

Wiley Consumer Protection Download (July 30, 2024)

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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 select 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 Proposes Interpretive Rule That Would Classify Certain EWA Products and Services as "Credit" Under TILA and Regulation Z.

On **July 18**, the CFPB issued a proposed Interpretive Rule that, if adopted, would classify earned wage access (EWA) products and services as consumer "credit" offerings under the Truth In Lending Act (TILA) and Regulation Z. EWA products are employer-provided benefits that allow employees to access money that they have earned before their scheduled payday. TILA and Regulation Z require covered financial institutions to, among other things, make certain

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disclosures to consumers regarding credit products and services. If finalized, the proposed Interpretive Rule would specifically address EWA products that involve both: "(1) the provision of funds to the consumer in an amount that is based, by estimate or otherwise, on the wages that the consumer has accrued in a given pay cycle; and (2) repayment to the third-party provider via some automatic means, like a scheduled payroll deduction or a preauthorized account debit, or after the end of the pay cycle."

The proposed Interpretive Rule would also supplant the CFPB's 2020 Advisory Opinion, which concluded that certain EWA products and services where no fee – voluntary or otherwise – is charged are not consumer "credit" under Regulation Z or the TILA. Comments on the proposed Interpretive Rule are due August 30.

CFPB Releases Report on School Lunch Payment Providers' Practices. On **July 25**, the CFPB released a report on payment processing companies that work with school districts to process payments for children's school lunch programs. The report noted CFPB concerns about this school fee arrangement, including: (1) "parents and caregivers cannot choose their payment platform[] because [provider] contracts are determined at the school-district level[;]" (2) fee-free payment options may not be available to all families because school districts and processors "frequently fail to post the availability of free payment methods[;]" (3) processing fees include flat fees that are charged per transaction and that "may disproportionately burden lower-income families making frequent small payments as compared to families who can afford to load a substantial amount into their child's lunch account at one time[;]" and (4) these payment processors face little competition due to "complex payment processor company structures and contracts" that "appear to insulate companies from competition and make school districts less likely to negotiate fees for these services."

CFPB Issues Consumer Financial Protection Circular on Nondisclosure Agreements That Could Deter Whistleblowing. On **July 24**, the CFPB issued a Consumer Financial Protection Circular that explains that covered financial institutions may violate the Consumer Financial Protection Act (CFPA) when they "require employees in certain circumstances to sign broadly worded confidentiality agreements" because employees may interpret such confidentiality agreements "as threats to retaliate for engaging in whistleblowing activity." The Circular explains that Section 1057(a) of the CFPA prohibits covered financial institutions from either terminating or discriminating against covered employees for engaging in whistleblowing activities. According to the Circular, the term "discriminate against" is "broad and encompasses a variety of adverse actions that a covered person may take against covered employees."

FTC Issues Section 6(b) Orders to Eight Companies Regarding Pricing Products and Services. On **July 23**, the FTC issued Section 6(b) orders to eight companies seeking information about pricing products and services that use AI, consumer data, and algorithms to set prices for consumer products and services. The FTC refers to these pricing products and services as "surveillance pricing" products and services. Section 6(b) of the FTC Act authorizes the agency to conduct studies that do not have a specific law enforcement purpose. According to the FTC, the 6(b) orders seek information in four major areas: (1) the types of pricing products and services being offered, including "details about the technical implementation and current and intended uses of this technology;" (2) information regarding the data sources used for each pricing product or service; (3) customer and sales information, including what customers "planned to do with those products or services;" and (4) the impact that such pricing products and services have on consumer goods prices.

The FTC voted 5-0 to issue the 6(b) orders to the eight companies, with Commissioners Holyoak and Ferguson issuing concurring statements. Commissioner Holyoak's concurrence took issue with the FTC's use of the term "surveillance pricing," which comes with "negative connotations" that "may suggest that personalized pricing is necessarily a nefarious practice." Commissioner Ferguson's concurrence, meanwhile, supported the 6(b) orders but expressed concern with the agency's rulemaking actions, many of which Commissioner Ferguson states are "unlawful."

DOJ, FTC, and European Counterparts Issue Joint Statement on Generative AI Competition Issues. On July 23, the U.S. Department of Justice (DOJ), FTC, the U.K. Competition and Markets Authority, and the European Commission issued a joint statement on risks to competition presented by generative AI and principles for protecting competition in the generative AI market. In terms of risks, the agencies identify three aspects to watch: (1) concentrated control of three inputs, such as "[s]pecialized chips, substantial compute, data at scale, and specialist technical expertise[;]" (2) "large incumbent digital firms" that have "substantial market power at multiple levels related to the AI stack[;]" and (3) partnerships, financial investments and other arrangements that "could be used by major firms to undermine or coopt competitive threats and steer market outcomes in their favour at the expense of the public."

The joint statement also identifies three principles for protecting competition in the generative AI sector – (1) fair dealing; (2) interoperable products and services; and (3) consumer choice. The joint statement separately notes that the agencies "will also be vigilant of any consumer protection threats that may derive from the use and application of AI."

Select Enforcement Actions

FTC Sues Two Debt Relief Entities and Their Owners for Allegedly Misrepresenting Their Affiliations and Services. On July 9, the FTC filed a complaint in the U.S. District Court for the Middle District of Florida against two student loan debt relief entities and their three owners and operators for alleged violations of the FTC Act, the Telemarketing Sales Rule, and the Gramm-Leach-Bliley Act. The FTC alleges that the defendants misled consumers by advertising affiliation with the Department of Education, posting false testimonials, promising low monthly payments that most customers did not experience, and incorrectly claiming to put consumers' monthly payments toward their loan balances. On July 11, 2024, the district court granted the FTC's motion for a temporary restraining order against the defendants, freezing their assets. The FTC is requesting a permanent injunction against the defendants and monetary relief for harmed consumers.

CFPB Sues Lease-to-Own Companies and Their Founder for Allegedly Misrepresenting Their Services. On July 26, the CFPB filed a complaint in the U.S. District Court for the District of Utah against two lease-to-own companies and their founder and former CEO for alleged violations of the Consumer Financial Protection Act, Truth in Lending Act, Fair Credit Reporting Act, and Electronic Fund Transfer Act. The CFPB alleges that the defendants misrepresented the lease-to-own agreement as a 90-day early purchase option, made it difficult for consumers to return the items subject to the lease-to-own agreement, and inaccurately reported consumer credit information. The CFPB seeks monetary and injunctive relief.

FTC and FDA Send Cease-and-Desist Letters to Five Cannabis Companies. On **July 12**, the FTC and Food and Drug Administration (FDA) sent letters to five cannabis companies that sell edibles containing Delta-8 tetrahydrocannabinol (THC) in packaging that resembles popular cookies and candies for allegedly deceptive advertising. The FTC and FDA allege that the packaging is deceptive and appealing to children who can be harmed by THC. The letters demand that each company immediately stop marketing these THC products and review its other marketing products for deceptive advertising. In July 2023, the FTC and FDA sent similar cease-and-desist letters to five other cannabis companies.

Upcoming Comment Deadlines and Events

DOJ and FTC to Hold First Public Strike Force on Unfair and Illegal Pricing Meeting. On **August 1** at 3:30 p.m. ET, the DOJ and FTC will virtually cohost the first public meeting of the Strike Force on Unfair and Illegal Pricing (Strike Force). The meeting will commence with an open press session and will feature remarks from FTC Chair Lina Khan, Associate Attorney General Benjamin C. Mizer, Assistant Attorney General for the Antitrust Division Jonathan S. Kanter, and Principal Deputy Assistant Attorney General for the Civil Division Brian M. Boynton. President Biden announced the creation of the Strike Force in March 2024 to “strengthen interagency efforts to root out and stop illegal corporate behavior that hikes prices on American families through anti-competitive, unfair, deceptive, or fraudulent business practices.” Other agencies included in the Strike Force include the Department of Agriculture, Department of Health and Human Services, Department of Transportation, Securities and Exchange Commission, Federal Communications Commission, and the Consumer Financial Protection Bureau.

FTC to Hold August Open Commission Meeting. The FTC will hold a virtual Open Commission Meeting on **August 1**. The Open Commission Meeting will feature both a staff presentation regarding an Interim Report on Pharmacy Benefit Managers (PBMs) as part of the FTC’s ongoing study of PBMs, and a staff presentation on the agency’s efforts to protect servicemembers, veterans, and their families. The Open Commission Meeting will commence at 10 a.m. ET, and a link to the event will be available through the FTC’s website.

CFPB Seeks Comment on Interpretive Rule on “Buy Now, Pay Later” Products. On **May 31**, the CFPB published an interpretive rule and request for comment in the Federal Register to address the applicability of Regulation Z, which implements the Truth in Lending Act (TILA), to “Buy Now, Pay Later” (BNPL) products and services. BNPL is a short-term financing option that allows customers to purchase items and pay for them over time in installments. The CFPB’s interpretive rule states that BNPL lenders are “creditors” under Regulation Z because BNPL customer digital accounts are “credit cards” under the regulation. Accordingly, the interpretive rule concludes that BNPL lenders must comply with subpart B of Regulation Z, including provisions governing credit card disputes and refund rights.

The request seeks comment on the CFPB’s interpretation, and comments are due **August 1**.

CFPB Seeks Comment on Proposed Rule to Remove Medical Bills from Credit Reports. Comments are due **August 12** on a CFPB proposed rule, “Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V),” to remove medical bill debt from consideration in credit reports and

credit scores. Specifically, the proposed rule would remove the Regulation V exception that broadly permits lenders to obtain and use information regarding medical debt to make credit eligibility determinations. Additionally, the proposed rule would prohibit credit reporting agencies from including medical debt on credit reports and would prohibit lenders from taking medical devices as collateral for a loan or repossessing medical devices in the event of default.

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