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FTC PROVIDES INSIGHT INTO LIABILITY FOR THIRD PARTY MISCONDUCT

In a forthright blog post, the Director of the Bureau of Consumer Protection, Andrew Smith, explained the Federal Trade Commission's ("FTC") approach to bringing enforcement actions against companies that assist, facilitate or participate with their customers, vendors or business partners in misconduct.

Mr. Smith wrote that the FTC "will seek to hold companies liable when they actively participate in illegal conduct with knowledge of its wrongfulness." This multi-party enforcement approach is not new. Over 30 years ago the FTC recognized the importance of holding companies liable for misconduct by others when the company is the "spoke of the wheel." The blog post lists examples of legal theories that the FTC has used to impose liability on companies for third party misconduct, including, but not limited to, holding a principal liable for its agent's activities, a means and instrumentalities theory and unfairness.

Mr. Smith also shared six factors that the FTC might consider in "looking for good candidates for enforcement" where multiple players are involved. One factor is whether a vendor, business partner or customer is involved in any other action brought by the FTC or a law enforcement agency. The FTC will look at the entire ecosystem supporting or enabling the misconduct to determine which party or parties may be subject to enforcement.

Within the last two years, the FTC has initiated actions against companies that helped consumers obtain financing to purchase fraudulent products. The FTC has also brought enforcement actions against companies that purchased leads generated through unlawful or deceptive means. The post provides other examples of enforcement actions involving multi-party liability.

The FTC encouraged companies to engage in sensible vetting or monitoring of third parties. The FTC has broad enforcement powers against nonbanks. In the interconnected world of financial services, the FTC's post is a good reminder of the legal risks posed by third party relationships. We can help identify risks with third party relationships, discuss potential third party management strategies and review agreements with third parties for potential issues. Be careful out there! ☐

✧ *Mike Tomkies and Susan Seaman*

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