

Wiley Consumer Protection Download (July 10, 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 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

President Biden Announces Intent to Nominate Andrew Ferguson and Melissa Holyoak to Open FTC Commissioner Seats. On July 3, President Joe Biden announced his intent to nominate Andrew N. Ferguson and Melissa Holyoak to the two open Republican seats on the FTC, previously occupied by former Commissioners Noah Phillips and Christine Wilson, who resigned from the agency in October 2022 and March 2023, respectively. On July 3, FTC Chair Lina Khan issued a press release regarding the nominations: "I congratulate Andrew Ferguson and Melissa Holyoak on their nominations to serve on the

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Practice Areas

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

Federal Trade Commission. Each would bring key skills, experiences, and expertise to the Commission as we work to promote fair competition and protect Americans.”

Ferguson is currently serving as the Solicitor General in the Virginia Attorney General’s Office. Before joining the Virginia state government, Ferguson worked as Chief Counsel for Sen. Mitch McConnell (R-KY) and Chief Counsel for Nominations and the Constitution to then-Judiciary Committee Chairman Lindsey Graham (R-SC), among other positions.

Holyoak is currently serving as the Solicitor General in the Utah Attorney General’s Office. Previously, she served as President and General Counsel for the Hamilton Lincoln Law Institute, and Senior Attorney for the Center for Class Action Fairness at the Competitive Enterprise Institute.

FTC Announces NPRM Proposing to Classify Certain Consumer Review and Testimonial Practices as Unfair or Deceptive. On **June 30**, the FTC released a Notice of Proposed Rulemaking (NPRM) that, if adopted, would classify certain consumer review and testimonial practices as unfair or deceptive practices under Section 5 of the FTC Act. The NPRM comes after the agency released an Advance Notice of Proposed Rulemaking in November 2022 seeking comment on the prevalence of fake reviews and endorsements in the online economy, what regulatory provisions are currently in place to deter them, and whether additional rules are needed, among other things. 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) review suppression; and (7) misuse of fake social media influence indicators. Comments on the NPRM are due 60 days after publication in the Federal Register.

FTC Finalizes Revisions to Its Endorsement Guides. On **June 29**, the FTC announced final revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides). The Endorsement Guides provide guidance to business practices that the FTC may consider to be violations of the FTC Act’s existing prohibition on deceptive acts or practices, regardless of whether those practices would also be covered under the proposed Consumer Review and Testimonial Rule discussed above. The FTC issued a Request for Comment in July 2022 seeking comment on proposed changes to the Endorsement Guides (we summarized the Request for Comment here). Among other things, the revised Endorsement Guides: (1) add a definition of “clear and conspicuous” and guidance surrounding built-in disclosure tools; (2) revise the definition of “endorsement” to include “[v]erbal statements, tags in social media posts, demonstrations, depictions of the name, signature, likeness or other identifying personal characteristics of an individual;” (3) add an FTC Act standard addressing advertisers procuring, suppressing, boosting, organizing, or editing consumer reviews; (4) address incentivized reviews, reviews by employees, and fake negative competitor reviews; (5) clarify the FTC Act liability of advertisers, endorsers, and intermediaries alike; and (6) assert that endorsements directed at children are of special concern. The FTC’s revisions to its Endorsement Guides will become effective upon publication in the Federal Register.

CFPB, HHS, and Treasury Release RFI on Medical Payment Products. On **July 7**, the CFPB, U.S. Department of Health and Human Services (HHS), and U.S. Department of Treasury (Treasury) released a Request for Information (RFI) seeking information about the prevalence of medical credit cards and installment loans that are offered to patients as a way to pay for medical care. The agencies specifically request information about the specialty medical payment market and associated data on interest fees and costs for medical credit products, patient experiences with medical credit cards and installment loans, issues with patient billing and collections, and any incentives that health care providers have to offer medical credit cards and installment loans. Comments on the RFI are due 60 days after publication in the Federal Register.

FTC Files *Amicus* Brief in Seventh Circuit Case Challenging ECOA's Anti-Discouragement Rule. On **June 22**, the FTC announced that it filed an *amicus* brief in *CFPB v. Townstone Financial and Barry Sturmer*, a case before the U.S. Court of Appeals for the Seventh Circuit that challenges the validity of the Equal Credit Opportunity Act's (ECOA) Anti-Discouragement Rule. The CFPB's regulations implementing ECOA, also known as Regulation B, include the Anti-Discouragement Rule, which prohibits creditors or brokers from discouraging applicants from applying for credit on the basis of race, color, religion, national origin, sex or marital status, the fact that an applicant's income derives from a public assistance program, or the fact that an applicant has exercised a right under the Consumer Credit Protection Act in good faith.

The CFPB appealed the case to the Seventh Circuit after the U.S. District Court for the Northern District of Illinois ruled that the Anti-Discouragement Rule is invalid because ECOA only applies to credit transactions involving applicants, and therefore the CFPB cannot regulate conduct that occurs before "the filing of an application." In its *amicus* brief in support of the CFPB, the FTC argues, among other things, that the Anti-Discouragement Rule furthers the statute's purpose and prevents circumvention of ECOA by creditors conveying to protected classes that their applications would not be welcome.

FTC Sends Letters to Online Marketplace to Notify Them of INFORM Consumers Act Obligations. On **June 20**, the FTC announced that it sent letters to 50 online marketplaces notifying them about their obligation to comply with the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (INFORM Consumers Act), which took effect on June 27. The INFORM Consumers Act specifically regulates "online marketplaces," which are defined as entities that operate a consumer-directed platform that allows third-party sellers to engage in the "sale, purchase, payment, storage, shipping, or delivery of a consumer product in the United States." The Act requires online marketplaces to collect and verify certain financial and identifying information from "high-volume third party sellers," which are defined as entities that meet specific sales thresholds on an online marketplaces. The Act also obligates online marketplaces to generally disclose on seller product listing pages the seller's name, address, and contact information. Further, the Act requires online marketplaces to (a) suspend high-volume third-party sellers that do not provide required information, and (b) offer a clear method for consumers to report suspicious conduct. The FTC has developed educational materials for businesses, titled "Informing Businesses About the INFORM Consumers Act."

CFPB Releases Annual Report Regarding Financial Concerns Involving Servicemembers and Their Families. On **June 20**, the CFPB released its annual report on the top financial concerns facing servicemembers and their families. The annual report identified complaints about digital payment

applications as one of the fastest growing categories of complaints from servicemembers and their families. The report also summarized in-depth complaint data, and found several risks to military families, such as: (1) financial harm from fraud and scams perpetrated on digital payment apps; (2) identity theft and unauthorized account access perpetrated over digital payment apps; and (3) the failure of digital payment apps to resolve servicemember complaints in a timely and substantive manner. As a result of the report's findings, the CFPB recommends that digital payment apps improve the safety of their app networks to prevent fraud, improve their responsiveness to complaints regarding fraud, and create refund policies for fraud losses that recognize the unique experiences of military families.

Recent Enforcement Actions

FTC Settles with Genetic Testing Firm Over Alleged Privacy Misrepresentations. On **June 16**, the FTC filed a complaint and consent order against 1Health.io, formerly Vitagene, Inc., for allegedly violating the FTC Act. The FTC asserts that 1Health.io engaged in deceptive practices by not securely storing or deleting consumers' health and personal data as stated in its privacy policy, and engaged in unfair practices in materially and retroactively changing its policy for sharing health and genetic information with third parties. The company has agreed to pay \$75,000 in addition to implementing an information security program.

FTC Files Suit Against Online Retail Platform Regarding Its Enrollment and Cancellation Policies. On **June 21**, the FTC filed a complaint in the U.S. District Court for the Western District of Washington against Amazon.com, Inc. alleging violations of the FTC Act and the Restore Online Shoppers' Confidence Act (ROSCA) in the course of the enrollment and cancellation practices for its Prime subscription service. The FTC is requesting a permanent injunction and monetary relief.

FTC Settles with Clothing Manufacturer for Alleged Misuse of "Made in the USA" Label. On **June 27**, the FTC filed a complaint and consent order against a group of retail stores in New England which includes Chaucer Accessories, Bates Accessories, and Bates Retail Group, and their owners. The FTC's complaint alleges that the stores and their owners violated the FTC Act and the Made in USA Labeling Rule. The FTC alleges that these stores deceived consumers by advertising their products as "Made in USA," although they sold certain belts that were made in Taiwan. The stores have agreed to a monetary penalty of \$191,481 and to cease making unqualified U.S.-origin claims.

FTC Settles with Online Sweepstakes Company for Allegedly Misrepresenting Sweepstakes Entry Requirements. On **June 26**, the FTC filed a complaint and stipulated order in the U.S. District Court for the Eastern District of New York against Publisher's Clearing House for alleged violations of the FTC Act. The FTC argues that the company misled consumers by (1) adding hidden shipping costs to items purchased and (2) leading consumers to believe they needed to make purchases through the company to be eligible to win the company's sweepstakes. The company has agreed to pay \$18.5 million in addition to injunctive relief.

CFPB Settles with Nationwide Payment Processor for Allegedly Processing Erroneous Payments. On **June 27**, the CFPB filed a consent order and stipulation against ACI Worldwide Corp. and ACI Payments, Inc. for allegedly violating the Consumer Financial Protection Act, the Electronic Fund Transfer Act, and Regulation E.

The CFPB asserts that ACI conducted a test of its payments platform using real consumer accounts, which unlawfully charged \$2.3 billion in mortgage payment transactions. ACI has agreed to pay \$25 million in addition to injunctive relief.

FTC Settles with Companies Selling Products to Quit Smoking for Allegedly Deceptive Advertising. On **June 30**, the FTC filed a complaint and stipulated order in the Middle District Court of Florida against Michael Connors and his companies for alleged violations of the FTC Act and Opioid Addiction Recovery Fraud Prevention Act (OARFPA). The FTC alleges that Connors misled consumers by making unsubstantiated claims that his product, Smoke Away, was a cheap and effective way to quit smoking. Connors has agreed to pay a \$7.1 million monetary judgment, \$500,000 civil money penalty, and injunctive relief.

FTC Settles With Auto Marketing Company for Alleged Deceptive Telemarketing Tactics. On **June 23**, the FTC filed a stipulated order in the United States District Court for the Southern District of Florida against Daniel Kole and Kole Consulting Group, Inc., the two remaining defendants affiliated with the automobile marketing company, American Vehicle Protection Corp (AVP). The other five defendants settled with the FTC in March 2023. The FTC filed its complaint against AVP on February 9, 2022, alleging that AVP and affiliates illegally called consumers, many of whom were on the National Do Not Call Registry; deceived consumers by misrepresenting that calls were made on behalf of the consumers' vehicle manufacturer; and made false claims about the applicability of "extended auto warranty" programs, all in violation of the FTC Act and the Telemarketing Sales Rule (TSR). Kole and Kole Consulting have agreed to a \$6.5 million monetary judgment in addition to injunctive relief.

Upcoming Comment Deadlines and Events

FTC Seeking Comment on Revisions to Health Breach Notification Rule. Comments are due **August 8** on the FTC's Notice of Proposed Rulemaking to Amend the Health Breach Notification Rule (HBNR NPRM). The HBNR NPRM proposes to update the HBNR to clarify the rule's coverage of mental health apps and other technologies that collect location and browsing history data. The HBNR NPRM also proposes to clarify, among other things, that the definition of "breach of security" under the rule includes an unauthorized acquisition of identifiable health information that occurs as a result of a data security breach or an unauthorized disclosure, and therefore does not limit reportable incidents to "cybersecurity intrusions or nefarious behavior."

FTC to Host Workshop on Proposed Changes to the Funeral Rule. On **September 7**, the FTC will host a public workshop on the changes to its Funeral Rule proposed in its Advance Notice of Proposed Rulemaking. The workshop will cover a number of topics including, among other things, online or electronic disclosures of price information, the general price list required by the Funeral Rule, and whether funeral providers should be required to give out general price lists in languages other than English. The public can submit comments on the topics to be covered in the workshop until **October 10**. Instructions for filing comments will be published in the Federal Register.

More Analysis from Wiley

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

Podcast: The FTC Safeguards Rule: A Deep Dive into the Revisions Effective June 9, 2023

Webinar: How to Keep Up with the Influx of New State Privacy Laws and Regulations

Podcast: What could AI regulation in the US look like?

California privacy law changes draw in more businesses

U.S. Fulfills Its Commitments to Implement the EU-U.S. Data Privacy Framework

CPRA Update: California Court Delays Enforcement of New Privacy Regulations

A New White House Project on Responsible AI Sends a Message to the Private Sector, Including Contractors

Podcast: AI: The Next Big Thing in Government Contracting

FCC Launches Privacy and Data Protection Task Force

Initial Takeaways on the FCC's New Privacy and Data Protection Task Force

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

FTC Joins the Cloud Security Discussion

5 Takeaways From Recent CFPB, FTC Equal Credit Push

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

Federal Legislators Are Taking AI Implementation and Oversight Seriously

NIST Announces Generative AI Working Group

Webinar: Staying Ahead of State Privacy Laws: Tips and Best Practices for Building Compliant Strategies for Five Key States

Podcast: State Privacy Laws and Federal Government Contractors

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

U.S. State Privacy Law Guide

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Download Disclaimer: Information is current as of July 10, 2023. This document is for informational purposes only and does not intend to be a comprehensive review of all proceedings and deadlines. Deadlines and dates are subject to change. Please contact us with any questions.