

# Wiley Consumer Protection Download (April 10, 2023)

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Welcome to Wiley's update on recent developments and what's next in consumer protection at the Consumer Financial Protection Bureau (CFPB) and Federal Trade Commission (FTC). In this newsletter, we analyze recent regulatory announcements, recap key enforcement actions, and preview upcoming deadlines and events. We also include links to our articles, blogs, and webinars with more analysis in these areas. We understand that keeping on top of the rapidly evolving regulatory landscape is more important than ever for businesses seeking to offer new and groundbreaking technologies. Please reach out if there are other topics you'd like to see us cover or for any additional information.

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## Regulatory Announcements

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**CFPB Finalizes New Rule on Small Business Data Reporting.** On **March 30**, the CFPB finalized a rule pursuant to Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that requires covered financial institutions to report certain information about their small business lending practices, including the amount and category of small business credit applied for and granted, demographic information about applicants, and key characteristics about the details of the price offered. Covered financial institutions include entities that originated at least 100

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## Practice Areas

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Cyber and Privacy Investigations, Incidents & Enforcement

FTC and Consumer Protection

Privacy, Cyber & Data Governance

Telecom, Media & Technology

covered originations in each of the two preceding calendar years, and may include, for example, depository institutions, online lenders, platform lenders, community development financial institutions, lenders involved in equipment and vehicle financing (excluding motor vehicle dealers), commercial finance companies, merchant cash advance providers, government lending entities, and nonprofit lenders. The information collection generally applies to credit such as term loans, lines of credit, credit cards, and merchant cash advances. The CFPB's final rule comes after the agency issued a proposed rule in September 2021.

The final rule includes some changes from the proposed rule, which the CFPB indicates are intended to simplify data collection. These changes include, among other things: (1) a phased implementation period that requires the largest lenders to begin complying with the rule by October 1, 2024; (2) demographic and data collection requirements that allow small businesses to self-identify as women-, minority-, or LGBTQI+-owned; (3) provisions that make clear that loans reportable under the Home Mortgage Disclosure Act do not need to be reported under the final rule; and (4) allowing financial institutions and trade associations to develop services and technologies to assist lenders in complying with the final rule's information collection requirements.

#### **CFPB Issues Final Preemption Determination That State Lending Disclosure Laws are Consistent with TILA.**

On **March 28**, the CFPB issued a preemption determination, finding that state disclosure laws covering lending to businesses in California, New York, Utah, and Virginia are not preempted by the federal Truth in Lending Act (TILA). On December 15, 2022, the CFPB published a Notification in the Federal Register signaling its intent to make a preemption determination as to whether TILA preempts certain provisions of a New York commercial financing law. The CFPB published the Notification in response to a preemption request made by the Small Business Finance Association. In the notice, the CFPB also stated that it was considering whether to make a preemption determination regarding certain state laws in California, Utah, and Virginia that are potentially similar to the New York law.

Similar to TILA, the state laws at issue require creditors to make certain disclosures before the consummation of covered transactions. The CFPB's preemption determination concluded that the state laws are not preempted by TILA because the state laws only apply to commercial financing as opposed to personal lending. The preemption determination became effective on **March 31**.

**FTC Official Testifies Before House Judiciary Subcommittee on Responsiveness and Accountability to Oversight.** On **March 29**, the FTC Director of the Office of Congressional Relations Jeanne Bumpus testified before the House Judiciary Subcommittee on Responsiveness and Accountability to Oversight (the "Committee"). During her testimony, Ms. Bumpus noted that the FTC has worked to respond to the House Judiciary Committee's information requests "in a timely manner", including a February 14 information request concerning the agency's notice of proposed rulemaking (NPRM) on non-compete clauses.

#### Recent Enforcement Actions

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**CFPB Sues Owners of Lending Business for Allegedly Avoiding Settlement Payments.** On **April 3**, the CFPB filed a complaint in the U.S. District Court of Kansas against James R. Carnes and Melissa C. Carnes, both individually and as co-trustees of the James R. Carnes Revocable Trust and the Melissa C. Carnes Revocable

Trust, for alleged violations of the Consumer Financial Protection Act and the Federal Debt Collection Procedures Act. In November 2015, the CFPB sued the Carnes and their company, Integrity Advance, an online lending service, for deceptive loan practices. An Administrative Law Judge and the 10th Circuit upheld the CFPB's order, which concluded that Integrity Advance and James Carnes were jointly and severally liable for more than \$38 million in restitution and imposed a \$7.5 million civil money penalty against Integrity Advance and \$5 million penalty against Carnes. In the most recent action, the CFPB alleges that James and Melissa Carnes tried to hide money from the agency by transferring their assets into revocable trusts between 2013 and 2015 and have not made any payment to satisfy the outstanding judgment. The CFPB requests that the 2013 to 2015 transfers are declared fraudulent and proper remedies are issued against the Carnes' assets.

## Upcoming Comment Deadlines and Events

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**FTC to Hold Informal Hearing on Its Impersonation Fraud Rulemaking.** Written submissions and requests to make statements at the FTC's May 4 informal hearing on its proposed rule prohibiting government and business impersonation fraud must be submitted by **April 14**. According to the Federal Register Notice, there are "no 'disputed issues of material fact' to resolve at the informal hearing" and accordingly, "the presiding officer of the hearing will make no recommended decision." However, parties may submit written statement in advance, or make oral statements at the hearing.

**FTC Issues NPRM Proposing to Broadly Ban Employee Non-Compete Clauses.** Comments are due **April 19** (extended from March 20) on the FTC's NPRM that proposes to ban employers from imposing and enforcing employee non-compete clauses in contracts (we summarized the NPRM here). The NPRM specifically seeks comment on prohibiting an employer from: (1) either entering into or attempting to enter into a non-compete agreement with an employee; (2) maintaining a non-compete agreement with an employee; and (3) representing to an employee that they are subject to a non-compete clause without a good faith basis to believe that the employee is subject to an enforceable non-compete clause.

**FTC Requests Comment on Regulatory Review of the Green Guides.** Comments are due **April 24** (extended from February 21) on the FTC's Request for Comment to commence a regulatory review of the Guides for the Use of Environmental Marketing Claims (Green Guides). The Request for Comment (which we summarized here) asks, among other things: (1) whether the Green Guides should provide additional guidance on claims related to carbon offsets and climate change; (2) whether guidance on the term "recyclable" should be revised; (3) whether the term "recycled content" and claims about recycled content are widely understood by consumers; and (4) whether there is need for additional guidance in the Green Guides regarding "biodegradable," "compostable," "ozone-friendly," and "sustainable" product claims, or guidance on additional kinds of environmental claims. The Request for Comment also asks whether any aspect of the Green Guides should be codified as a rule.

**CFPB Proposes Rule to Regulate Credit Card Late Fees.** Comments are due **May 3** on the CFPB's NPRM proposing to regulate credit card payment late fees, which total \$12 billion annually. The NPRM's proposed changes would amend regulations implementing the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) to lower the immunity provision for late fees to \$8 for a missed payment. The NPRM

would also ban late fee amounts above 25% of the consumer's required payment, among other things.

**FTC Releases RFI on Cloud Computing Industry.** Comments are due **May 22** on an FTC Request for Information (RFI) seeking information regarding the business practices of cloud computing providers. The RFI outlines questions on both competition and data security issues in the cloud computing industry. The RFI also notes that FTC staff is interested in cloud computing with regards to specific industries, including healthcare, finance, transportation, e-commerce, and defense.

**CFPB Releases RFI on Data Broker Business Practices.** Comments on the CFPB's RFI seeking public comments on the business practices of data brokers are due **June 13**. Specifically, the RFI seeks information about the business models and data collection practices of a range of entities it defines as "data brokers," including the types of information that they collect, sell, and aggregate; the types of sources that they rely on to collect information; and the types of information that they receive from financial institutions, among other questions.

**FTC to Host a Workshop on "Recyclable" Claims.** The FTC will host a workshop on **May 23** titled *Talking Trash at the FTC: Recyclable Claims and the Green Guides*. The workshop is part of its recently announced regulatory review of the Green Guides. The half-day hybrid event will cover topics including: the current state of recycling practices and advertisements, consumer perceptions of recycling-related claims, and whether the Green Guides need to be updated or revised to accommodate changes in recycling advertising. Comments related to the issues discussed at the workshop are due **June 13**.

## More Analysis from Wiley

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Wiley Wins Four Law360 'Practice Group of the Year' Awards for 2022

FTC Joins the Cloud Security Discussion

5 Takeaways From Recent CFPB, FTC Equal Credit Push

State Privacy Update: California Finalizes New CCPA Regulations and Iowa Becomes the Sixth State to Adopt Comprehensive Privacy Legislation

State Privacy Update: A New Omnibus Privacy Law Passes in Iowa, Colorado Finalizes Privacy Rules

Podcast: AI Risk Management: A Discussion with NIST's Elham Tabassi on the NIST AI Risk Management Framework

FTC Proposes New Rule to Broadly Ban Non-Compete Agreements

FTC Requests Comment on Potential Revisions to Green Guides

At CES, FTC Commissioner Slaughter Discusses Agency Priorities and Tech Innovation

Webinar: Staying Ahead of State Privacy Laws: Tips and Best Practices for Building Compliant Strategies for Five Key States

Webinar: State Privacy Laws and Federal Government Contractors

California Moves Closer to Finalizing Updated CCPA Regulations and Launching a New Rulemaking for Cybersecurity Audits, Risk Assessments, and Automated Decisionmaking

NIST Releases AI Risk Management Framework, Expected to Be a Critical Tool for Trustworthy AI Deployment

New York Law Will Regulate Consumer Device Repair Options: What the Digital Fair Repair Act Means for the Consumer Electronics Industry

New Year, New State Privacy Laws: California and Virginia Laws Are Now Effective and More Requirements Are on Tap in 2023

FTC and DOJ File Complaint Against "Web of VoIP Service Providers" for Allegedly Making Illegal Robocalls Using Ringless Voicemails

PrivacyCon Illustrates the FTC's Focus on AI and Automated Decision Making Systems

FTC's PrivacyCon Highlights Risks and Opportunities For Children's Privacy

PrivacyCon 2022: FTC Hears from Researchers on Wide Range of Topics, Many of Which Overlap With Its Ongoing Privacy and Security Efforts

FTC Pushing Ahead Toward Major Privacy Regulation

FTC Hosts Event to Examine Children's Advertising in Digital Media

New Congressional Report Raises Possibility of False Claims Act Scrutiny for Fintech Companies Involved In PPP Loans

The Future of Web3 Depends on Careful Regulatory Approaches

California Age-Appropriate Design Code Act to Impose Significant New Requirements on Businesses Providing Online Services, Products, or Features

An Introduction to the California Age-Appropriate Design Code

*West Virginia v. EPA* and the Future of Tech Regulation

U.S. State Privacy Law Guide

Cyber Spotlight: Wiley Tackles White House's National Cybersecurity Strategy and Other Developments

Webinar: Transactional Due Diligence Related to Privacy and Cybersecurity

Webinar: FTC's Revised Safeguards Rule: How to Navigate New Information Security Requirements

Duane Pozza Named a Cryptocurrency and Fintech 'Trailblazer' by The National Law Journal

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**Download Disclaimer:** Information is current as of April 10, 2023. This document is for informational purposes only and does not intend to be a comprehensive review of all proceedings and deadlines. Deadlines and dates are subject to change. Please contact us with any questions.