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NEWSLETTER

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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 Commissioner Phillips Plans to Leave the Agency in the Fall, Per Media Reports. On **August 8**, several media outlets reported that FTC Commissioner Noah Phillips informed his staff through a memo that he plans to resign from his position at the agency this Fall. Commissioner Phillips was originally confirmed as FTC Commissioner on April 26, 2018 after being nominated by President Donald Trump. Before joining the agency, Commissioner Phillips served as Chief

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Counsel to Senator John Cornyn (R-TX) on the Senate Judiciary Committee. Commissioner Phillips' departure will leave a 3-1 Democratic to Republican split at the agency pending confirmation of a replacement. No more than three FTC Commissioners may be from the same political party.

CFPB and DOJ Issue Joint Letter Highlighting SCRA Obligations to Auto Finance Companies. On **July 29**, the U.S. Department of Justice (DOJ) and the CFPB issued a Joint Letter reminding auto finance companies of their obligations to military servicemembers under the Servicemembers Civil Relief Act (SCRA). Specifically, the Joint Letter notes that the SCRA: (1) prohibits an auto finance company from repossessing a vehicle without a court order during the borrower's military service; (2) allows servicemembers to terminate vehicle leases early and without penalty after either entering military service or receiving military orders for a permanent change in station or assignment; and (3) limits interest rates on vehicle loans incurred prior to military service to no more than six percent per year, including the majority of fees.

CFPB Issues Analysis of How Medical Debt Reporting Changes Will Impact Consumer Credit Reports. On **July 27**, the CFPB released a Report finding that credit reporting changes by the three largest national consumer reporting companies – Experian, Equifax, and TransUnion – will eliminate a significant amount of medical debt credit reporting. Experian, Equifax, and TransUnion have announced that beginning in 2023, they will no longer list medical collections tradelines less than $500 on consumer credit reports. The Report notes that although lower income residents and residents in certain majority-minority census tracts are more likely to have medical collections tradelines on their credit reports than residents of high income and majority-white census tracts, they are slightly less likely to benefit from the changes.

Significant Enforcement Actions

FTC Obtains Summary Judgment in Litigation Against Company That Failed to Deliver COVID-19 PPE. On **August 1**, the FTC announced that the U.S. District Court for the Eastern District of Missouri ruled in favor of its motion for summary judgement against American Screening, LLC (American Screening) for allegedly failing to fulfill orders for personal protective equipment (PPE) during the onset of the COVID-19 pandemic. The FTC originally filed suit against American Screening in August 2020 under the Federal Trade Commission Act (FTC Act) and the Mail, Internet and Telephone Order Rule (Mail Order Rule), alleging that the company deceived consumers about the availability of PPE during the onset of the COVID-19 pandemic. In granting the FTC's summary judgment motion, the court found that, although its website stated that items were in stock and would be shipped within 24-48 hours, American Screening had no reasonable basis for its claims and failed to ship many of its orders. The court also concluded that American Screening did not follow the Mail Order Rule's requirements for delayed shipments. Ultimately, the court held that both injunctive relief and $14 million in monetary relief were appropriate. The FTC will submit a proposed order to finalize relief in the American Screening case in the coming weeks.

FTC Obtains Monetary Settlement with Home Buying Firm for Making Allegedly Misleading Claims About Its Service. On **August 1**, the FTC announced that Opendoor Labs Inc. (Opendoor), a company that operates an online real estate business that buys homes directly from consumers, agreed to a proposed administrative consent order requiring the company to pay $62 million for allegedly making false claims about proceeds consumers could receive from using their services. According to the FTC's complaint allegations, Opendoor promised that consumers would make more by selling their homes to Opendoor than they would on the open market by providing "market-value" offers and reducing transaction costs. However, the FTC alleged that Opendoor's offers were below market value on average and that its costs were higher than what consumers typically pay, costing the majority of consumers who sold to Opendoor thousands of dollars. The FTC voted 5-0 to accept the consent order, which will be subject to a 30-day public comment period before the FTC votes on finalizing the settlement.

FTC Settles with Payment Processor for Allegedly Making False Claims and Concealing Cancellation Terms. On **July 29**, the FTC announced that it reached a settlement with payment processing and marketing provider First American Payment Systems (First American) and two of its sales affiliates for alleged violations of the FTC Act and the Restore Online Shoppers' Confidence Act (ROSCA). The FTC's complaint alleges that First American, through its sales affiliates, violated ROSCA by failing to disclose material contract terms to consumers, charging consumers without express informed consent, and failing to provide a simple mechanism for consumers to cancel the agreements. The FTC also alleges that First American violated the FTC Act by representing that consumers may cancel at any time without penalty, may cancel within an introductory trial period without penalty, or are subject to just a short-term agreement, when First American's standard service agreement allegedly "binds consumers to a three-year agreement with a $495.00 early termination fee." Under the proposed order, First American must provide $4.9 million to the FTC for refunds to affected businesses.

CFPB Fines U.S. Bank $37.5 Million for Allegedly Opening Bank Accounts Without Consumer Consent. On **July 28**, the CFPB announced that it issued a consent order against U.S. Bank National Association (U.S. Bank). According to the CFPB, U.S. Bank imposed sales goals on bank employees as part of their job description and implemented an incentive-compensation program that financially rewarded employees for selling U.S. Bank's consumer financial products or services. The CFPB alleged that in response to this incentive structure, U.S. Bank employees used consumer credit reports and sensitive personal information to issue credit cards and lines of credit and open deposit accounts for certain consumers, without their knowledge and consent and without required applications and disclosures in violation of both the Truth in Lending Act and Truth in Savings Act, and their implementing regulations. The CFPB also alleged the account openings to be abusive in violation of the Consumer Financial Protection Act of 2010, and further found that U.S. Bank violated the Fair Credit Reporting Act (FCRA) by using or obtaining consumer reports without a permissible purpose in connection with unauthorized applications for credit cards. Under the order, U.S. Bank is required to cease these practices, develop a plan to remediate harmed consumers by returning unlawfully charged fees, and pay a $37.5 million penalty to the CFPB.

FTC Fines Apparel Company for Alleged False Made in USA Claims. On **July 28**, the FTC announced that it finalized an order against apparel company Lions Not Sheep Products, LLC (LNSP), fining the company $211,335 for falsely claiming that its imported apparel is made in the U.S. The FTC first announced its administrative complaint against LNSP in May 2022, alleging that the company "removed tags disclosing appropriate foreign country of origin from shirt products and printed 'Made in USA' at the neck of the shirts[.]"

In addition to the monetary penalty, the order requires LNSP to stop representing that a product is made in the United States unless the company can prove as much, and to disclose its products' country of origin on the products' labels and in any catalogs or promotional material. The FTC voted 5-0 to approve this final order.

CFPB and DOJ File Complaint and Proposed Consent Order Against Mortgage Company Based on Discrimination Claims. On **July 27**, the CFPB announced that it, together with the Department of Justice (DOJ), filed a complaint and proposed consent order in the Eastern District of Pennsylvania against Trident Mortgage Company, LP (Trident). The CFPB and DOJ allege that Trident engaged in unlawful discrimination on the basis of race, color, or national origin against applicants and prospective applicants, including by redlining specific majority-minority neighborhoods, when considering applications for credit, in violation of the Equal Credit Opportunity Act, Regulation B, and the Consumer Financial Protection Act of 2010 (CFPA). DOJ also alleges that Trident's conduct violated the Fair Housing Act (FHA). If approved by the court, the proposed consent order would require Trident to invest $18.4 million in a loan subsidy program under which Trident will contract with a lender to increase the credit extended in majority-minority neighborhoods in the Philadelphia Metropolitan Statistical Area and make the loans under the loan subsidy fund. Trident must also fund targeted advertising to generate applications for credit from qualified consumers in majority-minority neighborhoods in the Philadelphia MSA and take other remedial steps to serve the credit needs of majority-minority neighborhoods in the Philadelphia MSA. Finally, Trident must pay a civil money penalty of $4 million.

CFPB Fines Hyundai $19 Million for Credit Reporting Violations. On **July 26**, the CFPB announced that it issued a consent order against Hyundai Capital America (Hyundai), a nonbank automotive finance company. Hyundai purchases and services retail installment contracts and vehicle leases originated by Hyundai, Kia, and Genesis dealerships, and furnishes credit information on the auto loans it services to consumer reporting agencies (CRAs). The CFPB alleged that over several years, Hyundai repeatedly furnished to CRAs information containing systemic errors and that it knew of many of these inaccuracies for years before attempting to fix them. The CFPB alleged that Hyundai violated the FCRA and Regulation V by: (1) failing to promptly update and correct information it furnished to CRAs that it determined was not complete or accurate, and continuing to furnish this inaccurate and incomplete information; (2) failing to provide the FCRA-required date of first delinquency on certain delinquent or charged-off accounts; (3) failing to modify or delete information disputed by consumers that it found to be inaccurate; (4) failing to establish reasonable identity theft and related blocking procedures to respond to identity theft notifications from CRAs; and (5) failing to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information provided to CRAs. The CFPB also alleged that these FCRA violations also constituted violations of the CFPA, and that Hyundai used ineffective manual processes and systems to furnish consumer information that was unfair in violation of the CFPA. The consent order requires Hyundai to take steps to prevent future violations and to pay $13,200,000 in redress to affected consumers and a $6,000,000 civil money penalty.

Upcoming Comment Deadlines and Events

CFPB Extends Comment Period for Input on Relationship Banking and Customer Service. Comments are due **August 22** on the CFPB's Request for Information (RFI) regarding relationship banking and how consumers can assert the right to obtain timely responses to requests for information about their accounts from banks and credit unions with more than $10 billion in assets, as well as from their affiliates.

CFPB Solicits Comment on Employee Debt Obligations. Comments are due **September 7** on the CFPB's 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.

FTC Seeks Comment on Proposed Motor Vehicle Dealers Trade Regulation Rule. Comments are due **September 12** on a NPRM seeking comment on a proposed trade regulation rule that would: (1) prohibit automotive dealers from making certain representations while selling, leasing, or arranging for the financing of motor vehicles; (2) require pricing disclosures in automotive dealers' advertising and sale discussions; (3) obligate automotive dealers to obtain consumer express informed consent for charges; (4) prohibit the sale of add-on products or services that confer no benefit to the consumer; and (5) require automotive dealers to retain records of advertisements and customer transactions. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 authorizes the FTC to promulgate certain rules related to automotive dealers.

FTC Seeks Comment on Revised Endorsement Guides. Comments are due **September 26** on the FTC's Request for Public Comment on Amendments to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (Request for Comment) that proposes a number of revisions to the FTC's Endorsement Guides. Among other matters, the Request for Comment seeks input on treating the deletion of negative reviews or the decision not to publish negative reviews as a deceptive act or practice under Section 5 of the FTC Act; addresses endorsements made on social media posts; and solicits feedback on adding a section to the Endorsement Guides focused on advertising towards children. A summary of the Request for Comment is available here.

FTC Holding Virtual Event on 'Stealth Advertising' Toward 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.

FTC Seeking Research Presentations for PrivacyCon 2022. Research presentations were 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.

More Analysis from Wiley

FTC Seeks Comment on Updating Endorsement Guides on Digital Advertising

FTC Highlights Scrutiny of Health and Geolocation Data

West Virginia v. EPA and the Future of Tech Regulation

FTC Uses Enforcement Proceeding to Send Message on Account Security Practices

Top Developments to Watch at the FTC on Privacy

California Privacy Protection Agency Releases Draft CPRA Regulations

Webinar: The FTC's Changing Approach to Privacy

EU Institutions Reach Agreement on Landmark Regulations Targeting Big Tech

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 and 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

Podcast: Why the FTC Matters for Fintech

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