

Wiley Consumer Protection Download (July 12, 2022)

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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

CFPB Issues Advisory Opinion on FCRA Permissible Purposes for Providing Consumer Reports. On July 7, the CFPB issued an Advisory Opinion on the Fair Credit Reporting Act (FCRA) that outlines certain obligations of consumer reporting agencies (CRAs) and consumer report users under Section 604 of the FCRA. Section 604 allows a CRA to furnish a report “[t]o a person which it has reason to believe” intends to use the information for a permissible purpose. The CFPB's

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Advisory Opinion “interprets the permissible purposes … to apply only with respect to the consumer who is the subject of the user’s request.” The CFPB notes that “[t]he use of poor matching procedures, such as name-only matching” can lead CRAs to run afoul of this interpretation. The Advisory Opinion also states that a disclaimer to the consumer may not be used to cure such violations of the statute.

Additionally, the Advisory Opinion issues an interpretation of Section 604(f) of the FCRA, which prohibits a person from obtaining a consumer report unless it “is obtained for a purpose for which the consumer report is authorized to be furnished under [section 604].” The CFPB’s Advisory Opinion concludes that the provision “imposes a strict prohibition on using or obtaining a consumer report without a permissible purpose” and does not impose a “reason to believe” standard. Mistakenly obtaining a report by, for example, inputting data incorrectly, constitutes a violation of Section 604(f).

Finally, the Advisory Opinion outlines potential criminal liability provisions in the FCRA. Specifically, it flags that “[a]ny officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency’s files to a person not authorized to receive that information” can be criminally liable under Section 620 of the FCRA. The CFPB’s Advisory Opinion takes effect upon publication in the Federal Register.

CFPB Grants Earned Wage Access Provider’s Request to Terminate Its Sandbox Approval Order. On **June 30**, the CFPB issued an Order granting earned wage access provider Payactiv, Inc.’s (Payactiv) request to terminate its Sandbox Approval Order (Approval Order). In the Approval Order, which was signed in December 2020, the CFPB agreed to grant Payactiv “a safe harbor from liability under [the Truth-in-Lending Act] and Regulation Z.” Payactiv requested termination of the Approval Order because Payactiv is planning to modify its earned wage access product fee model, and the Approval Order only applies to its current model. This comes after the CFPB announced in May 2022 that it was replacing its Office of Innovation with the Office of Competition and Innovation, and ending the Sandbox program.

CFPB Issues Advisory Opinion on Convenience Fees. On **June 29**, the CFPB issued an Advisory Opinion to clarify that the Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from assessing convenience fees, which the CFPB refers to as “pay-to-pay” fees. Section 808(1) of the FDCPA prohibits debt collectors from collecting “any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.” Convenience fees are fees assessed for making a payment on a debt online or by phone, though the agreement creating the debt may not specify such fees. The CFPB’s Advisory Opinion also notes that a debt collector may violate the FDCPA when the debt collector collects convenience fees through a payment processor. The Advisory Opinion will take effect upon publication in the Federal Register.

FTC Approves HISA Registration Rule. On **June 29**, the FTC issued an Order approving the Horseracing Integrity and Safety Authority’s (HISA) proposed Registration Rule, which details which persons must register with HISA, and the applicable registration requirements. 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.

CFPB Issues Interpretive Rule on FCRA's Limited Preemption of State Laws. On **June 28**, the CFPB issued an Interpretive Rule clarifying that state credit reporting laws and regulations that are not inconsistent with the Fair Credit Reporting Act (FCRA) "are generally not preempted" by the statute. Specifically, the Interpretive Rule provides that states "retain substantial flexibility to pass laws involving consumer reporting to reflect emerging problems affecting their local economies and citizens." The Interpretive Rule notes, for example, that the FCRA would not preempt state laws that prohibit consumer reporting agencies (CRAs) from including information about medical debt, evictions, arrest records, or rental arrears on a consumer report. The Interpretive Rule also clarifies that states can promulgate laws and regulations that prohibit furnishers from furnishing certain information to CRAs. The Interpretive Rule will take effect upon publication in the Federal Register.

CFPB Issues Final Rule Implementing FCRA Amendments. On **June 24**, the CFPB issued a Final Rule that makes several changes to the CFPB's FCRA regulations. The Final Rule adds Section 605C to the FCRA. Section 605C prohibits a 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 Final Rule establishes procedures to implement the new prohibition, including procedures for consumers to submit the required documentation to CRAs, and record-keeping requirements for CRAs.

FTC Proposes Motor Vehicle Dealers Trade Regulation Rule. On **June 23**, the FTC released a Notice of Proposed Rulemaking (NPRM) seeking comment on a proposed trade regulation rule that would: (1) prohibit automotive dealers from making certain representations while selling, leasing, or arranging for the financing of motor vehicles; (2) require pricing disclosures in automotive dealers' advertising and sale discussions; (3) obligate automotive dealers to obtain consumer express informed consent for charges; (4) prohibit the sale of add-on products or services that confer no benefit to the consumer; and (5) require automotive dealers to retain records of advertisements and customer transactions. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 authorizes the FTC to promulgate certain rules related to automotive dealers. Comments on the NPRM are due 60 days after publication in the Federal Register.

Significant Enforcement Actions

FTC Obtains Preliminary Injunctive Relief Against Grant Writing Service for Allegedly Targeting Minority-Owned Small Businesses. On **June 27**, the FTC announced that, in conjunction with the State of Florida, it took action against Florida-based Grant Bae, and its owner, Traeshonna P. Graham, for alleged violations of the COVID-19 Consumer Protection Act, the FTC Act, and the Florida Deceptive Unfair Trade Practices Act. The Commission voted 5-0 to file the complaint and request for temporary restraining order. The complaint alleges that the defendant marketed grant writing and consulting services to minority-owned small business owners seeking pandemic relief, with false claims that the businesses could access "guaranteed" grant funding and COVID-19 economic benefits. The FTC sought a temporary restraining order (TRO) and the appointment of a receiver with an asset freeze, and the court issued the requested TRO on June 21, 2022.

FTC Files Suit Against National Retailer Based on Allegations Regarding Its Money Transfer Service Practices. On **June 28**, the FTC announced that it filed a complaint against Walmart Inc. under the Federal Trade Commission Act (FTC Act) and the Telemarketing Sales Rule (TSR). The complaint alleges that the company failed to take certain steps to prevent fraud-related money transfers using its services. The Commission voted 3-2 to approve the complaint, which was filed in the U.S. District Court for the Northern District of Illinois.

FTC Settles with Three Companies Based on Alleged Violations of the Magnuson-Moss Warranty Act. On **July 7**, the FTC announced that it reached a settlement with grill maker Weber-Stephen Products, LLC, to resolve the FTC's allegations that the company violated the Magnuson-Moss Warranty Act (MMWA) by allegedly including warranty terms that conveyed that the warranty would be void if customers use or install third-party parts. This follows a **June 23** announcement that the FTC reached separate settlements with Harley-Davidson Motor Company Group, LLC and Westinghouse outdoor generator maker MWE Investments, LLC, also for alleged violations of the MMWA. In each instance, the Commission voted to accept proposed consent agreements for public comment.

Upcoming Comment Deadlines and Events

CFPB Solicits Feedback on Proposed Changes to Credit Card Late Fees and Late Payment Rules.

Comments are due **July 22** on the CFPB's Advance Notice of Proposed Rulemaking (ANPR) seeking comment related to credit card late fees in the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) and Regulation Z. The ANPR requests public feedback on factors used by card issuers to set late fee amounts; card issuers' costs and losses associated with late payments; the deterrent effects of late fees; cardholders' late payment behavior; methods that card issuers use to facilitate or encourage timely payments, including autopay and notifications; card issuers' use of the late fee safe harbor provisions in Regulation Z; and card issuers' revenue and expenses related to their domestic consumer credit card operations.

FTC Requests Information on Revising Its '.com Disclosures' Guidance on Digital Advertising. Comments are due **August 2** on a Request for Information (RFI) seeking comment on revisions to the FTC's business guidance titled, ".com Disclosures: How to Make Effective Disclosures in Digital Advertising." The guide, which was originally published in 2013, provides guidance to businesses on how to make advertising and marketing disclosures online, particularly in the mobile context. The RFI seeks comment on, among other things: advertising embedded in games, virtual reality, and microtargeted advertisements; whether the current guidance adequately addresses advertising on mobile devices; and the "ubiquitous use of dark patterns, manipulative user interface designs used on websites and mobile apps, and in digital advertising that pose unique risks to consumers."

FTC Seeking Comment on Amendments to the TSR. Comments are due **August 2** on a Notice of Proposed Rulemaking (NPRM) and an Advance Notice of Proposed Rulemaking (ANPR) seeking comment on proposed amendments to the Telemarketing Sales Rule (TSR). The NPRM proposes to amend the TSR to prohibit business-to-business (B2B) telemarketing calls that qualify as "deceptive" under the Rule. It also seeks comment on modifying the TSR's current record-keeping provisions to require telemarketers to retain robocall

recordings, telemarketing scripts, and audio files from telemarketing calls. Further, the NPRM proposes to require telemarketers to retain certain records sufficient to show that a called party authorized a transaction before they were charged. The ANPR seeks public feedback on broader potential TSR amendments, including whether the TSR's B2B telemarketing exemption should be maintained, modified, or eliminated altogether; whether the B2B telemarketing exemption disproportionately impacts minority and marginalized communities; whether certain inbound calls to telemarketers should be covered by the TSR; and whether the TSR should require sellers that use "negative option" marketing to give consumers notice and a method to cancel negative option programs.

FTC Holding Virtual Event on 'Stealth Advertising' Towards Children. On **October 19**, the FTC will host a virtual event "to examine how best to protect children from a growing array of manipulative marketing practices that make it difficult or impossible for children to distinguish ads from entertainment in digital media." The event will examine evolving practices, such as the "kid influencer" marketplace, and the techniques being used to advertise to children over the internet. Research papers and written comments may be submitted to the FTC here by **July 18**.

FTC Seeking Research Presentations for PrivacyCon 2022. Research presentations are due **July 29** for PrivacyCon 2022, which will take place virtually on **November 1**. As part of the event, the FTC is seeking empirical research and presentations on topics including: algorithmic bias; "commercial surveillance" including workplace monitoring and "biometric surveillance"; new remedies and approaches to improve privacy and security practices; and the privacy risks posed by emerging technologies for children and teens.

More Analysis from Wiley

Top Developments to Watch at the FTC on Privacy

California Privacy Protection Agency Releases Draft CPRA Regulations

Webinar: The FTC's Changing Approach to Privacy

EU Institutions Reach Agreement on Landmark Regulations Targeting Big Tech

National Privacy Law: Bipartisan Proposed Legislation Regarding Privacy Released

And Then There Were Five: Connecticut Adopts Comprehensive State Privacy Law

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

Lawmakers Continue to Scrutinize Algorithm Use Directed at Youth

U.S. State Privacy Law Guide

Webinar: Transactional Due Diligence Related to Privacy and Cybersecurity

NIST Seeks Feedback on Draft AI Risk Management Framework in Connection with Extensive Stakeholder Workshop

Utah to Add Fourth Omnibus Privacy Law to the Growing State Patchwork

Federal Efforts Introduced to Protect Non-HIPAA Health Data

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

Industry Highlights NIST Cybersecurity Framework's Value as NIST Weighs a Potential Update

CISA Signals Cyber Incident Report Requirements

'An Avalanche of Rulemakings' – The FTC Gears Up for an Active 2022

EU and U.S. Reach Agreement in Principle on New Data Privacy Framework for EU-U.S. Data Transfers

Steps to Take in 2022 to Prepare for New State Privacy Laws

The Top 5 Cyber Issues for 2022

Podcast: Ransomware, Geopolitical Tensions, and the Race to Regulate

2022 Cyber Watch List: A look at 2021 and What's to Come in the Year Ahead

Podcast: Why the FTC Matters for Fintech

White House Seeks to Develop AI Bill of Rights and Calls for Feedback on Use of Biometric Data

FCC Shifts Regulatory Landscape for Gateway Providers; Proposed Rules Signal Further Changes

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

Podcast: Artificial Intelligence Can Do Really Dumb Things With Personal Information

American Bar Association Webinar: Crypto at a Crossroads: Crypto and Privacy

Data Transfers from the EU – Further Guidance Issued

Duane Pozza Discusses Emerging Regulatory Approach to Crypto and DeFi

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Download Disclaimer: Information is current as of July 12, 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.