

Wiley Consumer Protection Download (January 17, 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 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 Announces Tentative Agenda for January 2023 Open

Commission Meeting. On **January 12**, the FTC announced that the agency will hold an Open Commission Meeting on January 19. There are two items on the agency's agenda: (1) staff in the FTC's Division of Consumer Response and Operations will give a presentation "on the striking age-related differences seen in fraud reports from the public"; and (2) Chair Khan "will highlight a selection of individual

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Practice Areas

Cyber and Privacy Investigations, Incidents
& Enforcement

FTC Regulation

Privacy, Cyber & Data Governance

Telecom, Media & Technology

award recipients honored during the FTC's recent annual awards ceremony."

CFPB Proposes Rule to Establish Registry of Nonbank Terms or Conditions That Claim to Waive or Limit Consumer Rights. On **January 11**, the CFPB published a Proposed Regulation 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. Comments on the Proposed Regulation are due 60 days after publication in the Federal Register.

FTC Issues NPRM Proposing to Broadly Ban Employee Non-Compete Clauses. On **January 5**, the FTC released a Notice of Proposed Rulemaking (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. The FTC voted 3-1 to issue the NPRM, with Commissioner Wilson dissenting. Comments on the NPRM are due 60 days after publication in the Federal Register.

CFPB Issues Report on Handling of Consumer Complaints by Nationwide Consumer Reporting Companies. On **January 3**, the CFPB released an annual report detailing efforts by TransUnion, Experian, and Equifax to respond to consumer complaints. The Fair Credit Reporting Act requires the CFPB to submit an annual report about complaints submitted by consumers regarding nationwide consumer reporting agencies. The report found that from October 2021 to September 2022 the CFPB received "nearly one million credit or consumer reporting complaints." According to the CFPB, the agency sent more than 565,000 credit or consumer reporting complaints to companies for response. Of these, 488,000 were sent to Equifax, Experian, or TransUnion. The report also found that the three companies: are sending more substantive responses to consumer complaints; are sending tailored responses to more than 50% of complaints that were closed with an explanation or relief; and reported greater relief rates in response to consumer complaints.

FTC Issues Order Affirming the Agency's Prior HISA Orders and Approves HISA's Proposed Assessment Methodology Rule Modification. On **January 3**, the FTC issued an Order ratifying its previous orders regarding proposed rules submitted to the agency by the Horseracing Integrity and Safety Authority (HISA). The FTC issued the Order to clarify that the FTC "now has a broader rulemaking power with respect to horseracing rules such that it can exercise its own policy choices whenever it determines that [HISA's] proposals, even if consistent with the Act, are not the policies that the [FTC] thinks would be best for horseracing integrity or safety." HISA was established following the implementation of the Horseracing Integrity and Safety Act, and was amended by the Consolidated Appropriations Act of 2023 after the Fifth Circuit held the Act unconstitutional in *National Horsemen's Benevolent & Protective Ass'n v. Black*. The FTC voted 3-0-1 to issue the Order, with Commissioner Wilson abstaining.

On **January 9**, the FTC issued an Order approving modifications proposed by HISA to its Assessment Methodology rule “allow[ing] a state to elect to remit fees [to HISA] even after the first year of [HISA’s] operations.” The FTC voted to approve the rule by a 3-0-1 vote, with Commissioner Wilson abstaining.

Recent Enforcement Actions

FTC Settles with Three Companies for Enforcing Allegedly Unfair Noncomplete Clauses. On **January 4**, the FTC issued complaints and consent orders against Prudential Security, O-I Glass, and Ardagh Group, and their respective owners. The FTC alleged that the companies engaged in unfair methods of competition in violation of Section 5 of the FTC Act by limiting the ability of ex-employees to find new employment after entering into noncomplete clauses that the ex-employees could not negotiate. The stipulated orders prohibit the companies from enforcing or threatening to enforce noncomplete clauses against employees. Additionally, as part of the stipulated orders, the companies must provide all current and past employees with the stipulated order notifying them that any noncomplete clauses are void, ensure that all future directors and managers continue abiding by this order, and conspicuously display notice that the companies may not use non-compete clauses for at least 10 years. These consent packages were approved by the Commission 3-1, with Commissioner Wilson dissenting. The FTC publish the consent orders in the Federal Register for a 30-day comment period, before deciding whether to make the proposed orders final.

CFPB and New York Attorney General Sue Auto Lender for Engaging in Allegedly Deceptive Loan Practices. On **January 4**, the CFPB and the New York Attorney General's Office filed a complaint against Credit Acceptance Corporation in the Southern District Court of New York for alleged violations of the Consumer Protection Act and New York usury limits. The complaint alleges that Credit Acceptance misled consumers by offering loans that consumers could not afford and by failing to disclose the full cost of the loans up front, charging interest rates that exceeded the usury limits under New York state law. The CFPB and NY AG are seeking disgorgement, a permanent injunction against engaging in such activity, and money penalties of more than \$1 million per day the company engaged in the alleged activity.

CFPB Settles with Law Firm for Engaging in Allegedly Illegal Debt-Collection Practices. On **January 11**, the CFPB filed a proposed stipulated order in the Eastern District Court of New York against Forster & Garbus, LLP for allegedly filing thousands debt collection lawsuits against consumers without providing the proper documentation to support the claims. In addition to paying a \$100,000 civil money penalty, Forster & Garbus has agreed to include more detailed documentation before filing any additional debt collection lawsuits, review all documents before filing suit, and dismiss all pending debt-collection litigation where the company cannot certify that documents supporting the lawsuit are sufficiently detailed and have been reviewed by attorneys.

FTC Settles Deceptive Practices Allegations with WealthPress After Company Received a Notice of Penalty Offenses. On **January 12**, the FTC filed a complaint and stipulated order in the Middle District Court of Florida against WealthPress and its owners, Roger Scott and Conor Lynch. WealthPress had previously received a Notice of Penalty Offenses concerning money-making opportunities in October 2021 (we discussed the FTC’s use of Notices of Penalty Offenses here). The FTC alleged that WealthPress deceived consumers by falsely

advertising successful stock trading expertise and marketing that expertise to consumers through videos and trading recommendations, in violation of the FTC Act and the Restore Online Shoppers' Confidence Act (ROSCA). The FTC further alleged that the advertised successful trades did not take place, and the earnings the owners purported to earn using their own trading recommendations were false and deceptive. WealthPress has agreed to pay a \$500,000 civil money penalty and \$1.2 million in consumer redress, in addition to injunctive relief. The settlement marks the first time the FTC has collected penalties from a company that received a Notice of Penalty Offenses.

Upcoming Comment Deadlines and Events

FTC Solicits Feedback on Funeral Rule ANPR. Comments are due **January 17, 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 Business Opportunity Rule ANPR. Comments are due **January 31, 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.

FTC Seeks Comment on Junk Fees ANPR. Comments are due **February 8, 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 Comment on Regulatory Review of the Green Guides. Comments are due **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.

More Analysis from Wiley

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

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

FTC Proposes New Rule to Broadly Ban Non-Compete Agreements

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

FTC Requests Comment on Potential Revisions to Green Guides

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 Launches Rulemaking on Fee Disclosures and Practices Across Industries

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

FCC Releases Long-Anticipated Data Breach Reporting NPRM, Proposing Major Changes to CPNI Rules

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

Crypto and Web3 Under Consumer Protection Scrutiny

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

FTC Highlights Scrutiny of Health and Geolocation Data

West Virginia v. EPA and the Future of Tech Regulation

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

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