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NEWSLETTER

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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 ground-breaking 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

CFPB Director Chopra Signals Agency's Intent to Exercise CFPA Authority in New Areas at Enforcers Summit. At the FTC's Enforcers Summit on **April 4**, CFPB Director Rohit Chopra issued remarks indicating that the CFPB intends to fully enforce its authority under the Consumer Financial Protection Act (CFPA), including in two new areas. Director Chopra covered a number of regulatory priorities during his remarks, including the applicability of the CFPA to training

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repayment agreements (TRAs), and whether an alleged abuse of a dominant market position by a company could constitute an abusive act or practice under the CFPA.

TRAs are generally agreements between an employer and an employee where the employer will incur the cost of certain training programs on the employee's behalf. Typically, employees that remain with the sponsoring employer for a set period of time are under no obligation to repay the employer under a TRA. If the employee leaves the employer before the period established under the TRA, however, the training cost becomes a debt obligation for the employee. Proponents of TRAs have argued that they are not subject to federal consumer financial laws as loans or extensions of credit because employees are not required to repay the cost of training during the course of their employment. In his remarks however, Director Chopra indicated that the CFPB is rejecting this view, and that TRAs and other "debt-like" products are extensions of credit subject to federal consumer financial laws.

CFPB Director Chopra also stated that the purported abuse of a dominant market position by a company can constitute an abusive CFPA act or practice. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 declares that an act or practice is abusive if it "materially interferes with the consumer's ability to understand a term or condition of a consumer financial product or service, or takes unreasonable advantage of a consumer." This would mark an expansion of the scope of the "abusive" prong of the CFPA.

CFPB Issues Report on Payday Borrower Rollover Fees. On **April 6**, the CFPB issued a report on payday loans finding that "monetary incentives encourage lenders to promote higher-cost rollovers at the expense of extended payment plans." In payday loans, the amount borrowed (coupled with the fees on the loan) is typically due in a single payment, which is usually on the borrower's next receipt of income. The CFPB's report concluded that "[d]espite the prevalence of State laws providing for no-cost extended payment plans, data show that rollover and default rates consistently exceed extended payment plan usage rates." Moreover, the report notes that state eligibility requirements for no-cost extended payment plans "likely impact" their usage rates.

FTC Approves Assessment Methodology Rule Proposed by Horseracing Integrity and Safety Authority. On **April 1**, the FTC announced that it approved the Assessment Methodology Rule proposed by the Horseracing Integrity and Safety Authority (HISA) following a public comment period. HISA, which was established following the implementation of the Horseracing Integrity and Safety Act of 2020, is charged with developing a horseracing anti-doping and medication control program and a racetrack safety program. The Assessment Methodology Rule proposed by HISA sets out methodologies for calculating assessments that participants in each state must pay to HISA.

CFPB Report Finds That Credit Card Providers Charged $12 Billion in Late Fees in 2020. On **March 29**, the CFPB issued a report finding that credit card companies charged approximately $12 billion in late fees in 2020, which represents a decline from the $14 billion that the companies assessed in 2019. The CFPB's report attributes this decline to "record-high payment rates and public and private relief efforts," and notes that "[e]ven during the pandemic, late fees accounted for over one-tenth of the $120 billion consumers pay in credit card interest and fees annually." The report also concluded that late fees make up 99 percent of all credit

card penalty fees and "over half of the credit card market's total consumer fees."

Significant Enforcement Actions

FTC Reaches Settlement With For-Profit Medical School for Alleged Deceptive Marketing and Rule Violations. On **April 15**, the FTC announced that it reached a settlement with Saint James School of Medicine (Saint James), a for-profit medical school in the Caribbean, and its Illinois-based operators, for alleged violations of the Telemarketing Sales Rule (TSR), Holder Rule, and Credit Practices Rule (CPR). Among other allegations, the FTC's complaint claims that Saint James allegedly made deceptive representations regarding the school's medical license exam test pass rates and residency matches. Saint James also allegedly used financing contracts that attempted to waive consumers' rights under federal law and omitted legally mandated disclosures pursuant to the Holder Rule. The stipulated order provides for injunctive relief against further misrepresentations and unsubstantiated claims, prohibitions against further violations of the TSR, Holder Rule, and CPR; and a requirement for Saint James to pay $1.2 million in settlement. The judgment will go toward refunds and debt cancellation for students who financed their education in the past five years. Saint James is also required to provide debt cancellation notices to consumers whose debts are being canceled under the order.

FTC Fines Florida-Based Battery Manufacturer for Alleged False Labeling of Foreign-Made Batteries as American. On **April 13**, the FTC announced that it has filed suit against and reached a settlement with Lithionics Battery LLC (Lithionics) and its owner, Steven Tartaglia, for alleged violations of the Made in USA Labeling Rule, the first action taken by the FTC under the new Rule. The Commission voted 4-0 to refer the complaint to the DOJ, which filed the complaint and proposed consent decree on behalf of the FTC in U.S. District Court for the Middle District of Florida. The complaint alleges that, since at least 2018, Lithionics has labeled its battery products with an American flag image surrounded by the words "Made in U.S.A.," often accompanied by the statement "Proudly Designed and Built in USA," when these products were in fact primarily made overseas. The proposed order will provide injunctive relief, including prohibitions against misleading product labeling, and civil penalties of over $100,000, equal to three times Lithionics' profits attributable to the alleged unlawful activity.

CFPB Sues Credit Reporting Agency and Former Executive for Allegedly Violating Order Against Deceptive Marketing. On **April 12**, the CFPB filed a complaint against TransUnion, two of its subsidiaries, TransUnion, LLC, and TransUnion Interactive, Inc. (TransUnion), and a former executive John Danaher, for allegedly violating multiple requirements contained in a 2017 consent order. That order prohibits the company from engaging in deceptive marketing regarding its credit scores and other credit-related products in violation of the Consumer Financial Protection Act of 2010 (CFPA), including enrolling consumers in negative option products without obtaining required consent; failing to offer a simple mechanism for cancelling products; and failing to provide required disclosures. Mr. Danaher is alleged to have repeatedly failed to ensure that TransUnion took certain required steps and refrained from prohibited conduct under the order. Additionally, the complaint alleges that TransUnion deceived customers into enrolling into its credit monitoring service through digital "dark patterns" and misrepresented numerous aspects of its products, services, and

subscription plans. The agency seeks redress to consumers, disgorgement, injunctive relief, and civil monetary penalties.

FTC Reaches Settlement with Retailers on Allegedly Deceptive Bamboo-Related Claims. On **April 8**, the FTC announced that it reached settlements with national retailers Kohl's Inc. (Kohl's) and Walmart, Inc. (Walmart) based on allegations that they made misleading advertising and environmental claims regarding certain products in violation of the Federal Trade Commission Act (FTC Act) and the FTC's Textile Act and Rules. In particular, the complaints against Kohl's and Walmart allege that the retailers each falsely marketed dozens of rayon textile products as bamboo. The FTC also alleges that the retailers misleadingly marketed some of the "bamboo-derived" products as providing general environment benefits, such as being produced "free of harmful chemicals, using clean, non-toxic materials" when according to the FTC the manufacturing process for those rayon textile products uses toxic chemicals and results in the emission of hazardous pollutants. In its announcement, the FTC highlighted that it alleged civil penalties to be justified based on its "Penalty Offense Authority," under Section 5(m) of the FTC Act. The proposed orders would provide injunctive relief and civil penalties of $2.5 million and $3 million, from Kohl's and Walmart, respectively.

FTC Charges Multistate Auto Dealer with Deceptive Add-On Charges and Discriminating Against Black Consumers. On **April 1**, the FTC announced that jointly with the State of Illinois, it filed suit against an Illinois-based multistate auto dealer group, North American Automotive Services, Inc., also known as Ed Napleton Automotive Group (Napleton) in the U.S. District Court for the Northern District of Illinois for allegedly including unauthorized, charges for add-on products and discriminating against Black consumers in connection with financing vehicle purchases. The complaint alleges violations of the Federal Trade Commission Act (FTC Act), the Truth in Lending Act (TILA), and its implementing Regulation Z; and the Equal Credit Opportunity Act (ECOA) in addition to violations of the Illinois Consumer Fraud and Deceptive Business Practices and the Illinois Motor Vehicle Advertising Regulations. The settlement imposes, in addition to permanent injunctive and other relief, a $10 million monetary judgement. Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter issued a concurring statement indicating that they would have also supported a count alleging racial discrimination as a violation of the FTC Act's prohibition on unfair acts or practices.

CFPB Fines Student Loan Servicer for $1 Million Allegedly Misrepresenting Eligibility for Loan Forgiveness. As we previously reported, on **March 30**, the CFPB announced that it had fined student loan servicer Edfinancial Services (Edfinancial) for allegedly misrepresenting Federal Family Education Loan Program (FFELP) borrowers' eligibility for Public Service Loan Forgiveness (PSLF). In addition to the $1 million fine, the CFPB's Consent Order requires Edfinancial to contact all potentially impacted borrowers and to provide them with further information about PSLF. Our more detailed coverage of the announcement is here.

FTC Sues Tax Filing Software Company for Alleged Deceptive Advertising. On **March 29**, the FTC announced that it had filed both an administrative complaint and a federal court complaint seeking preliminary relief against Intuit Inc. (Intuit), the maker of the TurboTax tax filing software, alleging violations of the Federal Trade Commission Act (FTC Act). The complaint alleges that Intuit engaged in a high profile marketing campaign for its "free" tax filing services. However, the complaint alleges that TurboTax is free only for some users, and for others, Intuit tells consumers they will need to upgrade to a paid TurboTax service to

complete and file their taxes after they have completed entering their personal and financial information. The complaint seeks injunctive relief.

Upcoming Comment Deadlines and Events

FTC Requesting Comment on Earnings Claims ANPRM. Comments are due **May 10** on an Advance Notice of Proposed Rulemaking (ANPRM) regarding a potential rule to address purported deceptive or unfair marketing pertaining to earnings claims made by money-making ventures. The ANPRM states that the "use of such [misleading earnings] claims both deprives consumers of the ability to make informed decisions and unfairly advantages bad actors in the marketplace at the expense of honest businesses."

CFPB Seeking Input on Proposed Rule Changes to Implement FCRA Amendments. Comments are due **May 9** on a Proposed Rule that makes several changes to the CFPB's Fair Credit Reporting Act (FCRA) regulations. The CFPB is proposing the changes to implement newly added Section 605C of the FCRA. Section 605C prohibits a consumer reporting agency (CRA) from furnishing a report containing any adverse information that resulted from a "severe form" of human trafficking or sex trafficking where the consumer has provided documented evidence of trafficking to the CRA. Specifically, the Proposed Rule would establish procedures to implement the new prohibition, including procedures for consumers to submit the required documentation to CRAs, and recordkeeping requirements for CRAs.

More Analysis from Wiley

FTC Takes Action Against Company for Collecting Children's Personal Information Without Parental Permission

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Podcast: Cyber in 2022: What Happened and What is Coming

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Latest Changes at FTC Will Drive Federal Action on Privacy, Data Security, and AI

FTC Policy Statement Signals Increasing Scrutiny on the Protection of Sensitive Personal Health Information

Download Disclaimer: Information is current as of April 18, 2022. 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.