

Could the FTC Pass the Torch to the Consumer Financial Protection Bureau to Oversee the Fintech Industry?

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The change in the White House administration combined with a potential ground-breaking Supreme Court decision may move the oversight and enforcement for marketing by the fintech sector from the Federal Trade Commission (“FTC”) to the Consumer Financial Protection Bureau (“CFPB”). This would be a tectonic shift.

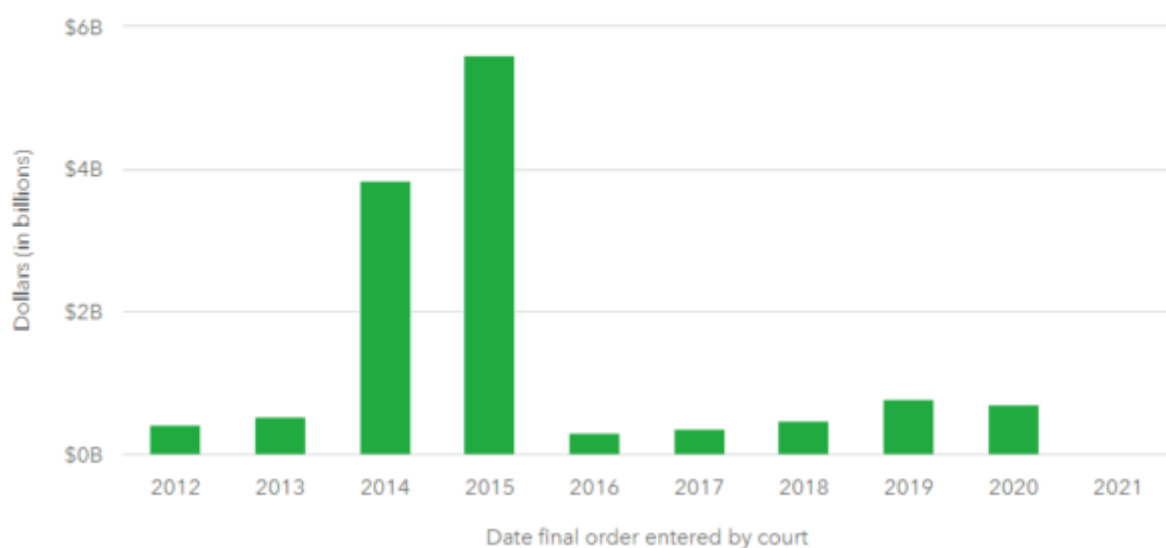
Up to the present, the FTC has been the primary federal watchdog prosecuting and investigating allegations of consumer fraud and deception in fintech. While the FTC has traditionally depended on administrative proceedings to prosecute perceived consumer harms, the FTC has increasingly relied on its authority under Section 13(b) of the FTC Act to bypass the administrative process and immediately seek relief in federal court. Though Section 13(b) explicitly references only injunctive relief, for the past decade, the FTC has aggressively pursued monetary relief in actions brought pursuant to Section 13(b). The FTC’s increasing pursuit of monetary awards in federal court under the invocation of Section 13(b) has been remarkable; according to estimates, the FTC has increased its pursuit of monetary penalties 23-fold, resulting in billions of dollars in recoveries. However, the Commission may soon find its preferred pathway is closed. In January, the Supreme Court heard oral argument in [AMG Capital Management, LLC v. FTC](#), a case that will likely decide whether Section 13(b) in fact authorizes the FTC to seek monetary relief. Should the Court rule against the FTC – as many observers predict – the FTC will be required to engage in administrative adjudication instead of going straight to federal court if it wants to seek consumer redress in the form of monetary damages for deceptive practices.

The timing and impact of the Supreme Court’s forthcoming decision may bring the CFPB to the forefront. Many have viewed the CFPB as a proverbial sleeping giant in terms of enforcement. Whereas the FTC’s Section 13(b) is silent as to monetary relief, the Consumer Financial Protection Act of 2010 (CFPA) 12 U.S.C. §§ 5565 explicitly provides that the CFPB can seek a broad array of relief including restitution, disgorgement, and various other forms of consumer redress. If the FTC’s enforcement strategy changes as a result of the Supreme Court’s decision, the CFPB is the most likely candidate agency to more aggressively supplement (or replace) the FTC’s dogged pursuit of consumer redress. Launched in 2011 in the wake of the financial crisis and authorized by Dodd-Frank, CFPB architect Elizabeth Warren initially described the new agency as the “[single point of accountability](#)” to serve as the “cop on the beat” enforcing consumer protection laws involving any entity offering consumer financial products or services. From a redress standpoint, the Obama administration prioritized monetary relief as part of its enforcement actions, generating nearly \$5.6 billion in consumer recovery in 2015 alone. As reflected in the [CFPB’s Enforcement Database](#), the Trump administration represented a shift in enforcement priorities, particularly with respect to remedies. Annual redress recoveries never exceeded \$800 million, and [penalties of \\$1 were commonplace](#).

FIGURE 3

Consumer relief by year

This interactive graph shows the total relief generated from CFPB enforcement actions by year from the Bureau's inception to the present. Hover over the bars to view the total consumer relief per year.



The Biden administration, however, is expected to revitalize the vitality of the Consumer Financial Protection Bureau, and has [tapped](#) current FTC Commissioner and former CFPB Assistant Director Rohit Chopra to serve as director of the CFPB.

Should he be confirmed, Chopra will likely seek to expand and build upon the enforcement authority of the CFPB, including in areas traditionally under the FTC's authority. Though it is impossible to predict his enforcement priorities, Chopra has offered a window into his views in his [dissenting statement](#) regarding the settlement in *In the Matter of Midwest Recovery Systems*, which involved allegations of unlawful debt collection and credit reporting practices. In his statement, Chopra highlighted ineffectiveness of the FTC's "go it alone debt collection enforcement strategy" as "frequently lead[ing] to outcomes" where consumers receive little or no redress. Chopra then recommended that the FTC should work alongside the CFPB to prosecute debt collection abuses. Chopra also suggested that the CFPB, and not the FTC, should be enforcing abuses in the mortgage, debt collection, and credit reporting markets. According to Chopra, although the FTC retained enforcement authority in those areas under the Fair Debt Collection Practices Act and the Fair Credit Reporting Act, the CFPB was better positioned than the FTC to "reform this market," rather than through the FTC's "one-off case-by-case enforcement." Chopra added the CFPB can both use its broad rulemaking authority to "define unfair, deceptive, and abusive practices" and also offer consumers relief through avenues like the CFPB's Civil Penalty Fund. Chopra's dissent made clear that he viewed the CFPB as an underutilized (and perhaps better equipped) agency to address issues of both rulemaking, enforcement, and redress. That view may only be reinforced if the Supreme Court further limits the scope of FTC enforcement.

Image Source: <https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/enforcement-database/>

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