

A Chat with the FTC's Tom Pahl

July 18, 2017 | [Lucy E. Morris](#)

Under the Trump Administration, the Federal Trade Commission (FTC) has come under new leadership and, in the process, returned to its roots as a traditional law enforcement agency focused on deception and consumer harm. Maureen Olhausen, previously an FTC Commissioner, now leads the FTC as its Acting Chairwoman. She has appointed a new head of the FTC's Bureau of Consumer Protection, Tom Pahl, as the Acting Bureau Director. Previously, Pahl served in various roles at the FTC and Consumer Financial Protection Bureau (CFPB), and I had the pleasure of working with him at both agencies. Recently, I joined a "fireside chat" with Pahl where he discussed the FTC's consumer protection priorities and its initiative to reform the agency's investigative process. He gave the standard disclaimer that his remarks are his own and do not necessarily reflect the views of the Commission. And with that caveat, here's what he had to say.

Privacy and Data Security - Priorities

Pahl said the FTC has been the country's leading agency on consumer privacy and data security, and he expects the agency to continue in that role under his leadership. Privacy enforcement remains a priority; the agency expects companies to honor their privacy promises and not misuse consumers' sensitive information. The FTC expects companies to take reasonable steps to ensure data security, and it will be issuing business guidance to help smaller companies understand this requirement.

Under the prior administration, the FTC used its enforcement authority to proclaim certain privacy and data security practices "unfair" or "deceptive" (UDAP) even in the absence of clear consumer harm. Under the FTC's new leadership, it appears the agency will target enforcement activity where there is concrete, tangible evidence of consumer injury. Pahl discussed the FTC's "economics of privacy" initiative, intended to ensure that the agency's UDAP actions are grounded in sound economics. The next step in that initiative is a Third PrivacyCon, which the agency has said "will focus on the economics of privacy including how to quantify the harms that result from companies' failure to secure consumer information, and how to balance the costs and benefits of privacy-protective technologies and practices." <https://www.ftc.gov/news-events/press-releases/2017/06/ftc-announces-third-privacycon-calls-presentations>.

In this regard, Pahl posed several rhetorical questions. What sorts of privacy claims are material to consumers? How "likely" does harm have to be to be "likely to cause substantial consumer injury" under the FTC's unfairness authority? It's clear that Pahl will be asking these and other questions in considering what law enforcement actions to bring in the area of privacy and information security. Nonetheless, these areas remain a top priority.

National Advertising - Priorities

In the area of national advertising, Pahl listed three priorities that indicate a return to a more traditional, conservative approach to law enforcement. First, he said the agency will focus on "fraud" and "quasi-fraud," similar to the agency's historic approach to deceptive weight loss and dietary supplement claims. A second priority is health and safety, for example preventing deceptive advertising claims relating to the Opioid crisis. Third, the agency will prioritize advertising and marketing directed to certain populations, such as those in the military, those in rural areas, and the elderly. As in privacy and data security, Pahl expects his staff to engage in a rigorous analysis of consumer injury, and the costs and benefits of a practice, when recommending an enforcement action. For example, Pahl wants to see a consistent and rigorous application of the FTC's traditional "Pfizer" elements in advertising substantiation cases, to determine whether an advertising claim lacks an adequate basis and is therefore deceptive.

Financial Practices - Priorities

Pahl began this part of the discussion by acknowledging the CFPB's regulatory authority in the area of consumer financial protection. Given this, the FTC will target its resources on law enforcement. Similar to other areas, Pahl said the agency will prioritize cases involving fraud or quasi-fraud, in areas such as debt collection and payday lending. In

addition, the agency will prioritize areas where other agencies, such as the CFPB, lack authority. For example, the FTC is the exclusive federal agency with authority over auto dealers and claims under the Credit Repair Organizations Act (CROA). Given this, it will continue to bring enforcement actions against auto dealers and credit repair outfits. (The CFPB's absence of authority under CROA has not stopped it from taking action against credit repair companies under other laws, however.)

FinTech issues are a third priority. Pahl said the FTC's Bureau of Consumer Protection will leverage its Office of Technology to encourage consumer research and provide litigation support in enforcement actions, such as those involving in-application purchases by consumers. Pahl also discussed the agency's "debt collection FinTech initiative," which will look at how to encourage and modernize collection communications while still protecting consumers. Although Pahl did not say this, it appears that this "FinTech" priority - in particular in the area of debt collection - could overlap or even conflict with the CFPB's debt collection rulemaking and other initiatives.

With that said, Pahl offered reassurance about the relationship and coordination between the FTC and CFPB. The two agencies have concurrent law enforcement authority over most non-bank providers of consumer financial products and services. There is an established process in place, Pahl said, to notify each other of investigations and enforcement actions, and agency managers talk frequently. Although the FTC has the *legal* authority to investigate companies of all sizes, Pahl said the FTC is more likely to use its enforcement resources on companies that are not subject to the CFPB's supervisory authority, such as debt collectors that are not "larger participants" already subject to CFPB exams.

Investigative Process Reform

Pahl next turned to investigative process reform. In April, Acting Chairwoman Olhausen announced process reform initiatives already underway at the Commission.

<https://www.ftc.gov/news-events/press-releases/2017/04/process-reform-initiatives-are-already-underway-federal-trade>

Pahl explained that the agency is considering how to make Civil Investigative Demands more streamlined and less burdensome on recipients, how to use experts to evaluate potential enforcement actions, and whether to revise certain boilerplate order provisions, such as "Project Scofflaw" order provisions that some see as overly burdensome. Working groups on these issues will soon make recommendations to Pahl, with an eye toward making the investigative process easier and shorter for investigation targets. There are some changes that Pahl might be able to make on his own, while others - such as those relating to the length of order provisions - may require Commission action. Pahl said one issue is whether the 20-year duration of administrative orders is too long, in light of the FTC's historical experience.

Since Pahl's remarks, there have been updates on this initiative. On July 17, Acting Chairwoman Olhausen announced several internal process reforms in the Bureau of Consumer Protection to streamline information requests and improve transparency in Commission investigations. The process reforms include:

- providing plain language descriptions of the CID process and developing business education materials to help small businesses understand how to comply;
- adding more detailed descriptions of the scope and purpose of investigations to give companies a better understanding of the information the agency seeks;
- where appropriate, limiting the relevant time periods to minimize undue burden on companies;
- where appropriate, significantly reducing the length and complexity of CID instructions for providing electronically stored information; and
- where appropriate, increasing response times for CIDs.

Olhausen also said the Bureau will continue to communicate with investigation targets concerning the status of investigations at least every six months after they comply with the CID.

These process reforms promise significant relief for companies. It will be Pahl's job, as head of the Bureau, to execute on these promises with more streamlined CIDs and better communication with companies.

Conclusion

Pahl currently serves in an "Acting" position and it remains to be seen whether he will be named the permanent Director of the FTC's Bureau of Consumer Protection. It appears that both consumers and industry would be well served by Pahl. On the one hand, he is an experienced and able consumer protection advocate with an established law enforcement record. On the other hand, he understands the need to carefully calibrate the FTC's enforcement actions

to focus on illegal trade practices that cause concrete consumer harm. Only time will tell how he strikes this balance in carrying out the FTC's consumer protection mission.

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