

Wiley Consumer Protection Download (March 15, 2021)

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[Regulatory Announcements](#)
[Significant Enforcement Actions](#)
[Upcoming Comment Deadlines and Events](#)
[More Analysis from Wiley](#)

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

CFPB Rescinds Abusiveness Policy Statement. On **March 11**, the Consumer Financial Protection Bureau (CFPB) rescinded its January 2020 policy statement titled, "Statement of Policy Regarding Prohibition on Abusive Acts or Practices." The CFPB explained that it had concluded that the policy statement was ineffective in promoting

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regulatory clarity and inconsistent with the agency's duty to enforce the abusiveness standard under Section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). Section 1031(d) of the Dodd-Frank Act provides that the CFPB cannot declare an act or practice abusive unless the act or practice materially interferes with a consumer's ability to understand a product or service; takes "unreasonable advantage" of a consumer's lack of understanding of material risks, costs, or conditions; takes "unreasonable advantage" of a consumer's inability to protect the interests of the consumer in selecting or using a consumer financial product or service; or takes "unreasonable advantage" of a consumer's reasonable reliance on a company to act in the consumer's interests. The 2020 policy statement had limited the CFPB's use of its authority to allege abusive acts or practices. In rescinding the previous statement, the CFPB noted that it "has determined that it should exercise the full scope of its supervisory and enforcement authority to identify and remediate abusive acts or practices."

CFPB Issues Interpretive Rule Clarifying That Discrimination on the Basis of Sexual Orientation and Gender Identity is Illegal Under ECOA. On **March 9**, the CFPB issued an Interpretive Rule clarifying that the prohibition on sex discrimination under the Equal Opportunity Act (EOA) extends to both sexual orientation and gender identity discrimination, including discrimination based on actual or perceived nonconformity with sex- or gender-based stereotypes and discrimination based on an applicant's association. The CFPB issued the Interpretive Rule following the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County, Georgia*. In that case, the Supreme Court held that sex discrimination under Title VII of the Civil Rights Act of 1964 encompasses sexual orientation discrimination and gender identity discrimination. The CFPB initially issued a Request for Information asking how the Supreme Court's decision in *Bostock* would affect ECOA in August 2020.

Significant Enforcement Actions

FTC Finalizes Settlement with Mobile Advertising Company Over Its Purported Failure to Provide In-Game Rewards. On **March 10**, the Federal Trade Commission (FTC) announced that it had finalized a settlement with Tapjoy, Inc. (Tapjoy) over allegations that it failed to provide in-game rewards to consumers in exchange for their completion of advertising offers. As discussed in the January 19 Newsletter, Tapjoy operates an advertising program that works with mobile gaming companies by promising in-game currency to users that complete advertising activities, such as signing up for free-trial offers. The FTC's settlement prohibits Tapjoy from misleading users about the rewards that they can earn, and requires Tapjoy to monitor advertisers to ensure that they also provide promised in-game rewards to consumers.

FTC Sues to Enjoin Magazine Subscription Service for Prisoners and Their Families. On **March 8**, the FTC announced that the U.S. District Court for the Northern District of Florida enjoined Inmate Magazine Service (IMS) from marketing magazine subscriptions to consumers serving prison sentences after the agency filed a complaint against the company. The FTC's complaint alleges that in many cases, the magazines either arrived far later than advertised, or were never delivered. Moreover, consumers allegedly were never notified about delayed shipments, and did not have the opportunity to cancel their orders, which violated the FTC's Mail, Internet, or Telephone Order Merchandise Rule. The complaint also alleges that IMS is difficult to contact to

either request a refund or inquire about the status of an order.

FTC Approves Administrative Consent Orders Against Six Companies Selling CBD Products. On **March 5**, the FTC announced that it had finalized administrative consent orders against six companies selling cannabidiol (CBD) products nationwide. The FTC took action against the six sellers – Bionatrol Health, LLC; Epichouse LLC (First Class Herbalist CBD); CBD Meds, Inc.; HempmeCBD; Reef Industries, Inc.; and Steves Distributing, LLC – in December 2020 for allegedly making a range of unsupported claims about the ability of CBD to treat serious health conditions, including cancer and heart disease. The consent orders required several of the companies to pay monetary penalties.

FTC and 39 Attorneys General Settle with Purportedly Fraudulent Charity Telefunding Operation. On **March 4**, the FTC and 46 agencies from 38 states and the District of Columbia announced that they had settled charges with Associated Community Services (ACS) and several related defendants that had allegedly deceived consumers into donating to charities that failed to provide the services that they had promised. The complaint, which was filed in the U.S. District Court for the Eastern District of Michigan, alleges that ACS and its related companies transmitted 1.3 billion deceptive fundraising robocalls to 67 million consumers. Moreover, the complaint alleges that the companies knowingly violated the Telemarketing Sales Rule (TSR) in making the robocalls. ACS and the other defendants are barred from conducting any fundraising work and ACS is subject to a \$110,063,843 monetary judgement.

CFPB Sues Payment Processor for Supporting Alleged Technical Support Scams. On **March 3**, the CFPB filed a complaint in the U.S. District Court for the Northern District of Michigan against BrightSpeed Solutions, Inc. (BrightSpeed). The CFPB's complaint alleges that between 2016 and 2018, BrightSpeed knowingly processed payments for companies that offered purportedly deceptive technical support products and services over the Internet. The FTC's complaint argues that the technical support companies deceived consumers into purchasing unnecessary antivirus software in violation of the Consumer Financial Protection Act of 2010 and the TSR. BrightSpeed allegedly generated check payments for over 100 client companies, totaling more than \$71 million. The CFPB alleges that BrightSpeed processed payments for the companies despite receiving nearly 1,000 consumer complaints. The CFPB's complaint seeks an injunction against BrightSpeed, along with damages and the imposition of civil money penalties.

FTC Sues Operators of Alleged Income Scam Targeting Latinas. On **March 2**, the FTC announced a settlement with Moda Latina BZ, Inc. (Moda Latina) after the agency filed a complaint alleging that the company targeted Spanish-language television viewers with misrepresentations about making money from home. Specifically, Moda Latina allegedly lured consumers into purchasing a work-from-home business with claims that they could earn "large profits" reselling luxury products. Moreover, the FTC's complaint alleges that Moda Latina's telemarketers routinely threatened consumers in violation of the TSR. The settlement includes a monetary judgement of \$7,000,489.

FTC Order Requires Sellers of Customizable Promotional Products to Cease Making Deceptive "Made in USA" Claims. On **March 1**, the FTC announced that Gennex Media LLC (Gennex), which sells customizable promotional products, will settle charges that the company had made misleading advertising claims that their

“Brandex” products were all made in the United States. The settlement requires Gennex to pay a monetary judgement of \$146,249.24. The FTC’s complaint alleges that, since 2012, Gennex has violated the FTC Act by claiming that the products it sells are made in the United States, when many of the products are in fact made in China. The FTC will publish a description of the Gennex Consent Order in the Federal Register.

FTC Issues Orders to Five E-Cigarette Manufacturers Seeking Information on 2019-2020 Sales, Advertising, and Promotional Materials. On **March 1**, the FTC issued orders to JUUL Labs, Inc.; R.J. Reynolds Vapor Company; Fontem US, LLC; Logic Technology Development LLC; and NJOY, LLC seeking information about the companies’ sales, advertising, and promotional materials from 2019 through 2020. The orders follow similar demands to e-cigarette companies for calendar years 2015 through 2018. The FTC is authorized to issue the orders under Section 6(b) of the FTC Act.

Upcoming Comment Deadlines and Events

CFPB Proposes to Delay General QM Rule Mandatory Compliance Date. Comments on the CFPB’s Notice of Proposed Rulemaking (NPRM) to delay the General Qualified Mortgage (QM) Final Rule’s mandatory compliance deadline are due **April 5**. As noted in the March 1 Newsletter, the CFPB is proposing to delay the July 1, 2021 deadline to give lenders more time to either make QM loans based on a debt-to-income ratio or to sell qualifying loans to Fannie Mae or Freddie Mac. The Final Rule amends the General QM loan definition in Regulation Z, including by removing the definition’s limit of a 43% DTI ratio (total monthly debt to total monthly income) and replacing it with price-based thresholds. The NPRM would delay the mandatory compliance deadline until October 1, 2022.

FTC to Hold Virtual Workshop on Digital “Dark Patterns”. The FTC will hold a virtual workshop on **April 29** to evaluate digital “dark patterns,” which is a term used to describe a range of potentially deceptive user interface designs on websites and applications. The event, titled Bringing Dark Patterns to Light: An FTC Workshop, will examine the ways in which user interfaces can have the intentional or unintentional effect of obscuring, subverting, or impairing consumer autonomy or decision-making. The workshop will examine how dark patterns differ from sales tactics used by brick-and-mortar stores; whether some groups of consumers are unfairly targeted; and whether there are additional rules or standards needed to protect consumers. Moreover, the FTC is seeking research, discussion topic recommendations, and panelist requests ahead of the workshop, which may be submitted here by **March 15**. The FTC will also be posting a request for comments on dark patterns, which will be due **June 29**.

FTC Seeks Research Presentations for PrivacyCon 2021. The FTC issued a call for research presentations on a wide array of privacy and security issues as part of its sixth PrivacyCon, which will be held on **July 27**. The FTC is seeking research on issues such as the evolution of privacy and security risks; privacy and security issues related to working from home; the costs and benefits of privacy and security; the effectiveness of consumer privacy and security disclosures; algorithmic bias and fairness in algorithms; and privacy-enhancing technologies for consumers. Research presentations are due April 9, 2021, and more information about submitting presentations can be found here.

More Analysis from Wiley

Wiley Achieves Perfect Score on Human Rights Campaign's 2021 'Best Places to Work for LGBTQ Equality' List

Wiley Among First Organizations to Join FCBA's New Diversity Pipeline Program

Duane Pozza Weighs In on Whether FTC Priorities Will Change Under Biden Administration

Five Issues a Biden-Era FTC is Likely to Prioritize

Acting Chairwoman Slaughter Forecasts FTC's Privacy Agenda

Virginia Enacts Comprehensive Privacy Legislation

Privacy in Focus: Ransomware: The Expanding Threat to Your Data and Steps that In-House Counsel Can Take Now

Privacy in Focus: Facial Recognition Tech and Biometrics Under Scrutiny at FTC

Privacy in Focus: With Health Apps on the Rise, Consumer Privacy Remains a Central Priority

Supreme Court Argument Analysis: AMG Capital Management v. FTC

California Privacy Rights Act – What Does It Mean For You?

Tech Risk Assessments: Cloud Services Under the Microscope?

Key Cyber Takeaways from the Senate Hearing on Biden's Nominee for DHS Secretary

Key Tech Takeaways from Hearing on Biden's Nominee for Commerce Secretary

TCPA Update: FCC Imposes New Call Limits and Opt-Out Requirements

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