

Wiley Consumer Protection Download (February 13, 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 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

FTC to Host Public Forum on Proposed Rule to Broadly Ban Non-Compete Agreements. The FTC announced that it will host a public forum on **February 16** to examine the FTC's Notice of Proposed Rulemaking (NPRM) that proposes to ban employers from either imposing or enforcing worker non-compete clauses (we summarized the NPRM [here](#)). The public forum will provide an opportunity for the public to share experiences with non-compete clauses, and will

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Privacy, Cyber & Data Governance
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supplement the NPRM's request for comments. 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.

CFPB Issues Advisory Opinion to Prevent Comparison Shopping Platforms from Charging Referral Fees for Mortgages. On February 7, the CFPB issued an Advisory Opinion concluding that companies violate the Real Estate Settlement Procedures Act (RESPA) when they recommend mortgage lenders to real estate shoppers by charging the lenders a referral fee, rather than recommending based on objective information. RESPA prohibits steering borrowers to "preferred" lenders based on a referral fee. Specifically RESPA requires that referrals be based on neutral, objective criteria that consider the interests of the consumer. According to the CFPB, the Advisory Opinion does not create new requirements, but provides guidance on how firms can navigate issues associated with digital mortgage comparison shopping platforms.

CFPB Proposes Rule to Regulate Credit Card Late Fees. On February 1, the CFPB released an 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. Comments on the NPRM are due April 3, 2023, or 30 days after publication in the Federal Register, whichever is later.

FTC Staff Provides Annual Letter to CFPB on ECOA Regulatory and Enforcement Activities. On February 9, FTC staff sent an annual summary of its activities enforcing the Equal Credit Opportunity Act (ECOA). ECOA prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, or age, among other factors. The FTC is responsible for enforcing ECOA compliance and education for most non-bank financial service providers. Among other things, the annual summary details two ECOA cases against auto dealership groups (here and here); a Report to Congress on Combatting Online Harms through Innovation which warns about using artificial intelligence to combat online harms, alleging that these tools may have potential for inaccuracy, bias, and discrimination; and the FTC's participation on the Interagency Task Force on Fair Lending and the Interagency Fair Lending Methodologies Working Group. A copy of the annual summary was also provided to the Federal Reserve Board.

Recent Enforcement Actions

FTC Approves Final Orders Regarding Allegedly Deceptive Product Endorsements. On February 9, finalized consent orders against Google and iHeartMedia following a public comment period. The FTC originally filed a complaint and proposed settlement with the companies on November 28 based on allegations that radio personalities promoted certain mobile phones though they had not personally owned or used them, which the FTC alleged was deceptive in violation of the FTC Act. Seven state attorneys general also reached monetary settlements with the companies. The FTC voted 4-0 to approve the final consent

orders.

FTC Settles Deceptive Advertising Claim with Nutritional Supplement Company. On February 6, the FTC filed a stipulated order in the U.S. District Court of Massachusetts for permanent injunctive relief against ZyCal Bioceuticals Healthcare Company, Inc. and its president James J. Scaffidi. The FTC initially filed its complaint against ZyCal, on February 10, 2020, alleging the nutritional supplement company had been advertising a supplement that could relieve joint pain by helping bone and cartilage growth without support from randomized controlled clinical trials. The FTC alleged that ZyCal was deceptively advertising this product directly to consumers and through third-party distributors. The order, which the Commission approved 4-0, requires ZyCal to cease any false or deceptive advertising claims about health benefits that are not scientifically substantiated and to notify customers of the finalized order.

FTC Settles with Digital Healthcare Platform for \$1.5 Million. On February 1, the FTC filed a complaint and stipulated order against GoodRx in the Northern District Court of California for alleged violations of the FTC Act and the Health Breach Notification Rule. The FTC alleges that GoodRx shared personal health information of its users with third-party advertisers, allegedly used the information to provide targeted ads to its users contrary to claims that it would not share such information, and misrepresented compliance with HIPAA. Additionally, the FTC alleges that the company's failure to notify consumers, the FTC, and the media of its release of personally identifiable health information to third parties was a violation of the Health Breach Notification Rule. The proposed order requires the company to pay a \$1.5 million civil money penalty, and implement a privacy program that includes data retention and deletion policies, among other injunctive provisions.

Upcoming Comment Deadlines and Events

FCC Seeks Comment on Data Breach NPRM. Comments are due **February 22, 2023** on the Federal Communication Commission's (FCC) Notice of Proposed Rulemaking (NPRM) that proposes a number of changes to the agency's customer proprietary network information breach reporting rules (we summarized the item here). Among other things, the FCC's NPRM proposes to: expand the definition of the term "breach" to include accidental access, use, or disclosure; require breach notification to the FCC, FBI, and Secret Service "as soon as practicable" after the discovery of a breach; and eliminate the mandatory seven-business-day waiting period prior to customer notification.

FTC Issues NPRM Proposing to Broadly Ban Employee Non-Compete Clauses. Comments are due **March 20, 2023** 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.

CFPB Proposes Rule to Establish Registry of Nonbank Terms or Conditions That Claim to Waive or Limit Consumer Rights. Comments are due **March 31, 2023** on the CFPB's Proposed Regulation to establish a public registry of nonbank financial institutions' terms or conditions that purport to waive or limit consumer rights or protections, such as "bankruptcy rights, liability amounts, or complaint rights." Specifically, the Proposed Rule would require nonbanks that are subject to the CFPB's supervisory authority to submit information on terms and conditions in form contracts they use.

FTC Requests Comment on Regulatory Review of the Green Guides. Comments are due **April 24, 2023** (extended from February 21, 2023) 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.

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FTC Requests Comment on Potential Revisions to Green Guides

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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 Launches Rulemaking on Fee Disclosures and Practices Across Industries

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

FCC Releases Long-Anticipated Data Breach Reporting NPRM, Proposing Major Changes to CPNI Rules

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