

Wiley Consumer Protection Download (June 7, 2021)

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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

Second Circuit Rules Against Challenge to OCC's Proposed Issuance of Federal Charters to Non-Depository Financial Institutions.

On **June 3**, the U.S. Court of Appeals for the Second Circuit vacated the lower court's decision in *Lacewell v. Office of the Comptroller of the Currency*. The case involves whether the Office of

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the Comptroller of the Currency (OCC) can issue federal bank charters to non-depository financial institutions, such as financial technology companies. The opinion concludes that the plaintiff New York Department of Financial Services (DFS) lacks Article III standing because it failed to allege that the OCC's decision caused it to suffer an actual or imminent injury in fact, and that DFS's claims are constitutionally unripe for substantially the same reason. The court's decision reverses a 2019 decision by the U.S. District Court for the Southern District of New York, finding that the OCC exceeded its authority under the National Bank Act in accepting applications for federal bank charters from financial technology companies and ordering that the DFS complaint be dismissed without prejudice.

FTC Submits 2020 Financial Acts Enforcement Report to the CFPB. On **June 1**, FTC staff submitted the 2020 Financial Acts Enforcement Report to the CFPB on its enforcement and related activities regarding the Truth in Lending Act, Consumer Leasing Act, and Electronic Fund Transfer Act. Among other things, the report highlights the FTC's enforcement actions related to automobile purchases and financing, payday lending, credit repair and debt relief, and electronic funds transfers. The report also discusses the agency's relief and policy efforts pertaining to truth in lending, including the release of two staff reports on a study of auto buyers and the car buying and financing process. One of those reports, issued by the Bureau of Consumer Protection staff, concluded that consumers were sometimes unaware of key terms of sales and financing practices in the auto buying process.

FTC Submits FY 2022 Budget Request, Performance Plan and Report to Congress. On **May 28**, the FTC submitted its annual budget request, and performance plan and report to Congress for fiscal year (FY) 2022. In support of President Biden's budget plan for the agency, the FTC is requesting \$389,800,000, which would represent an increase of \$38,800,000 over FY 2021. The FTC's vote to submit the documents to Congress was 4-0.

CFPB Report Finds That Manufactured Housing Loan Borrowers Have Higher Interest Rates, Risks, and Barriers to Credit. On **May 27**, the CFPB released a report finding that manufactured housing borrowers face higher interest rates and limited refinancing opportunities. Manufactured housing comprises a small segment – approximately 13% – of the overall U.S. housing market. However, it is one of the most affordable types of housing options available to low-income and rural consumers. The report also found that consumers that do not own the underlying land for manufactured homes are more likely to see their homes depreciate in value, and have fewer options if they fall behind on loan payments. The CFPB report uses new information collected under the Home Mortgage Disclosure Act in 2018.

Significant Enforcement Actions

FTC Approves Final Administrative Consent Orders Against Three Companies That Allegedly Made Deceptive Claims About Fish Oil Supplements. On **June 1**, the FTC approved final administrative consent orders against BASF SE, its subsidiary, BASF Corp., and DIEM Labs, which the agency claims deceptively marketed two dietary fish oil supplements as clinically proven to reduce liver fat in adults and children with non-alcoholic fatty liver disease. As we noted in our April 12 Newsletter, the companies settled charges with the FTC on April 1. The FTC alleges that the companies marketed the two drugs – Hepaxa and Hepaxa PD –

until mid-2020. The final administrative consent orders, which were approved 4-0, note that the companies have agreed to pay a collective \$416,000.

CFPB Proposes Settlement with Company for Allegedly Deceptive Deposit and Loan Products. On **May 27**, the CFPB filed a settlement proposal against Driver Loan, LLC (Driver Loan) in the U.S. District Court for the Southern District of Florida. If entered by the court, the settlement proposal would require Driver Loan to refund approximately \$1 million in deposits to consumers and pay a \$100,000 civil penalty. As we noted in our November 9, 2020 Newsletter, the CFPB filed a complaint against Driver Loan, alleging that the company misrepresented the risks associated with its short-term, high-interest loan product it offered consumers and the annual percentage rate for extensions of credit in violation of the Consumer Financial Protection Act of 2010 (CFPA).

FDA and FTC Send Warning Letters to Five Companies Allegedly Selling Dietary Supplements Claiming to Treat Infertility. On **May 26**, the Food and Drug Administration (FDA) and FTC sent warning letters to LeRoche Benicoeur/ConceiveEasy; EU Natural Inc.; Fertility Nutraceuticals LLC; SAL NATURE LLC/FertilHerb; and NS Products, Inc. The warning letters allege that the companies were making false or unproven claims that their products can cure, treat, mitigate, or prevent infertility, potentially in violation of the FTC Act. Additionally, the FDA letters discuss the Food, Drug, & Cosmetic Act (FD&C Act), under which products that are intended to “cure, treat, mitigate, or prevent disease are drugs and are subject to the requirements that apply to drugs, even if they are labeled as dietary supplements.” The letters indicate that, unlike drugs that are approved by the FDA, the agency has not evaluated whether the products that are the subject of the warning letters are effective for their advertised use.

Upcoming Comment Deadlines and Events

FTC Hosts Virtual Green Lights & Red Flags Public Workshop. On **June 24**, the FTC will host a “Green Lights & Red Flags: Rules of the Road for Business” public workshop. This workshop is focused on truth-in-advertising law and data security basic practices. The public workshop will provide insights from Texas business leaders and experts in consumer protection law. Acting FTC Chairwoman Rebecca Kelly Slaughter will present remarks to open the workshop. An agenda of the event is available [here](#). Interested parties may register [here](#).

CFPB Seeks Input on Financial Institutions’ Use of AI. Comments are due **July 1** (extended from June 1) on a Request for Information released by the CFPB; the Board of Governors of the Federal Reserve System’s Bureau of Consumer Financial Protection; the Federal Deposit Insurance Corporation; the National Credit Union Administration; and the Office of the Comptroller of the Currency. The five agencies are gathering information on financial institutions’ use of artificial intelligence (AI) for fraud prevention, the personalization of services, credit underwriting, and a number of other operations. Among other things, the Request for Information seeks comment to understand the use of AI; appropriate governance and risk management controls over AI; and challenges in developing and managing AI.

More Analysis from Wiley

Wiley Achieves Perfect Score on Human Rights Campaign's 2021 'Best Places to Work for LGBTQ Equality' List

Duane Pozza Discusses FTC's Focus on Rulemaking After Supreme Court's AMG Decision

Key Takeaways from the AMG Capital Management v. FTC Decision

Supreme Court Curbs FTC Power to Seek Monetary Relief

Privacy in Focus: New at the FTC: Agency Forges Ahead Even As Supreme Court Curbs Authority

Privacy in Focus: Five Considerations for Navigating Privacy Compliance Under Virginia's and California's New Laws

Privacy in Focus: EU Presses Ahead on AI Regulation – With Global Implications

FTC Outlines Approach to Discrimination in AI and Foreshadows Potential Enforcement

Virginia's New Privacy Law: How to Navigate the New Privacy Framework

Supreme Court Argument Analysis: TransUnion LLC v. Ramirez

California Privacy Rights Act – What Does It Mean For You?

SCOTUS Provides TCPA Clarity by Rejecting Expansive Autodialer Definition

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