

Wiley Consumer Protection Download (December 19, 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 December Open Commission Meeting, Approving Regulatory Review of Green Guides and Holding Data Security Presentation. On **December 14**, the FTC held a virtual Open Commission Meeting. During the meeting, the agency voted 4-0 to issue a Request for Comment to commence a regulatory review of the Guides for the Use of Environmental Marketing Claims (Green Guides). The Request for Comment asks, among other things: (1)

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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. Comments will be due 60 days after publication in the Federal Register.

Following the vote on the Request for Public Comment, the Commissioners heard a presentation from FTC Deputy Chief Technology Officer Alex Gaynor. The presentation detailed how new FTC data security “best practices” will be deployed in future consent orders. Such best practices include (1) the implementation of multi-factor authentication (MFA); (2) phishing-resistant MFA, such as use of a security key or pass key, for employees; (3) implementing encryption and authentication requirements for entire company networks; and (4) comprehensive data retention schedules.

CFPB Publishes Notification of Intent to Make a Preemption Determination on Whether TILA Preempts Certain Provisions of a New York Commercial Financing Law. On **December 15**, the CFPB published a Notification in the Federal Register signaling its intent to make a preemption determination whether the Truth in Lending Act (TILA) preempts certain provisions of a New York commercial financing law. The CFPB published the Notification in response to a preemption request made by the Small Business Finance Association. The agency also provided notice that it is considering whether to make a preemption determination regarding certain state laws in California, Utah, and Virginia that are potentially similar to the New York law.

Similar to TILA, the New York law at issue requires creditors to make certain disclosures before the consummation of covered transactions. Both TILA and the New York law require creditors to disclose information about “finance charges” and “APRs” before the consummation of a covered transaction. Unlike TILA, however, the New York law applies to commercial financing as opposed to consumer credit. In its preliminary preemption analysis, the CFPB argues that TILA does not preempt the New York law because the regimes cover different types of transactions – TILA applies to consumer credit transactions and the New York law applies to commercial financing transactions. Comments on the CFPB’s preliminary preemption analysis are due **January 20, 2023**.

CFPB Director Chopra Testifies Before Senate Committee on Banking, Housing, and Urban Affairs and House Financial Services Committee. On **December 14**, CFPB Director Rohit Chopra testified before the House Financial Services Committee as part of the presentation of the agency’s Semi-Annual Report to Congress. Director Chopra then testified before the Senate Banking, Housing, and Urban Affairs Committee on the following day. Director Chopra led off his testimony before both chambers by noting that both the economy generally and the consumer finance markets specifically are in transition out of the COVID-19 pandemic and further into the digital era. Director Chopra highlighted a number of steps that the CFPB is taking with the goal of protecting consumers, including: recovering hundreds of millions of dollars in victim redress and penalties from companies that allegedly violated the agency’s rules; issuing a Small Business

Advisory Review Panel Outline of Proposals and Alternatives Under Consideration (Outline), in anticipation of issuing a proposed consumer data rights rule under Section 1033 of the Consumer Financial Protection Act (CFPA); and focusing on refinancing markets, including auto, credit card, and mortgage, and enabling small banks and firms to enter these markets. As part of his testimony, Director Chopra also emphasized the importance of maintaining the neutrality of digital payment systems, and encouraged Congress to strengthen financial privacy protections.

CFPB Proposes to Create Registry of Nonbank Financial Institutions Subject to Federal, State, or Local Agency or Court Orders. On **December 12**, the CFPB released a Proposed Rule seeking comment on whether it 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. Comments on the Proposed Rule are due 60 days after publication in the Federal Register.

FTC Disapproves HISA Anti-Doping and Medication Control Proposed Rule. On **December 12**, the FTC issued an Order disapproving the Horseracing Integrity and Safety Authority (HISA) Anti-Doping and Medication Control proposed rule following a public comment period. The Order explains that the FTC's disapproval stems from the U.S. Court of Appeals for the Fifth Circuit's decision in *National Horsemen's Benevolent & Protective Ass'n v. Black*, which held that the Horseracing Integrity and Safety Act of 2020 is unconstitutional. Specifically, the Order explains that the FTC rejected the rule because "agency confusion could result for industry participants and regulators in the jurisdictions affected by the Fifth Circuit's decision, as the rule takes effect one week only to be rendered potentially unenforceable the following week." HISA, which was established following the implementation of the Horseracing Integrity and Safety Act, is charged with developing a horseracing anti-doping and medication control program and a racetrack safety program.

FTC Consumer Protection Data Spotlight Finds That Consumers Under the of Age of 60 Are Significantly More Likely to Lose Money from Online Shopping and Investment Scams. On **December 8**, the FTC released a Consumer Protection Data Spotlight showing that consumers under the age of 60 are 86 percent more likely to report losing money to online shopping scams than older adults, and that these consumers stated that such scams often originated from posts on social media. According to the Spotlight, adults under the age of 60 were also more than four times as likely to report losing money to an investment scam – particularly a scam involving cryptocurrency.

Recent Enforcement Actions

FTC and Florida Attorney General Settle with Grant Writing Service that Allegedly Misled Minority-Owned Small Businesses. On **December 8**, the FTC announced that it approved by a 4-0 vote a proposed stipulated order, along with the Florida Attorney General, against Grant Bae. The proposed order, filed in the U.S. District Court for the Middle District of Florida, would require Grant Bae and its owner to stop providing any products or services related to grants or business consulting, prohibit making misleading statements, turn over assets to be sold to provide restitution to harmed consumers, and pay a \$2.1 million monetary judgment. The FTC and State of Florida filed a complaint against Grant Bae in June 2022 for allegedly false marketing stating that the company could guarantee grant funding and COVID-19 economic benefits, in violation of the COVID-19 Consumer Protection Act, the FTC Act, and the Florida Deceptive Unfair Trade Practices Act.

FTC Files Proposed Consent Order In Case Against Credit Repair Operators. On **December 15**, the FTC filed a proposed stipulated order in the U.S. District Court for the Middle District of Florida to settle its action against The Credit Game and its owners, Michael and Valerie Rando (collectively "Defendants"), for alleged violations of the Federal Trade Commission Act (FTC Act), the Credit Repair Organizations Act (CROA), the Business Opportunity Rule, the Telemarketing Sales Rule (TSR), and the COVID-19 Consumer Protection Act (CCPA). In addition to imposing a \$18.8 million monetary penalty, the proposed order bans the Defendants from operating or working with any credit repair service, prohibits any false claims, and liquidates numerous assets to be turned over by the Defendants. The FTC filed its initial complaint in May 2022 alleging that the Defendants unlawfully charged consumers for credit repair services, told consumers to spend or otherwise "invest" their COVID-19 governmental benefits on the company's unlawful services, and encouraged consumers to file false identity theft reports, among other things.

Upcoming Comment Deadlines and Events

FTC Solicits Feedback on Funeral Rule ANPR. Comments are due **January 3, 2023** on the FTC's Funeral Rule ANPR. The ANPR seeks comment on updates to the Funeral Rule, including improvements to the public accessibility of funeral home price information.

FTC Seeks Comment on Junk Fees ANPR. Comments are due **January 9, 2023** on the FTC's Junk Fees ANPR. As we explained in greater detail here, the ANPR asks 21 questions about what the FTC labels as "junk fees" practices such as "drip pricing"; billing consumers for products and services without consent; and whether a "junk fees" rule should require that "businesses to disclose in all advertising one price that encompasses all mandatory component parts."

FTC Requests Input on Fake Reviews and Endorsements ANPR. Comments are due **January 9, 2023** on the FTC's Fake Reviews and Endorsements ANPR. The ANPR asks 17 questions about the presence of fake reviews and endorsements in the marketplace, what regulatory provisions mitigate or deter them, and whether additional rules are needed.

FTC Seeks Comment on Business Opportunity Rule ANPR. Comments are due **January 24, 2023** on the FTC's Business Opportunity Rule ANPR. The ANPR (1) initiates a regulatory review of the Business Opportunity Rule; (2) inquires about the efficacy of the current Business Opportunity Rule in preventing consumer harm; (3) asks

whether the Business Opportunity Rule should be expanded to cover coaching programs, work-from-home e-commerce opportunities, and certain investment opportunities; and (4) incorporates into the record comments filed on the ANPR on Deceptive and Unfair Earnings Claims, which was published in the Federal Register in March 2022.

FTC Seeks Comment on Energy Labeling Rule ANPR. Comments are due **January 31, 2023** (extended from December 27) on the FTC's ANPR. The ANPR requests public input on a number of proposed revisions to the Rule, including whether to amend the rule to require companies to provide repair instructions for products covered under the Rule.

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

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

Updates on the FTC Privacy Rulemaking: Insights from Commissioner Slaughter and Comment Deadline Extension

FTC Pushing Ahead Toward Major Privacy Regulation

FTC Launches Rulemaking on Fee Disclosures and Practices Across Industries

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

Crypto and Web3 Under Consumer Protection Scrutiny

How the Supreme Court's OT 2022 Term (So Far) Might Affect Tech

With 2023 Compliance Deadlines Looming for Several New State Privacy Laws, California and Colorado Release Draft Privacy Rules

California AG Issues First Fine for CCPA Violations

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

NIST Is Taking Critical Steps Towards an AI Risk Management Framework

The Private Sector Should Watch NIST's Broad Work on Privacy and Cybersecurity Guidance

FTC Highlights Scrutiny of Health and Geolocation Data

West Virginia v. EPA and the Future of Tech Regulation

Executive Order on EU-U.S. Data Sharing Signed

EU Institutions Reach Agreement on Landmark Regulations Targeting Big Tech

U.S. State Privacy Law Guide

Webinar: Transactional Due Diligence Related to Privacy and Cybersecurity

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

Podcast: Why the FTC Matters for Fintech

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