanimous U.S. Supreme Court held in *AMG Capital Management, LLC v. Federal Trade Commission*¹ that Section 13(b) of the Federal Trade Commission Act does not give the FTC the authority to seek (or authorize a court to award) equitable monetary relief such as restitution or disgorgement. This decision may significantly affect the FTC's enforcement program. FTC Acting Chair Rebecca Kelly Slaughter described the *AMG Capital Management* decision as "devastating" for the FTC. In response to the Supreme Court's decision, the FTC is seeking a legislative fix by Congress that would restore the FTC's ability to seek equitable monetary relief. Acting Chair Slaughter further stated that the FTC would use the other tools at the agency's disposal, including: partnering with state attorneys general who have redress authority; bringing more cases via FTC administrative proceedings; and seeking other civil penalties. Colorado Attorney General Phil Weiser agreed that a legislative fix by Congress was the ideal resolution, but was not optimistic about such a fix's prospects. Iowa Attorney General Tom Miller stated that the case was a "loss" for both consumers and the FTC, but noted that the decision was an "opportunity" for state attorneys general to partner with the FTC.

Further analysis of the Supreme Court's *AMG Capital Management* decision and its implications for the FTC's enforcement program can be found in Sullivan & Cromwell's memo, "U.S. Supreme Court Holds That the Federal Trade Commission Cannot Obtain Monetary Relief Under Section 13(b) of the Federal Trade Commission Act" (<https://www.sullcrom.com/files/upload/SC-Publication-Federal-Trade-Commission-Cannot-Obtain-Monetary-Relief-Section-13b-FTC-Act.pdf>).

2. COVID-Related Fraud

The top consumer protection issue identified by the federal agency acting heads and state attorneys general was the COVID-19 pandemic and COVID-related frauds. CFPB Acting Director Dave Uejio noted that one of his top two priorities was seeking relief for consumers related to the COVID-19 pandemic. Similarly, FTC Acting Chair Slaughter pointed to a report published by the FTC in April that highlighted the agency's ongoing efforts to protect consumers from personal protective equipment ("PPE") sales scams, deceptive and fraudulent COVID-related marketing, and other harms related to the COVID-19 pandemic.² The state attorneys general echoed this sentiment.

3. Housing and Racial Inequity

CFPB Acting Director Uejio stated that another top priority was addressing racial inequities in the financial services industry, including through mortgage relief provided during the COVID-19 pandemic. He touted the foreclosure and eviction moratorium implemented by the Centers for Disease Control and Prevention ("CDC"), noting that foreclosures and evictions will not only exacerbate the impact of the COVID-19 pandemic and the associated financial hardships but also preexisting racial inequities in homeownership.

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Acting Chair Slaughter said the FTC will continue to focus on housing insecurity and inequity issues even after the CDC's foreclosure and eviction moratorium expires on June 30. Both FTC Acting Chair Slaughter and CFPB Acting Director Uejio acknowledged a recent court decision striking down the CDC's moratorium,³ but declined to comment further due to the ongoing litigation. Following the decision, the court temporarily stayed its ruling.⁴ The landlord groups challenging the moratorium filed their briefs opposing the stay earlier this week and the Department of Justice will file its briefs supporting the stay in the coming days.⁵

4. Payday Lending and Debt Collection Schemes

CFPB Acting Director Uejio identified payday lending and the "ability-to-repay" underwriting standards as other major issues the CFPB is prioritizing. Due to ongoing litigation over the CFPB's 2020 regulation loosening standards for payday lenders,⁶ Acting Director Uejio declined to discuss specifics about his priorities or plans concerning payday lending. He did, however, affirm that the CFPB is dedicated to protecting consumers from predatory payday lending schemes and that the CFPB would use the "full force" of its enforcement and supervisory tools. Acting Chair Slaughter suggested that the FTC is also monitoring payday lending, but did not offer any specifics on the topic.

Acting Director Uejio further indicated that he has been working with the Office of the Comptroller of the Currency ("OCC") to protect borrowers and address predatory payday lending. North Carolina Attorney General Josh Stein added that he and other state attorneys general recently asked Congress to overturn the OCC's 2020 "true lender" rule through use of the Congressional Review Act.⁷ The "true lender" rule established an approach for determining the "true lender" of a loan issued by the partnership of a national bank and a third party, including non-bank lenders.⁸ Earlier this week, the Senate voted 52-47 to repeal the "true lender" rule under the Congressional Review Act.⁹ The House of Representatives is also expected to approve the repeal and the White House has indicated that it also supports repealing the rule.¹⁰

Acting Director Uejio also said the CFPB is taking action to protect consumers and homeowners, including through policies targeting debt collectors. In April, the CFPB proposed delaying the effective date of two 2020 debt collection-related CFPB rules to give affected parties additional time to comply with the rules during the ongoing COVID-19 pandemic.¹¹ Acting Director Uejio stated that the comment period for the proposal ended earlier this week and that the CFPB would review the submitted comments. He also touted a recent partnership with New York Attorney General Letitia James in filing a lawsuit in federal court related to a fraudulent debt collection scheme.¹²

5. Robocalls

FCC Acting Chairwoman Jessica Rosenworcel said the primary source of consumer complaints received by her agency relate to robocalls. She noted that the FCC is continuing to crack down on illegal robocallers and recently issued the largest fine in FCC history against a telemarketing company that made one billion robocalls falsely claiming to provide health insurance plans from major health insurance providers such as Aetna, Blue Cross Blue Shield, and Cigna.¹³ She said that the FCC is

considering bringing enforcement actions against phone service providers for their involvement in illegal robocalls. Acting Chair Slaughter echoed these statements, noting that the FTC is also considering pursuing enforcement actions related to illegal robocalls against phone providers and seeking technological fixes to stop robocalls.

6. The “Digital Divide” and Broadband Internet Accessibility

FCC Acting Chairwoman Rosenworcel identified bridging the “digital divide” as another major priority for the FCC. A major component of this, she said, is ensuring that all Americans have access to affordable broadband internet. The FCC is working with state attorneys general to identify areas that do not currently have access to affordable broadband internet. Acting Chairwoman Rosenworcel noted that, as part of one of the COVID relief packages, Congress allocated funds to the FCC to establish an Emergency Broadband Benefit program to help eligible households afford broadband internet.¹⁴ Earlier this week, the FCC also adopted final rules to implement an Emergency Connectivity Fund program that will provide electronic devices and other digital resources to schools and libraries.¹⁵

7. Healthcare and Pharmaceutical Costs

Other priorities articulated by FTC Acting Chair Slaughter are soaring healthcare and pharmaceutical costs. The FTC—along with its international counterparts, the Department of Justice’s Antitrust Division, and state attorneys general—is working to “identify concrete and actionable steps to review and update the analysis of pharmaceutical mergers” and “ensure that FTC investigations include fresh approaches that fully analyze and address the varied competitive concerns that these mergers and acquisitions raise.”¹⁶ Earlier this week, the FTC and the other agencies solicited public comment on how they should approach and analyze pharmaceutical mergers and their potential effects on pricing.¹⁷ Additionally, Mississippi Attorney General Lynn Fitch explained that her top priority is addressing the high cost of insulin. She noted that, although the costs of producing insulin have remained relatively stagnant in recent years, the cost of insulin for consumers has skyrocketed.

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ENDNOTES

- 1 593 U.S. ____ (2021).
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- 5 *Id.*
- 6 See Evan Weinberger, *Consumer Group Asks Court to Revive Tougher Payday Lending Rules*, BLOOMBERG LAW (Oct. 29, 2020), <https://news.bloomberglaw.com/banking-law/consumer-group-asks-court-to-revive-tougher-payday-lending-rules>.
- 7 Press Release, Office of North Carolina Attorney General Josh Stein, *Attorney General Josh Stein Asks Congress to Protect North Carolinians from Predatory Lending* (Apr. 21, 2021), https://ncdoj.gov/attorney-general-josh-stein-asks-congress-to-protect-north-carolinians-from-predatory-lenders/?utm_source=rss&utm_medium=rss&utm_campaign=attorney-general-josh-stein-asks-congress-to-protect-north-carolinians-from-predatory-lenders.
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- 10 *Id.*
- 11 Press Release, Consumer Financial Protection Bureau, *CFPB Proposes Delay of Effective Date for Recent Debt Collection Rules* (Apr. 7, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-delay-of-effective-date-for-recent-debt-collection-rules/>.
- 12 Press Release, Consumer Financial Protection Bureau, *CFPB and New York Attorney General File Suit to Seize Hidden Assets from Operator of Shuttered Debt Collection Scheme* (Apr. 22, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-file-suit-to-seize-hidden-assets-from-operator-of-shuttered-debt-collection-scheme/>.
- 13 Press Release, Federal Communications Commission, *FCC Proposes Record \$225 Million Fine for Massive Spoofed Robocall Campaign Selling Health Insurance* (June 9, 2020), <https://docs.fcc.gov/public/attachments/DOC-364824A1.pdf>.
- 14 Federal Communications Commission, *Emergency Broadband Benefit*, <https://www.fcc.gov/broadbandbenefit>.
- 15 Press Release, Federal Communications Commission, *FCC to Launch \$7.17 Billion Connectivity Fund Program* (May 10, 2021), <https://docs.fcc.gov/public/attachments/DOC-372311A1.pdf>.
- 16 Press Release, Federal Trade Commission, *Strengthening the Federal Trade Commission's Authority to Protect Consumers* (May 11, 2021), <https://www.ftc.gov/news-events/press-releases/2021/05/multilateral-pharmaceutical-merger-task-force-seeks-public-input>.
- 17 *Id.*

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