

# Wiley Consumer Protection Download (January 30, 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 Holds January 2023 Open Commission Meeting.** On **January 19**, the FTC held its monthly virtual Open Commission Meeting. During the meeting, staff from the Division of Consumer Response and Operations gave a presentation on age-related differences seen in fraud reports to the public. The Staff presentation was developed using fraud reports from the FTC, other federal agencies, companies, and organizations. The presentation highlighted the following four key

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points: (1) all age groups are very susceptible to fraud; (2) trends vary between age groups; (3) many consumers are exposed to fraud via social media; and (4) the Supreme Court decision in *AMG Capital Management* has made it more difficult for the agency to obtain money to return to injured customers, and the FTC supports Congressional action in response.

**CFPB Issues Consumer Financial Protection Circular Regarding Negative Option Marketing Practices.** On **January 19**, the CFPB issued a Consumer Financial Protection Circular addressing whether persons engaging in negative option marketing practices can violate the Consumer Financial Protection Act (CFPA). The Circular defines negative option marketing as “a term or condition under which a seller may interpret a consumer’s silence, failure to take an affirmative action to reject a product or service, or failure to cancel an agreement as acceptance or continued acceptance of the offer.” The Circular states that entities covered by the CFPA and their service providers must comply with the prohibition on unfair, deceptive, or abusive acts or practices in the CFPA. Specifically, the Circular finds that negative option marketing practices may violate the CFPA where a seller “(1) misrepresents or fails to clearly and conspicuously disclose the material terms of a negative option program; (2) fails to obtain consumers’ informed consent; or (3) misleads consumers who want to cancel, erects unreasonable barriers to cancellation, or fails to honor cancellation requests that comply with its promised cancellation procedures.”

**CFPB Issues RFI on Consumer Credit Card Market.** On **January 24**, the CFPB issued a Request for Information (RFI) seeking feedback on how the consumer credit card market is functioning as part of a biennial review of the industry. Under the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), Congress is required to establish “fair and transparent practices” pertaining to the extension of credit in the credit card market. The CARD Act requires the CFPB to conduct a review of the credit card industry every two years. Comments on the RFI are due April 24, 2023.

## Recent Enforcement Actions

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**FTC Settles with Manufacturer for Allegedly Deceptive US-Origin Advertising Claims.** On **January 18**, the FTC filed a complaint and proposed order against a home products manufacturer, Instant Brands, for allegedly advertising products manufactured in China as being “Made in USA” in violation of the FTC Act and “Made in USA” Labeling Rule. The FTC alleges that the company labeled products with “Made in China,” but misled and deceived consumers by claiming to sell American products in its Amazon product descriptions and in other marketing campaigns. Instant Brands settled with the FTC for \$129,000 and agreed to cease making any unqualified claims about where its products are manufactured and assembled.

**FTC Settles with Advertiser for \$1.25M for Allegedly Deceptive Advertising on Pricing.** On **January 19**, the FTC filed a complaint and proposed order against LasikPlus for allegedly advertising services for a lower price than consumers were actually charged. The FTC alleges that the company’s advertising did not make clear to consumers that the advertised cost was “per eye” and that only certain consumers were eligible for the discounted pricing being advertised. As part of the settlement, LasikPlus agreed to pay \$1.25M to the FTC and to enter into certain injunctive provisions. This consent package was approved by the Commission 3-1, with Commissioner Wilson dissenting. The FTC will publish a description of the consent agreement package

for public comment in the Federal Register, and decide whether to make the proposed order final after a 30-day comment period.

**FTC Settles with Home Services Recruiter for Alleged Misrepresentations in Connection with Job Leads.**

On **January 23**, the FTC filed a proposed order against Home Advisor, Inc. requiring the company to pay \$7.2M and agree to injunctive provisions regarding advertising of the availability of job opportunities or the cost of its services. The FTC filed a complaint against Home Advisor on March 11, 2022, alleging misrepresentations to service providers regarding the quality and source of home improvement project leads, and the likelihood that the leads would result in actual jobs. The complaint also alleged that the company misled service providers about the cost of an optional one-month subscription to its software platform. The FTC will publish a description of the consent agreement package for public comment in the Federal Register and decide whether to make the proposed order final after a 30-day comment period.

**FTC Approves Final Order Against Credit Karma.** On **January 23**, after the 30-day notice and comment period ended, the FTC voted 4-0 to finalize the order requiring Credit Karma to pay \$3 million for alleged violations of the FTC Act. FTC alleged that Credit Karma falsely represented that (1) consumers were “pre-approved” and (2) consumers had “90% odds’ of approval.” The complaint claimed consumers wasted time and experienced hard credit checks when applying for credit offers that were not accepted.

**FTC Finalizes Settlement with Online Education Provider.** On **January 27**, the FTC voted 4-0 to finalize the proposed order against Chegg Inc. after the 30-day notice and comment period ended. Based on allegations that the company had insufficient data protections, this settlement requires Chegg to limit its data collection, give consumers access and control over the collection and retention of their data, implement multi-factor authentication, and develop a comprehensive information security program, among other things.

## Upcoming Comment Deadlines and Events

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**FTC Seeks Comment on Business Opportunity Rule ANPR.** Comments are due **January 31, 2023** (extended from January 24) 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 Holds Identity Theft Awareness Week.** The FTC will hold Identity Theft Awareness Week from **January 30 to February 3**. During the week, the FTC and its partners will “host free podcasts, webinars, Facebook Live interviews, and other events focused on avoiding and recovering from identity theft and spotting scams.” An agenda for the week is listed here.

**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.

**FCC Seeks Comment on Data Breach NPRM.** Comments are due **February 22, 2023** on the Federal Communication Commission’s (FCC) Notice of Proposed Rulemaking (NPRM) that proposes a number of changes to the agency’s customer proprietary network information breach reporting rules (we summarized the item here). Among other things, the FCC’s NPRM proposes to: expand the definition of the term “breach” to include accidental access, use, or disclosure; require breach notification to the FCC, FBI, and Secret Service “as soon as practicable” after the discovery of a breach; and eliminate the mandatory seven-business-day waiting period prior to customer notification.

**FTC Issues NPRM Proposing to Broadly Ban Employee Non-Compete Clauses.** Comments are due **March 20, 2023** on the FTC’s 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.

**CFPB Proposes Rule to Establish Registry of Nonbank Terms or Conditions That Claim to Waive or Limit Consumer Rights.** Comments are due **March 31, 2023** on the CFPB’s 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.

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Wiley Wins Four Law360 'Practice Group of the Year' Awards for 2022

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

NIST Releases AI Risk Management Framework, Expected to Be a Critical Tool for Trustworthy AI Deployment

New York Law Will Regulate Consumer Device Repair Options: What the Digital Fair Repair Act Means for the Consumer Electronics Industry

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

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

Enter Stage Right - a New Cyber Regulator Steps into the Spotlight

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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