

Wiley Consumer Protection Download (January 23, 2024)

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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 select 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

CFPB Issues Advisory Opinions on Background Screening and File Disclosure Requirements Under the FCRA. On **January 11**, the CFPB issued two advisory opinions under the Fair Credit Reporting Act (FCRA). In the Background Screening Advisory Opinion, the CFPB explains that, when preparing consumer reports, a consumer reporting agency must have certain specific procedures in place to satisfy the requirement of Section 607(b) of the FCRA that it use reasonable procedures to ensure maximum possible accuracy. Specifically, the Opinion states that consumer reporting agencies

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Cyber and Privacy Investigations, Incidents & Enforcement
FTC Regulation
Privacy, Cyber & Data Governance
Telecom, Media & Technology

must have procedures in place that: (1) prevent reporting information that is duplicative or that has been expunged, sealed, or otherwise legally restricted from public access; and (2) include any existing disposition information if it reports arrests, criminal charges, eviction proceedings, or other court filings. The Opinion also explains that when consumer reporting agencies include adverse information in consumer reports: (1) the occurrence of the adverse event starts the running of the reporting period for adverse items under Section 605 (a)(5) of the FCRA; (2) that period is not restarted or reopened by the occurrence of subsequent events; and (3) a non-conviction disposition of a criminal charge cannot be reported beyond the seven-year period that begins to run at the time of the charge.

The second opinion, the File Disclosure Advisory Opinion, explains that, to trigger a consumer reporting agency's file disclosure obligations under Section 609(a) of the FCRA, a consumer does not need to use specific language such as "complete file" or "file." That Opinion further details the requirements regarding the information that must be disclosed to consumers under Section 609(a) and confirms that consumer reporting agencies must disclose to a consumer both the original source and any intermediary sources that provide the item of information to the consumer reporting agency.

FTC Seeks Comment on Energy Labeling Rule NPRM. On **January 16**, the FTC released a Notice of Proposed Rulemaking (NPRM) seeking comment on proposed revisions to the agency's Energy Labeling Rule. As described by the FTC, the Energy Labeling Rule requires, for certain products, "the familiar yellow Energy Guide labels stating a product's estimated annual operating cost and energy consumption, and a range for comparing the highest and lowest energy cost for similar models." The NPRM seeks comment on four broad issue areas related to the Energy Labeling Rule: (1) proposed new labels for previously unlabeled air cleaners, clothes dryers, miscellaneous refrigerator products, and portable electric spas; (2) new issues that commenters raised in the Advance Notice of Proposed Rulemaking phase regarding existing labels for clothes washers, televisions, and heating products including water heaters, pool heaters, and boilers; (3) several proposed amendments to match label format and location shopping patterns (such as requiring manufacturers to affix labels to large appliances prepared for showroom display only); and (4) minor amendments to address various issues, including compliance dates for ranges, television data updates, and format and placement requirements for labels. Comments on the NPRM are due 60 days after publication in the Federal Register.

FTC Holds Virtual Open Commission Meeting and Discussion on COPPA Rulemaking and CARS Rule. On **January 18**, the FTC held a virtual Open Commission Meeting, and heard presentations on (1) the Children's Online Privacy Protection Act (COPPA) Rule NPRM (COPPA Rule NPRM); and (2) the Combating Auto Retail Scams Rule (CARS Rule). First, staff from the FTC's Division of Privacy and Identity Protection provided an overview of the COPPA Rule NPRM. The presentation focused on, among other things, the proposed new opt-in requirement for targeted advertising, the proposed limits on "nudging" children without parental consent, and proposed revisions to the COPPA Rule's data security and data retention requirements. During the presentation, staff also discussed the proposed opt-in requirement for behavioral advertising, the proposed revisions to the COPPA Rule's direct and online notice requirements, and the proposal to prohibit operators from conditioning website access on consent to third-party data sharing.

Second, staff from the FTC's Division of Financial Practices provided an overview of the new CARS Rule, which regulates auto advertising practices. The presentation explained the CARS Rule at a high level, noting that the Rule: (1) prohibits dealers from misrepresenting costs and financing terms; (2) requires dealers to reveal the offering price, that add-ons are not required, and total payments information; (3) prohibits "junk" fees for items that consumers do not know about; and (4) requires dealers to obtain express informed consent for charges. The presentation also explained that the CARS Rule prohibits dealers from making certain misrepresentations to servicemembers during the car buying process.

FTC Signs Agreement to Participate in Global CAPE. On **January 17**, the FTC announced that it agreed to participate in the nonbinding Global Cooperation Arrangement for Privacy Enforcement (Global CAPE). According to the FTC, Global CAPE "ensures the agency can keep pace with the increasingly global nature of commerce." Global CAPE supplements the Asian Pacific Economic Cooperation Cross-border Privacy Rules (APEC CBPR), which also facilitates cooperation and assistance in privacy and data security investigations among APEC's Asian Pacific countries. The FTC voted 3-0 to authorize agency staff to participate in Global CAPE.

FTC Issues Biennial Report to Congress on the National Do Not Call Registry. On **January 8**, the FTC released its Biennial Report to Congress Under the Do Not Call Registry Extension Fee Act of 2007 for Fiscal Years 2022 and 2023 (Biennial Report). The National Do Not Call Registry is a database maintained by the FTC that lists the telephone numbers of individuals who have requested that telemarketers not contact them. The Biennial Report notes that the National Do Not Call Registry now has over 249 million active registrations. Moreover, the Biennial Report found that the FTC received over two million Do Not Call complaints in the past year, with the majority of these violations coming via robocalls, as opposed to live telemarketing calls. And the Biennial Report explains that imposter scams, medical needs, and prescription scam calls led the list of commonly reported topics in FY 2023. Other commonly reported call topics included debt reduction, and energy, solar, and utilities calls.

Select Enforcement Actions

CFPB and Seven State Attorneys General Sue Debt-Relief Enterprise for Allegedly Charging Advanced Fees and Misrepresenting Legal Services. On **January 10**, the CFPB and Colorado, Delaware, Illinois, Minnesota, New York, North Carolina, and Wisconsin filed a complaint in the U.S. District Court for the Western District of New York against a debt-relief company and two of its executives for alleged violations of the Telemarketing Sales Rule, Consumer Financial Protection Act, and relevant state laws. The CFPB and state attorneys general allege that the defendants charged consumers fees prior to providing debt-relief service, and misled consumers by promising to provide debt-relief services, including legal representation during debt-relief negotiations, but failed to provide actual relief and used non-lawyer employees to represent consumers in negotiations. The CFPB and state attorneys general requested a preliminary injunction and monetary relief, in addition to a temporary restraining order, which the court granted on January 11.

FTC Settles with Real Estate Investment Executives for Allegedly Misrepresenting Investment Opportunities to Consumers. On **January 17**, the FTC filed two proposed stipulated orders in the U.S. District Court for the Middle District of Florida against real estate investment companies and certain individuals for allegedly violating the FTC Act, Business Opportunities Rule, and Cooling Off Rule. The FTC had alleged that the defendants misled consumers by falsely promising that attendance at the defendants' three-day workshop would guarantee success in starting an online business or investing in real estate, failing to deliver the mentorship and lucrative investment opportunities promised, and not translating all disclaimers into Spanish for consumers who did not speak English. The FTC further alleged that consumers were denied refunds when the defendants' services failed to deliver the financial returns promised. The settling defendants agreed to a total monetary judgment of \$29,175,000, a permanent ban on engaging in business coaching on ecommerce or real estate, and other injunctive relief, while litigation against another individual remains ongoing.

FTC Settles with Digital Marketing Platform Regarding Data Collection and Use. On **January 18**, the FTC filed a complaint and proposed order against a digital marketing platform, alleging that the company failed to inform app users that location data was being used for targeted advertising purposes. The company agreed to a settlement that places restrictions on certain use of location data in addition to other injunctive relief.

Upcoming Comment Deadlines and Events

FTC to Host Virtual Tech Summit Focused on AI. The FTC announced that it will host the virtual FTC Tech Summit focused on AI on **January 25, 2024 from 12 p.m. to 4:30 p.m. EST**. According to the FTC, the event will "bring together a diverse group of stakeholders to discuss key developments in the rapidly evolving field of [AI], looking across the layers of technology related to AI." Participants will include representatives from academia, industry, civil society organizations, and government who will "discuss the state of technology, emerging market trends, and real-world impacts of AI." FTC Chair Lina Khan, along with Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya, will provide remarks at the event. The tentative agenda is available [here](#).

FTC Requests Comment on Petition for Rulemaking on Consumer Device Repair Filed by PIRG and iFixit. Comments are due **February 2, 2024** on a Petition for Rulemaking (Petition) filed by the U.S. Public Interest Research Group Education Fund (PIRG) and iFixit. The Petition requests that the FTC "promulgate rules governing consumers' right to repair products and devices." The Petition suggests possible rules including those that would: require manufacturers to include labels on products that score their repairability at the point of sale; bar manufacturers from requiring that independent repair shops buy parts from preapproved exclusive vendors and prohibit them from "using exclusive contracts with their component suppliers;" and require manufacturers to "support repair and provide documentation for a period after purchase."

FTC Seeks Comment on 'Junk Fees' and Proposes Fee Disclosure Requirements. Comments are due **February 7, 2024** (extended from January 8, 2024) on the FTC's Trade Regulation Rule on Unfair or Deceptive Fees NPRM. The NPRM broadly addresses two practices: (1) fee disclosures after a consumer sees an initial base price; and (2) "practices that misrepresent the nature and purpose of fees or charges." The proposed

rule would define both as unfair and deceptive practices, which would enable the FTC to seek civil penalties for violations. Among other things, the NPRM proposes to require businesses to disclose a “Total Price” in any offer, display, or advertisement that contains an amount a consumer must pay and do so more prominently than other pricing information. It also proposes a preemptive disclosure requirement which would require businesses to disclose, clearly and conspicuously and before the consumer consents to pay, the nature and purpose of any amount the consumer may pay that is excluded from the “Total Price,” including shipping charges, government charges, optional fees, voluntary gratuities, and invitations to tip.

FTC to Hold Informal Hearing on Reviews and Testimonials NPRM. The FTC will hold a virtual Informal Hearing on **February 13, 2024 at 10 a.m. ET** on the agency’s NPRM that, if adopted, would classify certain consumer review and testimonial practices as unfair or deceptive under Section 5 of the FTC Act. Specifically, advertising practices that the NPRM proposes to classify as “unfair” or “deceptive” include (1) selling or obtaining “fake” consumer reviews; (2) repurposing consumer reviews or “review hijacking;” (3) purchasing positive or negative reviews; (4) permitting insider reviews and testimonials without adequate disclosure; (5) representing that company-controlled review websites or entities are independent; (6) suppressing review; and (7) misuse of fake social media influence indicators. The hearing will be open to the public, and will feature oral statements from three interested parties—the Interactive Advertising Bureau, the Fake Review Watch, and a group of academic researchers—addressing issues raised during the rulemaking process.

FTC Seeks Research Presentations for PrivacyCon 2024. The FTC will hold PrivacyCon 2024 on **March 6, 2024**. The event will be particularly focused on automated systems and AI, health-related “surveillance,” children’s and teens’ privacy, deepfakes and voice clones, worker “surveillance,” and advertising practices. The agenda for PrivacyCon 2024 will be posted here prior to the event. Members of the public wishing to attend the event may visit the FTC’s website at www.ftc.gov to access the live webcast.

FTC Seeks Comment on Its Proposed Revisions to the COPPA Rule. Comments are due **March 11, 2024** on the agency’s COPPA Rule NPRM. The COPPA Rule “imposes certain requirements on operators of websites or online services directed to children under 13 years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age.” If adopted, the NPRM’s proposals would place new restrictions on covered operators’ use and disclosure of the personal information of children, and further limit the ability of covered operators to condition access to services on sharing data with third parties including for advertising purposes. Specifically, the NPRM’s proposals would, among other things, require separate parental consent for sharing children’s data in addition to obtaining consent for collection; allow text messages as a means to obtain parental consent; expand the definition of “personal information” to include biometric information; require covered operators to develop written information security programs as well as retention policies, and follow data minimization practices; and codify schools’ ability to authorize collection of children’s data for limited educational purposes.

CFPB Proposes Rule to Targeting Certain Overdraft Fees Charged by Large Financial Institutions.

Comments are due **April 1, 2024** on the CFPB’s Proposed Rule to amend Regulation E, implemented under the Electronic Fund Transfer Act and Regulation Z, implemented under the Truth in Lending Act, to update

regulatory exceptions for overdraft credit provided by financial institutions with assets of \$10 billion or more. Among other things, the Proposed Rule would, if adopted, preserve courtesy overdraft loan services provided by these financial institutions, but would limit the fees charged on such loans to only the financial institutions costs and losses. Specifically, the Proposed Rule would permit financial institutions to calculate their own costs using either a “breakeven standard” or rely on a “benchmark fee” set by the CFPB. Under the “breakeven standard,” the Proposed Rule would allow financial institutions to charge fees to recover both losses the financial institutions incur when they write off overdrawn account balances not returned to positive, and any direct costs that are traceable to the provision of overdraft services. Under the “benchmark fee” approach, financial institutions would be permitted to charge a fixed fee set by the CFPB. The CFPB is considering setting the benchmark fee at \$3, \$6, \$7, or \$14.

More Analysis from Wiley

Wiley Promotes Megan Brown and Duane Pozza to Co-Chairs of Privacy, Cyber & Data Governance Practice

CES 2024: FTC Commissioner Slaughter Discusses New Rules, Competition, and AI

State Privacy Update: New Jersey Becomes 13th State to Pass a Consumer Privacy Bill

IG Report Finds Cyber Info Sharing Works but Barriers Remain – Implications for Incident Reporting?

Heading into 2024, Federal AI Activity Ramps Up After AI Executive Order

AI Around the Globe: What to Know in 2024

Cybersecurity in 2024: Ten Top Issues to Consider

New AI Executive Order Outlines Sweeping Approach to AI

California Previews Draft Regulations for Automated Decision-Making Technology, Promising More to Come in 2024

Annual Updates to Privacy Policies Reminder and Looking Ahead to 2024

Congress Ramps Up Its Focus on Artificial Intelligence

FCC and FTC Launch Inquiries on AI and Voice Cloning

FCC Expands Privacy and Data Protection Work with States to Increase Investigations

State Regulation of AI Use Should Give Political Campaigns Pause

OMB Proposes Far-Reaching AI Risk Management Guidance Following AI Executive Order

New Executive Order Signals Companies Should Reassess AI Security

AI Use is Promising Yet Risky for Government Subpoenas and CIDs

DOJ Must Help in Fighting Illegal Robocalls, Lawyers Say

CFPB Poised to Significantly Expand the Reach of the Fair Credit Reporting Act

FTC and HHS Caution Hospitals and Telehealth Providers on Tracking Tech

Podcast: The "Wild West" of AI Use in Campaigns

Cracks in the State Privacy Law Foundation: State Privacy Law Challenges See Success in District and State Courts

SEC Cyber Reporting Mandates: How to Request a National Security or Public Safety Delay

Coming Soon: New Cyber Labeling Program for IoT Devices

Podcast: What could AI regulation in the U.S. look like?

FTC Issues Policy Statement on Biometric Information, Signaling a New Enforcement Priority

Podcast: AI Risk Management: A Discussion with NIST's Elham Tabassi on the NIST AI Risk Management Framework

Generative AI Policies: Five Key Considerations for Companies to Weigh Before Using Generative AI Tools

U.S. State Privacy Law Guide

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