

# Wiley Consumer Protection Download (March 13, 2023)

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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

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### **FTC Announces Tentative Agenda for March 2023 Open**

**Commission Meeting.** On March 9, the FTC announced that the agency will hold an Open Commission Meeting on March 16. There are two items on the agency's agenda: (1) the FTC will vote on whether to issue Section 6(b) Orders to eight social media and video streaming platforms seeking information on how they monitor and review deceptive advertising on their platforms; and (2) the FTC will vote on whether to issue Section 6(b) Orders to five business credit reporting agencies concerning how they collect and report

## Authors

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Duane C. Pozza

Partner

202.719.4533

dpozza@wiley.law

Stephen J. Conley

Associate

202.719.4572

sconley@wiley.law

Lauren N. Lerman

Associate

202.719.4664

llerman@wiley.law

## Practice Areas

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Cyber and Privacy Investigations, Incidents & Enforcement

FTC and Consumer Protection

Privacy, Cyber & Data Governance

Telecom, Media & Technology

information about small businesses, including how they market their business credit reporting products and services.

**FTC Issues RFI Seeking Comment on Franchise Agreements and Business Practices.** On **March 10**, the FTC issued a Request for Information (RFI) seeking comment on franchise agreements and the business practices of franchisors, including whether and how franchisors “exert control over franchisees and their workers.” Specifically, the RFI seeks comment on, among other things: (1) franchisors’ enforcement of non-disparagement, goodwill, or other similar clauses; (2) the prevalence of certain contract terms in franchise agreements; and (3) indirect impacts on franchisee labor costs as a result of franchisor business practices. Comments on the RFI are due 60 days after publication in the Federal Register.

**CFPB Issues Supervisory Highlights Special Edition on “Junk Fees” in the Deposit Account and Loan Servicing Markets.** On **March 8**, the CFPB released a special edition of its Supervisory Highlights reporting on what it characterizes as “junk fees” in the deposit account and loan servicing markets, including servicing for mortgage loans, student loans, and payday loans. Specifically, the report finds that some deposit account institutions reportedly charged “surprise” overdraft fees and multiple non-sufficient funds (NSF) fees. The CFPB describes “surprise” overdraft fees as fees charged after an institution authorizes a debit that was made with a positive balance “because of intervening transactions that were processed before the debit settled.” The CFPB’s examiners also found that financial institutions charged customers multiple NSF fees for “for a single item against an insufficient balance in the consumer’s account, potentially as soon as the next day.”

In the mortgage servicing market, CFPB examiners concluded that some servicers charged fees such as: excessive late fee amounts; fees for property inspections deemed “unnecessary”; and “fake” private mortgage insurance premium charges. In the student loan servicing market, CFPB examiners concluded that some servicers charged late fees and interest after payments were made on time. In the payday loan market, CFPB examiners reported that some servicers charged vehicle repossession and property retrieval fees that were not permitted by the borrowers’ loan agreements.

**CFPB and NLRB Announce Information Sharing Agreement.** On **March 7**, the CFPB and the National Labor Relations Board (NLRB) announced that the agencies signed a Memorandum of Understanding (MOU). According to the CFPB, the MOU creates “a formal partnership between the two agencies to better protect American families and to address practices that harm workers in the ‘gig economy’ and other labor markets.” The CFPB states that the agencies are particularly concerned with “employer surveillance” and “employer-driven debt.” Specifically, the agencies are concerned with worker productivity tracking tools that may track employees outside of working hours, and companies charging employees for particular employer-mandated training programs that, according to the CFPB, “may be more expensive or harmful than what they might purchase in a competitive market.”

**CFPB Publishes New Report on BNPL Borrowers.** On **March 2**, the CFPB published a new report, titled *Consumer Use of Buy Now, Pay Later*, which assesses the financial profiles of borrowers using Buy Now, Pay Later (BNPL) financial products. The CFPB has previously characterized BNPL products as “a form of interest-free credit that allows a consumer to fully purchase a product, and then pay back the loan over four

installments, with the first installment typically being a down payment on the purchase.” According to the report, many BNPL borrowers use such products without notable indications of financial stress. The report also found that approximately 95% of BNPL borrowers are active users of other credit products, including credit cards, personal loans, and student loans. Additionally, the report notes that those borrowers who have other open credit records are more than twice as likely to be delinquent on at least one of these products by at least 30 days. The report also found that BNPL borrowers typically had lower credit scores than non-borrowers. The release of this report follows previous CFPB research on the BNPL market in September 2022, which we discussed here.

**CFPB and FTC Issue RFI Seeking Comment on the Use of Algorithms and Automated Decision Making in the Tenant Screening Process.** On February 28, the CFPB and FTC issued a RFI seeking comment on how issues in the tenant background screening process impact individuals applying for rental housing, including how the use of algorithms and automated decision making systems may impact tenant screening decisions. The RFI seeks comment on a wide array of issues, including: (1) how criminal and eviction records factor into housing decisions; (2) whether applicants are informed about the criteria used in tenant background checks, including whether tenants are notified about what information in their background check led to a rejection; and (3) how algorithms, automated decision making systems, and artificial intelligence are used in the tenant background check process. The issuance of the RFI comes after the Biden Administration in January 2023 published *The White House Blueprint for a Renters Bill of Rights*, which notes that this RFI is part of a whole-of-government effort to address a “patchwork of renters rights, a shortfall of affordable housing, and a longstanding challenge of rents rising faster than incomes. . . .” Comments on the RFI are due May 30.

## Recent Enforcement Actions

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**CFPB Settles with Mortgage Lender for \$1 Million.** On February 27, the CFPB filed a consent order and stipulation against RMK Financial Corp. (RMK) for alleged violations of the Consumer Financial Protection Act (CFPA), Regulation N, Regulation Z, and a 2015 CFPB Order against RMK. The CFPB alleges that RMK continued its deceptive advertising practices that were the subject of the 2015 Order. Specifically, the CFPB alleges that RMK misrepresented the loans’ interest rates and fees, and falsely implied that RMK was endorsed by the Department of Veteran Affairs, the Federal Housing Administration, and other government agencies. In 2015, the CFPB brought similar allegations against RMK and issued an order for injunctive and monetary relief. Considering RMK a repeat offender, the CFPB’s consent order requires RMK to pay a \$1 million civil penalty and includes injunctive relief to prevent RMK from engaging in any further mortgage lending activities.

**FTC Settles with Online Counseling Service for Alleged Data Privacy Violations.** On March 2, the FTC filed a complaint and proposed consent order against BetterHelp, an online counselor matching program, for allegedly disclosing consumer health data to third parties, while representing that such date would be kept private. The FTC alleges that BetterHelp violated the FTC Act by misrepresenting its privacy practices as to consumers’ health data while allegedly sharing information with third-party advertising platforms. The proposed order requires BetterHelp to pay \$7.8 million in restitution and to implement additional privacy

policies, including instructing third parties to delete all consumer data from BetterHelp. The FTC will publish the consent order in the Federal Register, setting a 30-day comment period, before deciding whether to make the proposed order final.

**FTC and DOJ Sue Supplement Distributors for Allegedly Fraudulent Health Claims.** On **March 3**, the DOJ, on behalf of the FTC, sued three distributors of essential oils and dietary supplements sold by a multi-level marketing company, doTERRA International, for making allegedly false and misleading claims about the products' abilities to treat COVID-19. The FTC alleges that the defendants, Eliza Johnson Bacot, Lauren Busch, and Dr. Tina Wong, all made unsubstantiated claims about the ability of doTERRA's products to prevent or cure COVID-19 in violation of the FTC Act and COVID-19 Consumer Protection Act. The defendants have each agreed to a consent order that provides injunctive relief and requires payment of a \$15,000 civil money penalty. The orders have been filed for approval in the U.S. District Courts of Northern District of Georgia, District of Utah, and Central District of California.

**FTC Finalizes Order Against Manufacturer for Allegedly Deceptive US-Origin Advertising Claims.** On **March 7**, the FTC finalized its order against a home products manufacturer, Instant Brands, after a 30-day notice and comment period. The settlement resolves allegations that Instant Brands labeled products with "Made in China," but deceived consumers by claiming to sell American products in its Amazon product descriptions and in other marketing campaigns in violation of the FTC Act and "Made in USA" Labeling Rule. The order requires Instant Brands to pay \$129,416 and cease making any unqualified claims about where its products are manufactured and assembled.

**FTC Finalizes Settlement with Security Company Regarding Noncompete Provisions.** On **March 8**, the FTC voted 3-1, with Commissioner Wilson dissenting, to finalize a proposed order against Prudential Security, Inc., Prudential Command Inc., and their owners, Greg Wier and Matthew Keywell, after the 30-day notice and comment period ended. Specifically, following FTC allegations that the Prudential's noncompete agreements violated the FTC Act, the order prohibits Prudential and its owners from enforcing or threatening to enforce noncompete clauses against employees. Additionally, the order requires Prudential to provide all current and past employees with the stipulated order notifying them that any noncompete clauses are void, ensure that all future directors and managers continue abiding by this order, and conspicuously display notice of the absence of noncompete clauses for at least 10 years.

## Upcoming Comment Deadlines and Events

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**CFPB Proposes to Create Registry of Nonbank Financial Institutions Subject to Federal, State, or Local Agency or Court Orders.** Comments are due **March 31, 2023** on the CFPB's Proposed Rule regarding whether the agency should require nonbank financial firms to register with the CFPB when they become subject to local, state, or federal consumer financial protection agency or court orders. The Proposed Rule further seeks comment on whether it should publish the registry online. The Proposed Rule would require nonbank financial institutions to report final agency and court orders and judgments under federal or state consumer financial protection laws regarding unfair, deceptive, or abusive acts or practices. Additionally, larger nonbanks supervised by the CFPB would be required to designate a senior executive to submit an annual written

certification affirming the steps taken to oversee activities subject to such an order and whether the executive knows of any instances of noncompliance or violations.

**CFPB Proposes Rule to Establish Registry of Nonbank Terms or Conditions That Claim to Waive or Limit Consumer Rights.** Comments are due **April 3, 2023** on the CFPB's Proposed Rule to establish a public registry of nonbank financial institutions' terms or conditions that purport to waive or limit consumer rights or protections, such as "bankruptcy rights, liability amounts, or complaint rights." Specifically, the Proposed Rule would require nonbanks that are subject to the CFPB's supervisory authority to submit information on terms and conditions in form contracts they use.

**FTC Issues NPRM Proposing to Broadly Ban Employee Non-Compete Clauses.** Comments are due **April 19, 2023** (extended from March 20, 2023) on the FTC's NPRM that proposes to ban employers from imposing and enforcing employee non-compete clauses in contracts (we summarized the NPRM here). The NPRM specifically seeks comment on prohibiting an employer from: (1) either entering into or attempting to enter into a non-compete agreement with an employee; (2) maintaining a non-compete agreement with an employee; and (3) representing to an employee that they are subject to a non-compete clause without a good faith basis to believe that the employee is subject to an enforceable non-compete clause.

**FTC Requests Comment on Regulatory Review of the Green Guides.** Comments are due **April 24, 2023** (extended from February 21, 2023) on the FTC's Request for Comment to commence a regulatory review of the Guides for the Use of Environmental Marketing Claims (Green Guides). The Request for Comment (which we summarized here) asks, among other things: (1) whether the Green Guides should provide additional guidance on claims related to carbon offsets and climate change; (2) whether guidance on the term "recyclable" should be revised; (3) whether the term "recycled content" and claims about recycled content are widely understood by consumers; and (4) whether there is need for additional guidance in the Green Guides regarding "biodegradable," "compostable," "ozone-friendly," and "sustainable" product claims, or guidance on additional kinds of environmental claims. The Request for Comment also asks whether any aspect of the Green Guides should be codified as a rule.

**FTC to Host a Workshop on "Recyclable" Claims.** The FTC will host a workshop on **May 23, 2023** titled *Talking Trash at the FTC: Recyclable Claims and the Green Guides*. The workshop is part of its recently announced regulatory review of the Green Guides. The half-day hybrid event will cover topics including: the current state of recycling practices and advertisements, consumer perceptions of recycling-related claims, and whether the Green Guides need to be updated or revised to accommodate changes in recycling advertising. Comments related to the issues discussed at the workshop are due **June 13, 2023**.

## More Analysis from Wiley

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Wiley Wins Four Law360 'Practice Group of the Year' Awards for 2022

FTC Proposes New Rule to Broadly Ban Non-Compete Agreements

FTC Requests Comment on Potential Revisions to Green Guides

At CES, FTC Commissioner Slaughter Discusses Agency Priorities and Tech Innovation

Webinar: Staying Ahead of State Privacy Laws: Tips and Best Practices for Building Compliant Strategies for Five Key States

California Moves Closer to Finalizing Updated CCPA Regulations and Launching a New Rulemaking for Cybersecurity Audits, Risk Assessments, and Automated Decisionmaking

NIST Releases AI Risk Management Framework, Expected to Be a Critical Tool for Trustworthy AI Deployment

New York Law Will Regulate Consumer Device Repair Options: What the Digital Fair Repair Act Means for the Consumer Electronics Industry

New Year, New State Privacy Laws: California and Virginia Laws Are Now Effective and More Requirements Are on Tap in 2023

FTC and DOJ File Complaint Against "Web of VoIP Service Providers" for Allegedly Making Illegal Robocalls Using Ringless Voicemails

PrivacyCon Illustrates the FTC's Focus on AI and Automated Decision Making Systems

FTC's PrivacyCon Highlights Risks and Opportunities For Children's Privacy

PrivacyCon 2022: FTC Hears from Researchers on Wide Range of Topics, Many of Which Overlap With Its Ongoing Privacy and Security Efforts

FTC Pushing Ahead Toward Major Privacy Regulation

FTC Hosts Event to Examine Children's Advertising in Digital Media

New Congressional Report Raises Possibility of False Claims Act Scrutiny for Fintech Companies Involved In PPP Loans

The Future of Web3 Depends on Careful Regulatory Approaches

California Age-Appropriate Design Code Act to Impose Significant New Requirements on Businesses Providing Online Services, Products, or Features

An Introduction to the California Age-Appropriate Design Code

*West Virginia v. EPA* and the Future of Tech Regulation

U.S. State Privacy Law Guide

Enter Stage Right – a New Cyber Regulator Steps into the Spotlight

Webinar: Transactional Due Diligence Related to Privacy and Cybersecurity

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

Duane Pozza Named a Cryptocurrency and Fintech 'Trailblazer' by The National Law Journal

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