

Wiley Consumer Protection Download (August 17, 2020)

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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.

Regulatory Announcements

CFPB Answers "Frequently Asked Questions" About the Payday Lending Rule. The CFPB provided some guidance on compliance with the agency's Payday Lending Rule – 12 C.F.R. § 1041 – through the Payday Lending Rule FAQs, which were released on **August 11**. The Payday Lending Rule, which the CFPB promulgated in 2017, covers loans that require that either the entire loan balance – or the majority of the loan balance – be repaid at once. Although the

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mandatory underwriting provisions of the original rule have been withdrawn, the CFPB has now ratified the payment provisions of the rule, covering when debts owed can be withdrawn from accounts. Therefore, some of the key topics covered by the Payday Lending Rule FAQs include what categories of loans are covered by the Payday Lending Rule, what constitutes a prohibited “payment transfer,” and payment amounts that would trigger a mandatory “unusual payment withdrawal” notice from the lender. The CFPB has previously issued a Small Entity Compliance Guide to help smaller lenders comply with the Payday Lending Rule.

FTC Commissioners Testify Before the Senate Commerce Committee. FTC Chairman Joseph Simons and Commissioners Noah Joshua Phillips, Rohit Chopra, Rebecca Kelly Slaughter, and Christine S. Wilson testified before the U.S. Senate Committee on Commerce on **August 5**. During their joint testimony, the Commissioners weighed in on potential changes to Section 230 of the Communications Decency Act (CDA), continued enforcement of the EU-U.S. Privacy Shield, and challenges to their enforcement authority. In addition to highlighting the agency’s COVID-19-related enforcement actions, the commissioners also repeated their support for federal privacy and data security laws. Our recap of highlights of the Commissioners’ testimony is [here](#).

FTC Focuses on Protecting Small Businesses During the COVID-19 Pandemic. The FTC Director of the Bureau of Consumer Protection published a Blog Post on **August 3** discussing the agency’s efforts to protect small businesses during the COVID-19 pandemic. The FTC highlighted recent enforcement actions taken against merchant cash advance providers and against a business that the agency alleged to misrepresent that it was an approved Paycheck Protection Program (PPP) lender. Additionally, the post urged market participants to supervise marketers and other agents making claims on their behalf and encouraged them to avoid unlawful servicing practices, among other things. The post made clear that small business lending is a focal point for the agency during the COVID-19 outbreak and likely beyond.

Significant Enforcement Actions

FTC Brings Enforcement Actions Against Online Sellers Making False Promises About PPE Delivery. On August 5, the FTC filed complaints against the operators of the online store Glowyy ([available here](#)), the operators of wrist-band.com ([available here](#)), and American Screening, LLC ([available here](#)) for violations of the FTC’s Mail, Internet, and Telephone Order Rule (Mail Order Rule). The Mail Order Rule requires companies to notify consumers of shipping delays in a prompt manner and give consumers the opportunity to cancel orders and receive timely refunds. The FTC’s complaints allege that the defendants repeatedly failed to ship various categories of personal protective equipment (PPE) to consumers based on the timeline initially guaranteed by the defendants. Additionally, many of the companies refused to provide refunds for late or defective PPE.

Capital One Agrees to Pay \$80 Million to Settle OCC Cybersecurity Breach Investigation. On **August 6**, the Office of the Comptroller of the Currency (OCC) assessed an \$80 million civil penalty against Capital One, N.A. and Capital One Bank (USA), N.A. (collectively, Capital One) due to the bank’s alleged failure to establish effective risk management procedures before transferring substantial information technology to the cloud environment. Specifically, the OCC concluded that Capital One’s alleged deficiencies constituted unsafe or

unsound practices that violated 12 C.F.R. Part 30, Appendix B after a 2019 hack exposed the financial data of more than 100 million individuals. Additionally, the OCC's Consent Order requires Capital One to establish a compliance committee by the end of August.

FTC Files Complaint Against Merchant Cash Advance Provider. The FTC filed a complaint against Yellowstone Capital (Yellowstone) in the U.S. District Court for the Southern District of New York on **August 3**. Specifically, the FTC's complaint alleges that Yellowstone withdrew millions of dollars from small business' accounts after the businesses had paid back the amounts that they owed under Yellowstone's merchant cash advance contracts. Merchant cash advances are a financing structure in which a provider advances money to a business up front in exchange for a larger repayment amount through daily automatic payments. The FTC alleges that Yellowstone deceived small businesses about the amounts that they would receive under the contracts as the amount displayed did not reflect additional fees and other deductions. The FTC's complaint alleges that these practices, along with potential deceptive marketing tactics, violated the Federal Trade Commission Act.

Upcoming Comment Deadlines and Events

CFPB Solicits Input on Pilot Advisory Opinion Program. Comments are due **August 21** on the CFPB's Proposed Rule seeking comment on its new advisory opinion (AO) program. The pilot AO program permits companies seeking clarity over uncertain regulations to submit requests for opinions. Among other things, the Proposed Rule is seeking comment on whether to allow trade associations to submit questions on behalf of its members without naming them. The CFPB will select topics based on program priorities and will publicize its responses. Requests for advisory opinions may be submitted via email [here](#).

OCC Seeks Comment on Proposed True Lender Rule. The Office of the Comptroller of the Currency (OCC) is soliciting comment on a Proposed Rule to determine when a national bank or federal savings association is the "true lender" in the context of a loan made in partnership between a bank and a third party. The Proposed Rule seeks to resolve uncertainty regarding the regulatory framework that applies to loans made pursuant to such partnerships by specifying that a bank making a loan is the "true lender" if "as of the date of origination, it (1) is named as the lender in the loan agreement or (2) funds the loan." If promulgated, the OCC's proposals would impact banks under the CFPB's supervisory jurisdiction. Comments on the Proposed Rule are due **September 3**.

CFPB Seeks Comment on Amendments to General Qualified Mortgage (QM) Loan Definition. Comments are due **September 8** on the CFPB's Proposed Rule on seeking modifications to the loan definition of General QMs under Regulation Z. For example, the CFPB proposes to eliminate the total monthly debt to total monthly income ratio (DTI ratio) of 43% and replace it with a price-based limit.

FTC Seeks Comment on "Made in the USA" Rulemaking. Comments are due **September 14** on the FTC's Notice of Proposed Rulemaking (NPRM) to codify "Made in the USA" product labeling requirements. This could allow the FTC to impose greater monetary penalties on companies that the agency finds in violation of the requirements. One of the critical issues in the Rulemaking will be the extent to which the finalized rule

covers product marketing and advertising claims in conjunction with product labeling. Our summary of the Rulemaking and its implications can be found [here](#).

CFPB Solicits Input on Exemptions from Escrow Account Requirements for Mortgage Loans. The CFPB is seeking comment on a Proposed Rule that would amend Regulation Z under the Truth in Lending Act (TILA). Specifically, the Proposed Rule would create an exemption for certain insured depository institutions and credit unions from the requirement to establish escrow accounts for some higher-priced mortgage loans. The CFPB is issuing the proposal pursuant to the 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act, which required the CFPB to implement a new exception from TILA's escrow obligation for depository institutions and credit unions. Comments are due September 21.

[More Analysis from Wiley](#)

Antonio Reynolds Discusses Cyber Vulnerabilities for Financial Institutions' Vendors

FTC Commissioners Weigh In on Prominent Topics at Oversight Hearing

CFPB and FTC Highlight Consumer Protection Priorities During the Coronavirus Pandemic in Separate Congressional Hearings

European Authorities Take Hard Line on EU-U.S. Data Transfers After Privacy Shield Decision, While FTC Still Plans to Enforce Privacy Shield Compliance

FTC PrivacyCon 2020 Examines Health Apps and IoT

New York DFS Takes First Enforcement Action Under Its Cybersecurity Regulation

NTIA Files Rulemaking Petition Seeking "Clarification" of Section 230, as Required by Recent Executive Order

Federal Court Says Data Breach Alone Is Insufficient To Establish Standing

Cross-Border Data Transfer Mechanisms in Flux as Court of Justice for the European Union Invalidates Privacy Shield

FTC Authority Under Challenge at Supreme Court: What's At Stake

Supreme Court Rules That the Removal Standard for the CFPB Director is Unconstitutional

Sixth Circuit Enters TCPA Autodialer Fray

President Trump Targets Chinese Social Media Apps TikTok and WeChat in New Executive Orders

FTC Examines Proposed Amendments to the GLBA Safeguards Rule in Full-Day Workshop

Tech, ICT and 5G will Stay Under Bipartisan Scrutiny in the Senate: Minority Report on Chinese “Digital Authoritarianism”

Privacy in Focus (August 2020)

Privacy in Focus (July 2020)

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