

Wiley Consumer Protection Download (November 8, 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

CFPB Issues Advisory Opinion on Identification Procedures by Consumer Reporting Agencies. On **November 4**, the Fair Credit Reporting Act (FCRA) issued an Advisory Opinion stating that consumer reporting agencies, including background check companies providing consumer reports, violate the FCRA if they utilize deficient "name-only matching" procedures when providing consumer reports.

Authors

Duane C. Pozza
Partner
202.719.4533
dpozza@wiley.law
Stephen J. Conley
Associate
202.719.4572
sconley@wiley.law
Tawanna D. Lee
Consulting Counsel
202.719.4574
tdlee@wiley.law

Practice Areas

Cyber and Privacy Investigations, Incidents
& Enforcement
FTC and Consumer Protection

The Advisory Opinion outlines that providing a consumer report on an individual based solely on first and last name matching, without consideration of other information such as address, date of birth, or Social Security number, is a violation of FCRA section 607(b). That section provides that “[w]henver a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”

CFPB Finds Increased Credit Report Disputes in Majority Black and Hispanic Neighborhoods. On **November 2**, the CFPB released research concluding that consumers living in majority Black and Hispanic neighborhoods, along with younger consumers, are much more likely to have disputes on their credit records. The new research is part of a series of reports focused on trends in the consumer financial marketplace, using information from auto loans, student loans, and credit card accounts opened from 2012 to 2019. Specifically, consumers living in majority Black or Hispanic neighborhoods were twice as likely to have disputes appear on their credit reports as consumers residing in majority white areas. The FCRA gives consumers the right to file disputes with credit reporting companies to correct perceived inaccuracies in their credit files. The FCRA, in turn, requires consumer reporting agencies to investigate the disputes in a timely manner, and to correct any inaccuracies.

FTC Issues Enforcement Policy Statement Regarding Negative Option Marketing. On **October 28**, the FTC announced the release of a new Enforcement Policy Statement regarding negative option marketing, with the announcement focusing in particular on warning companies against using unlawful “dark patterns” that allegedly trick consumers into subscription services. Specifically, the Enforcement Policy Statement outlines requirements for companies to: (1) provide clear, up-front information regarding subscription services; (2) obtain consumers’ informed consent; and (3) make subscription cancellation easy. The use of dark patterns was recently the subject of an FTC workshop.

CFPB Director Chopra Testifies Before Senate Committee on Banking, Housing, and Urban Affairs and House Committee on Financial Services. On **October 28**, CFPB Director Rohit Chopra testified before both the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services. Director Chopra’s written testimony, which was the same for both the Senate and House hearings, focused on current economic conditions, monitoring the mortgage and payments markets, and the agency’s regulatory goals. Specifically, Director Chopra noted that while the economy is recovering from the COVID-19 pandemic, “many parts of the country and in many individual neighborhoods, conditions remain fragile.” He also noted that household debt is beginning to increase. In terms of market monitoring, Director Chopra focused on the mortgage market and payment systems administered by big tech companies, noting that the agency is focused on ensuring that “families and businesses can rely on a fast and reliable payments system.” Finally, Director Chopra forecasted some of the CFPB’s regulatory priorities, including increasing competition in the mortgage and refinance market and working with federal banking regulators such as the Office of the Comptroller of the Currency to target repeat rule violators.

FTC Issues Revised Safeguards Rule and Proposes Breach Notification Requirement for Certain Financial Institutions. On **October 27**, the FTC announced revisions to its Safeguards Rule, which requires financial institutions subject to the Gramm-Leach-Bliley Act (GLBA) to implement information security programs to

protect consumer financial information. Covered companies include many online financial technology (fintech) companies, mortgage lenders, and companies otherwise involved in credit transactions, among others. Within 30 days of Federal Register publication, and as we discussed in greater detail here, the revised rule will require financial institutions to, among other things, implement periodic risk assessments and modify their information security programs based in part on those risk assessments. More detailed requirements will become effective a year after Federal Register publication. In a separate Supplemental Notice of Proposed Rulemaking (SNPRM) the agency also proposed adding required reporting of security incidents to the FTC by covered financial institutions within 30 days of discovering an incident. Comments on the SNPRM are due 60 days after publication in the Federal Register.

FTC Issues Notices to Over 1,100 Businesses About Misleading Advertising of Money-Making Ventures. On **October 26**, the FTC announced that it had sent a Notice of Penalty Offenses to over 1,100 companies and ad agencies running advertisements, including multi-level marketing companies and investment “coaches.” The notices outline conduct in advertising money-making ventures that the FTC considers to be deceptive or unfair. The notices do not suggest that the companies have engaged in any unlawful conduct but warn that companies advertising money-making opportunities in a misleading way could lead to significant financial penalties. Additionally, companies also received a Notice of Penalty Offenses regarding endorsements and testimonials that over 700 national retailers, ad agencies, consumer product companies, and others received on October 13, which we discussed in greater detail here. The FTC states that the notices provide the companies with actual notice of certain unlawful conduct, authorizing the agency to bring enforcement action against companies that subsequently engage in such acts or practices under 15 U.S.C. § 45(m)(1)(B).

Significant Enforcement Actions

FTC Files Lawsuit Against Utah-based Company for Claiming Its Nasal Sprays Can Prevent and Treat COVID-19. On **October 28**, the FTC announced that it has sued Xlear, Inc., alleging that it falsely pitched its saline nasal sprays as an effective way to prevent and treat COVID-19 in violation of the COVID-19 Consumer Protection Act (COVID-19 Act). The COVID-19 Act makes it illegal for entities and individuals to engage in deceptive marketing regarding the treatment, cure, prevention, mitigation, or diagnosis of COVID-19, or any government benefits related to the COVID-19 pandemic. The COVID-19 Act also authorizes the agency to seek civil monetary penalties for first-time violations. The FTC alleges that Xlear made false and unsubstantiated claims on websites, social media platforms, and through appearances on podcasts and sponsored spots on local television news that its nasal sprays provide four hours of protection against infection from the coronavirus. Following an FTC warning letter in July 2020, Xlear promised to remove the claims from their website and other platforms but then continued making them, according to the complaint. After a 4-0-1 vote to refer the civil penalty complaint to the Department of Justice (DOJ), with Chair Lina M. Khan not participating, the DOJ filed the complaint in the U.S. District Court for District of Utah.

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FTC Releases Detailed Information Security Requirements and Proposes Breach Notification for Financial Institutions

FTC Broadly Issues Notices on Endorsements and Testimonials to National Advertisers, Signaling a New Enforcement Approach

California Set to Begin Potentially Far-Reaching Rulemaking on Privacy

Duane Pozza Discusses Emerging Regulatory Approach to Crypto and DeFi

Privacy in Focus: Latest Changes at FTC Will Drive Federal Action on Privacy, Data Security, and AI

Privacy in Focus: FTC Policy Statement Signals Increasing Scrutiny on the Protection of Sensitive Personal Health Information

Privacy in Focus: AI Risk Management Framework Is Among Emerging Federal Initiatives on AI

Webinar: Shifting U.S. Privacy Regulation: New State Laws Complicate Compliance Efforts

The FTC's Public Meeting Forecasts an Active and Far-Reaching Agenda Under Chair Lina Khan

FTC Adopts Policy Statement on Consumer Device Repairs and Announces That Enforcement Approach Will Be a Priority

Key Takeaways from the AMG Capital Management v. FTC Decision

Supreme Court Curbs FTC Power to Seek Monetary Relief

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Preview Disclaimer: Information is current as of November 8, 2021. 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.