

Wiley Consumer Protection Download (July 25, 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 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 Announces MOU with NLRB to Address Employment-Based Consumer Protection Issues. On **July 19**, the FTC announced that it entered into a memorandum of understanding (MOU) with the National Labor Relations Board (NLRB). The MOU states that the "FTC and NLRB share an interest in protecting American workers and promoting fair competition in labor markets." The MOU identifies a number of "issues of common regulatory interest," including labor

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market developments related to the “gig” economy, alternative work arrangements, the use of noncompete and nondisclosure provisions in employment contracts, and the impact of algorithmic decision-making on workers, among other things. The FTC and NLRB state that the purposes of the MOU are to “facilitate (a) information sharing and cross-agency consultations on an ad hoc basis for official law enforcement purposes, in a manner consistent with and permitted by the laws and regulations that govern the Parties, (b) cross-agency training to educate each Party about the laws and regulations enforced by the other Party, and (c) coordinated outreach and education as appropriate.”

FTC Publishes Blog Post on ‘Highly Sensitive’ Nature of Health and Geolocation Data. On **July 11**, FTC staff published a blog post emphasizing the agency’s focus on protecting a person’s health and precise location data as sensitive personal information. As we discussed in more detail, the FTC’s blog post discusses ways in which such data may be collected, shared, and sold, and notes that the agency is “committed to using the full scope of its legal authorities to protect consumers’ privacy” and that it “will vigorously enforce the law if [the FTC] uncover[s] illegal conduct that exploits Americans’ location, health, or other sensitive data.”

Significant Enforcement Actions

FTC and Multistate Group File Suit and Settle with Jewelry Retailer Based on Alleged Violations of the Military Lending Act. On **July 20**, the FTC announced that it filed suit against and reached a settlement with Harris Jewelry for alleged violations of state law, the Federal Trade Commission Act (FTC Act), the Truth in Lending Act (TILA), the Electronic Fund Transfer Act (EFTA), the Holder Rule, and the Military Lending Act (MLA). The lawsuit represents the first action taken by the FTC under the MLA in connection with jewelry sales and financing to members of the military. The Commission voted 5-0 to approve the complaint and stipulated order, which was filed in the U.S. District Court for the Eastern District of New York. The complaint alleges that the company targeted young service members at the lowest pay grades and: made false or unsubstantiated claims that financing jewelry purchases through the company would result in higher credit scores; misrepresented that protection plans were required to finance purchases; failed to include written disclosures in its retail installment contracts as required by TILA and the MLA; failed to meet authorization requirements as required by the EFTA. Harris Jewelry also allegedly failed to provide written notice in its contracts as required by the FTC’s Holder Rule and failed to make oral disclosures at the time of sale as required by the MLA. Under the proposed order with the FTC and a group of 18 states, Harris Jewelry must stop collection of millions of dollars in debt, provide approximately \$10.9 million in refunds for purchased protection plans, provide refunds for overpayments, assist with the deletion of any negative credit entries pertaining to debt in consumers’ credit reporting file, and once its obligations under the order are met, complete its shutdown of operations and dissolve pursuant to applicable state laws.

CFPB Fines Bank of America for Alleged EFTA and Other Violations in Relation to the Disbursement of State Unemployment Insurance Benefits. On **July 14**, the CFPB issued an order against Bank of America, Inc. (Bank of America) for alleged violations of the Consumer Financial Protection Act of 2010 (CFPA); EFTA; and the EFTA’s implementing Regulation E. The stipulation and consent order alleges that Bank of America failed to conduct reasonable investigations of prepaid debit cardholders’ notices of error; failed to timely investigate

and resolve prepaid debit cardholders' error claims; and made it difficult for consumers to unfreeze their prepaid debit cards or to report fraudulent use of their cards. The order requires Bank of America to provide consumer redress and to pay a \$100 million-dollar civil money penalty. In a separate order, the Office of the Comptroller of Currency (OCC) is fining the bank \$125 million.

CFPB Seeks to Enjoin Payday Lender for Allegedly Unlawful Lending Practices. On **July 12**, the CFPB filed a lawsuit against Populus Financial Group, Inc. d/b/a ACE Cash Express, Inc. (ACE Cash Express) in the U.S. District Court for the Northern District of Texas for alleged violations of a 2014 CFPB order and the Consumer Financial Protection Act. The CFPB alleged that ACE Cash Express concealed a free repayment plan from consumers who were entitled to it, instead inducing them to refinance their loans for additional fees, and withdrew money from borrowers' bank accounts without authorization. The Bureau seeks permanent injunctive relief, redress for consumers, and civil money penalties.

Upcoming Comment Deadlines and Events

FTC Seeks Comment on Revised Endorsement Guides. On May 19, the FTC approved a Request for Public Comment on Amendments to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (Request for Comment) that proposes a number of revisions to the FTC's Endorsement Guides. Among other matters, the Request for Comment seeks input on treating the deletion of negative reviews or the decision not to publish negative reviews as a deceptive act or practice under Section 5 of the FTC Act; addresses endorsements made on social media posts; and solicits feedback on adding a section to the Endorsement Guides focused on advertising towards children. **The Request for Comment will soon be published in the Federal Register, and comments are due 60 days after the date of publication.**

CFPB Extends Feedback Period on Proposed Changes to Credit Card Late Fees and Late Payment Rules. Comments are due **August 1** 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.

CFPB Extends Comment Period for Input on Relationship Banking and Customer Service. Comments are due **August 22** on the CFPB’s Request for Information (RFI) regarding relationship banking and how consumers can assert the right to obtain timely responses to requests for information about their accounts from banks and credit unions with more than \$10 billion in assets, as well as from their affiliates.

FTC Holding Virtual Event on ‘Stealth Advertising’ Toward 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.

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.

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FTC Highlights Scrutiny of Health and Geolocation Data

West Virginia v. EPA and the Future of Tech Regulation

FTC Uses Enforcement Proceeding to Send Message on Account Security Practices

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

Podcast: Why the FTC Matters for Fintech

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