

Wiley Consumer Protection Download (June 21, 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 Holds June 2022 Open Commission Meeting and Votes to Approve Congressional Report on AI. On **June 16**, the FTC held a virtual Open Commission Meeting. During the meeting, the FTC considered: (1) a Policy Statement on Rebates and Fees in Exchange for Excluding Lower Cost Drug Products (Policy Statement); and (2) a Report to Congress on Combatting Online Harms through Innovation (Congressional Report). The FTC voted unanimously to approve the

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Policy Statement, which describes the FTC's intent to examine rebates and fees paid by drug manufacturers to pharmacy benefit managers (PBMs) and other intermediaries in exchange for disfavoring the lowest cost drug products, including in the case of insulin. In the Policy Statement, the FTC states that the rebate and fee arrangements "may incentivize PBMs and other intermediaries to steer patients to higher-cost drugs over less expensive alternatives."

The FTC approved the Congressional Report by a 4-1 vote with Commissioner Phillips dissenting. The Congressional Report highlights current uses of artificial intelligence (AI) to combat specific online harms. Some of the harms identified include fake reviews, deepfakes, dark patterns, hate crimes, harassment, and child sexual abuse. The Congressional Report concludes that "governments, platforms, and others must exercise great caution in either mandating the use of, or over-relying on, [AI] even for the important purpose of reducing harms." Commissioner Phillips argued in dissent that the Commission did not conduct the study that Congress had requested and that the report read as a "general indictment" of AI technology rather than a comprehensive review of its potential beneficial uses to combat harmful and illegal content.

CFPB Releases RFI on Relationship Banking and Customer Service. On **June 14**, the CFPB released a Request for Information (RFI) seeking comments on relationship banking and how consumers can "can assert the right to obtain timely responses to requests for information about their accounts from banks and credit unions" that have more than \$10 billion in assets, as well as from their affiliates. The Consumer Financial Protection Act (CFPA) gives the CFPB supervisory and enforcement authority over banks and credit union that have more than \$10 billion in assets and gives a consumer the right to obtain certain information about their bank account. Among other things, the RFI seeks information on what types of information consumers typically request from their banks; how consumers are using the information they obtain from banks; what types of information consumers frequently request but may be unable to obtain; and how the communication channel – over the phone, in writing, via email – impacts consumers' abilities to obtain the information. Comments on the RFI are due July 21.

CFPB Issues Annual Report on Experiences of Military Families with Medical Billing, Credit Reporting, and Debt Collection. On **June 13**, the CFPB released its annual report on the top financial concerns facing military servicemembers, veterans, and their families based on the complaints that they submitted to the CFPB. Among other things, according to the report, servicemembers submitted more than 17,000 complaints pursuant to the Fair Credit Reporting Act about issues with credit reporting, debt collection, or medical billing; reported that nationwide credit reporting companies were not being responsive to requests for investigations into purported errors on credit reports; and reportedly experienced debt collection and credit reporting activity related to allegedly unpaid medical bills that servicemembers contend they did not owe. To address these concerns, the CFPB recommends that (1) medical providers and third-party billing companies "should have adequate systems in place to serve servicemembers, veterans, and military families enrolled in TRICARE and the Veterans Choice Program," and (2) medical providers and nationwide credit reporting companies should consider emulating recent rule changes made by the Department of Veterans Affairs (VA) to "exhaust all other collection efforts and review patients' ability to repay before reporting a medical debt as unpaid." Specifically, the VA published a Final Rule in February 2022 that amends the agency's procedures for

reporting medical debt by delaying the VA's reporting of purportedly unpaid medical bills to credit reporting agencies for a period of time to allow servicemembers an opportunity to address inaccuracies. The Servicemembers Civil Relief Act (SCRA) also provides some legal and financial protections to active servicemembers, such as protections against default judgments in court until a servicemember is represented by an attorney, and protections against personal property repossession before a creditor has filed a court order.

CFPB Issues Request for Information Regarding Employee Debt Obligations. On **June 9**, the CFPB issued a Request for Information (RFI) seeking input regarding debt obligations incurred by consumers in the context of an employee or independent contractor arrangement. The RFI seeks information in a number of areas, including the prevalence of such debt obligations, "the pricing and other terms of the obligations," disclosures, dispute resolution, and debt collection and servicing. The RFI suggests that such debt obligations may take two forms: (1) training repayment agreements, which require workers to pay employers or third-party providers for previously undertaken training if they terminate their employment within a certain time period; and (2) debt owed to an employer or third party for the purchase of equipment and supplies essential to their work or required by their employer. CFPB Director Chopra signaled that the applicability of the CFPA to training repayment agreements was a regulatory priority for the agency at the FTC's Enforcers Summit in April. The agency also highlighted these kinds of agreements in a March blog post. Comments on the RFI are due September 7.

FTC Seeks Comment on Revising Its ".com Disclosures" Guidance on Digital Advertising. On **June 3**, the FTC announced the release of an RFI seeking comment on revisions to its 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." Comments on the RFI are due August 2.

FTC Analysis Finds That Consumers Lost More Than \$1 Billion to Cryptocurrency Scams in 2021. On **June 3**, the FTC released its latest Consumer Protection Data Spotlight, which found that most of the cryptocurrency losses that consumers reported since January 2021 involved investment opportunity scams, totaling \$575 million in losses since January 2021. According to the agency, the scams often promise potential investors that they can earn huge returns. In total, consumers reported losing over \$1 billion in cryptocurrency scams from January 2021 to March 2022.

FTC Provides Staff Report to CFPB on TILA, CLA, and EFTA Enforcement-Related Activities in 2021. On **June 3**, the FTC provided its annual staff report to the CFPB on its enforcement-related activities pertaining to the Truth in Lending Act (TILA), Consumer Leasing Act (CLA), and Electronic Funds Transfer Act (EFTA). The report details the agency's enforcement actions related to the statutes and their implementing regulations, including in the areas of auto purchases and financing, payday lending, credit repair and debt relief, and electronic

fund transfers. The staff report further discusses the FTC's Military Task Force, which comprises several agency representatives and is centered on initiatives to assist military consumers. Additionally, the report discusses the FTC's consumer and business education efforts TILA and EFTA issues.

CFPB Grants Online Lender's Request to Terminate Its No-Action Letter. On **June 8**, the CFPB issued an Order granting online lender Upstart Network's (Upstart) request to terminate its no-action letter. In Upstart's no-action letter, which was signed in 2020, the CFPB agreed to not make any supervisory findings or bring a supervisory or enforcement action against Upstart "from Upstart's use of its model for making underwriting and pricing decisions on applications by consumers for unsecured, closed-end loans." Upstart requested termination of the no-action letter after the CFPB indicated to Upstart that it needed time to review changes that the company proposed to make to its underwriting and pricing model. This comes after the CFPB announced last month that it was replacing its Office of Innovation with the Office of Competition and Innovation, and ending the no-action letter program.

Significant Enforcement Actions

CFPB Obtains Ban in Settlement with Student Loan Debt Relief Operator for Allegedly Unlawful Student Loan Practices. On **June 9**, the CFPB announced a settlement with Frank Gebase Jr., the owner of student-loan debt relief company, Processingstudentloans, for alleged violations of the Consumer Financial Protection Act. The CFPB alleged that Gebase operated a company that debited borrowers' bank accounts with upfront student loan debt-relief service fees without authorization. According to the CFPB, Gebase was aware or should have known the debits were unauthorized and unlawful based on obtaining consumer names and account information from another student-loan debt-relief operator that the CFPB had previously shut down. The CFPB's proposed settlement, if entered by the court, would ban Gebase from the debt-relief industry and order him to pay a \$175,000 penalty.

FTC Seeks Ban Against Footwear Manufacturer for Allegedly Misleading Pain-Relief Claims. On **June 7**, the FTC announced that it filed suit against and sought a permanent injunction against California-based Gravity Defyer Medical Technology Corporation and its owner, Alexander Elnekaveh, for alleged violations of a 2001 FTC Order prohibiting deceptive advertising, including by making scientifically unsupported claims and using misleading consumer testimonials. The Commission voted 4-0 to approve the complaint, which was filed in the U.S. District Court for District of Columbia. The complaint alleges that the company made false claims to older consumers suffering from pain-related conditions like arthritis, without competent and reliable scientific evidence that its footwear contained technology that would relieve pain. The complaint seeks an order permanently barring the company from making misleading or deceptive pain-relief claims, as well as civil penalties and other relief.

FTC Seeks Preliminary Injunctive Relief Against Credit Repair Services Provider. On **May 31**, the FTC announced that, with the assistance of the Georgia Office of the Attorney General, it took action against Michigan-based Financial Education Services, its owners, and a number of related companies, for alleged violations of the Federal Trade Commission Act (FTC Act), the Credit Repair Organizations Act (CROA), the Business Opportunity Rule, and the Telemarketing Sales Rule (TSR). The Commission voted 4-0 to file the

complaint and request for temporary restraining order. The complaint was filed in the U.S. District Court for the Eastern District of Michigan. The complaint alleges that the defendants made false representations that consumers' credit scores could be improved by, among other things, removing permanently negative information from or adding positive payment history to consumers' credit reports or profiles; unlawfully charged consumers for credit repair services; failed to make required disclosures regarding those services; and operated and promoted an illegal pyramid scheme. The FTC sought a temporary restraining order (TRO) and the appointment of a receiver with an asset freeze. The court issued the requested TRO on May 24, 2022.

Upcoming Comment Deadlines and Events

FTC Solicits Feedback on Proposed Changes to Energy Labeling Rule. Comments are due **July 11** on the FTC's Notice of Proposed Rulemaking seeking comment on updates to the Energy Labeling Rule. The Energy Labeling Rule, which was originally promulgated in 1979 to implement the Energy Policy and Conservation Act, requires manufacturers to attach labels to home appliances and other consumer products that allow consumers to compare energy usage and competing model costs. The Notice of Proposed Rulemaking requests public feedback on updates to three consumer disclosures for covered products – 1) estimated annual operating cost, 2) a "comparability range" showing the highest and lowest energy consumption or efficiencies for all similar models, and 3) the product's energy consumption or energy efficiency rating.

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 recordkeeping 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.”

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Webinar: The FTC’s Changing Approach to Privacy

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 & 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

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 June 21, 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.