

Wiley Consumer Protection Download (May 2, 2022)

May 2, 2022

*Originally published May 2, 2022

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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 April 2022 Open Commission Meeting and Launches Rulemaking Proceedings on Telemarketing. On **April 28**, the FTC held a virtual Open Commission Meeting to consider a Notice of Proposed Rulemaking (NPRM) and Advance Notice of Proposed Rulemaking (ANPR) seeking input on revisions to the Telemarketing Sales Rule (TSR). The FTC approved the NPRM and ANPR in a unanimous 4-0 vote. The NPRM proposes to amend the TSR to

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prohibit business-to-business (B2B) telemarketing calls that qualify as “deceptive” under the Rule. It also seeks comment on modifying the TSR’s current recordkeeping provisions to require telemarketers to retain robocall recordings, telemarketing scripts, and audio files from telemarketing calls. Further, the NPRM proposes to require telemarketers to retain certain records sufficient to show that a called party authorized a transaction before they were charged. The ANPR seeks public feedback on broader potential TSR amendments, including whether the TSR’s B2B telemarketing exemption should be maintained, modified, or eliminated altogether; whether the B2B telemarketing exemption disproportionately impacts minority and marginalized communities; whether certain inbound calls to telemarketers should be covered by the TSR; and whether the TSR should require sellers that use “negative option” marketing to give consumers notice and a method to cancel negative option programs.

At the Open Meeting, the FTC also heard a presentation by FTC Staff on Section 13(b) of the FTC Act, which took place on the one-year anniversary of the Supreme Court’s decision in *AMG Capital Management v. FTC*, the case that overturned the FTC’s ability to seek monetary redress for consumers in federal court under that statutory provision. The presentation focused on the impact of the *AMG* decision on the agency’s enforcement capabilities – FTC Staff noted that between FY 2017-2020 the FTC obtained \$11 billion in redress for consumers under Section 13(b).

CFPB Director Chopra Testifies Before Congress in Conjunction with the Agency’s Semiannual Report to Congress. On **April 26 and 27**, CFPB Director Rohit Chopra testified before the U.S. Senate Committee on Banking, Housing, and Urban Affairs and U.S. House Committee on Financial Services, respectively. Director Chopra stated that during his first six months as CFPB Director, he has “refocused” the CFPB’s efforts “to align with the objectives that Congress set out for the agency,” providing six concrete examples. *First*, Director Chopra stated that the CFPB is pursuing a strategy to focus enforcement on large companies and repeat offenders which he claims are involved in “large-scale” harm. *Second*, he described a plan to increase the issuance of guidance documents including advisory opinions, compliance bulletins, and policy statements in an effort to make laws “easy to understand, easy to follow, and easy to enforce.” *Third*, Director Chopra noted that he is “committed to ensuring that the CFPB takes meaningful steps to carry out legislative directives,” and pointed to efforts to implement regulations under Sections 1033 and 1071 of the Consumer Financial Protection Act (CFPA), and the agency’s ongoing proceeding to implement regulations pursuant to statutory amendments to the Fair Credit Reporting Act (comments on the Proposed Rule are due May 9). *Fourth*, the Director stated that a “key priority” is to “engage with institutions” that do not have direct access to the agency, including businesses and nonprofit organizations such as health care providers, automobile dealers, farmers, hotel owners, and retailers, among others. *Fifth*, he noted that the CFPB is examining ways to lower the competitive barriers to entry for small financial institutions seeking to offer consumer financial products and services. *Sixth*, the Director warned that the U.S. “is lurching toward a consolidated market structure where finance and commerce co-mingle fueled by uncontrolled flows of consumer data.” He stated that the agency is currently studying the influence of large technology companies over the market for financial services by issuing orders for documents to a number of large technology companies (which we discussed here).

CFPB Invokes Supervisory Authority Over Nonbank Companies, Including Fintechs. On **April 25**, the CFPB announced that it is invoking its supervisory authority over certain nonbank financial companies that are not otherwise subject to its jurisdiction. As explained in the Procedural Rule released on April 25, Section 1091 of the CFPB provides that the CFPB may supervise a nonbank entity that the agency “has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond . . . is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.” The CFPB had previously focused its nonbank supervisory authority on companies in the mortgage, private loan, and payday loan industries, and certain larger companies in the consumer reporting, debt collection, student loan servicing, international remittances, and auto loan servicing industries. (The CFPB also exercises supervisory authority over depository institutions that have more than \$10 billion in assets.) The invocation of this nonbank supervisory is not focused on any specific financial products and services offered to consumers and may potentially encompass many financial technology (fintech) companies. Comments on the Procedural Rule are due May 31.

FTC Chair Khan Appoints General Counsel and Office of Policy Planning Director. On **April 25**, FTC Chair Lina Khan announced the appointment of Anisha Dasgupta as FTC General Counsel, and Elizabeth Wilkins as Director of the FTC’s Office of Policy Planning. Before joining the FTC, Ms. Dasgupta served as the Deputy Solicitor General for the New York State Attorney General. Prior to that, she served as an appellate attorney with the Civil Division of the Department of Justice. Ms. Wilkins previously served as Senior Advisor to the White House Chief of Staff. She also worked in a number of senior leadership roles at the Office of the Attorney General of the District of Columbia and clerked for Supreme Court Associate Justice Elena Kagan. The FTC voted 4-0 to appoint Dasgupta to the role of FTC General Counsel.

FTC Provides Guidance on Managing Individual Health Information. On **April 25**, the FTC Division of Privacy & Identity Protection published a Blog Post providing guidance for health-related app developers (and specifically vaccine verification app developers), and companies and nonprofits more generally that are taking steps to verify individuals’ vaccination status. For companies developing health-related apps, the Blog Post advises such developers to: make accurate representations regarding how users’ information will be used and shared; update the apps to protect against security vulnerabilities; review and update privacy claims made by the apps; minimize the amount of personal health data shared; protect the data on the app that is used for verification; and be aware of additional legal obligations that may apply, including the Children’s Online Privacy Protection Act, the Health Insurance Portability and Accountability Act, the Health Breach Notification Rule, and other potentially relevant laws. For businesses and nonprofit organizations checking vaccination status, the Blog Post advises such entities to consider the health information that they need to accomplish their objective; investigate apps before deciding to use them; use a secure network to transmit and store personal information; and securely dispose of personal information that is no longer needed.

Significant Enforcement Actions

FTC Pursues Action Against VOIP Provider for Illegal Telemarketing Robocall Scheme. On **April 26**, the FTC announced that it filed suit and reached a settlement with against Voice over Internet Protocol (VoIP) service provider VoIP Terminator, Inc. (VoIP Terminator), a related company, and the firms' owner for alleged violations of the Telemarketing Sales Rule (TSR). The complaint alleges that the defendants assisted and facilitated the transmission of millions of illegal prerecorded telemarketing robocalls, including those they knew or should have known were scams, to consumers nationwide. Specifically, the defendants allegedly continued to provide VoIP services to customers despite knowing or consciously avoiding knowing the customers were: using the services to place calls to numbers on the FTC's Do Not Call (DNC) Registry; delivering prerecorded messages; and displaying spoofed caller ID services to callers involved in scams related to credit card interest rate reduction, tech support, and the COVID-19 pandemic. The proposed order in the settlement seeks injunctive relief against assisting and facilitating abusive telemarketing practices and other violations of the TSR, and requires the defendants to pay \$3 million, which has been suspended based on the company's ability to pay.

FTC Charges Funeral and Cremation Services Companies with Allegedly Withholding Remains to Extract Payment. On **April 22**, the FTC announced that it has filed suit against Funeral & Cremation Group of North America, LLC, Legacy Cremation Services, LLC, d/b/a Heritage Cremation Provider (Heritage Cremation), and their owner, Anthony Joseph Damiano, for alleged violations of Section 5 of the Federal Trade Commission Act (FTC Act) and the Funeral Rule. The Commission voted 4-0 to refer the complaint to the DOJ, which filed the complaint on behalf of the FTC in the U.S. District Court for the Southern District of Florida. The complaint alleges that the cremation services companies misrepresented their location and prices, illegally threatened and failed to return cremated remains to consumers, and failed to provide disclosures required by the Funeral Rule. The FTC is seeking injunctive relief and civil penalties.

CFPB Charges Remittance Transfer Provider with EFTA and Other Violations in Relation to Customers Awaiting Money Transfers. On **April 21**, the CFPB, jointly with the New York Attorney General, filed suit against remittance provider, MoneyGram International, Inc. and MoneyGram Payment Systems, Inc. (MoneyGram), in the U.S. District Court for the Southern District of New York for alleged repeated violations of the Consumer Financial Protection Act of 2010 (CFPA); the Electronic Fund Transfer Act (EFTA) and its implementing Regulation E, which includes the CFPB's Remittance Transfer Rule; and New York Executive Law. The complaint alleges that MoneyGram delayed transmitting funds, and failed to accurately disclose how long it would take to make funds available to recipients abroad; failed to instruct or direct its employees on how to comply with laws on resolving disputes; failed to report the results of its error investigations or provide a written explanation of its findings to consumers; failed to put in place policies and procedures designed to ensure compliance with money-transferring laws; and failed to retain evidence of its compliance with certain error resolution requirements as required by law. The complaint seeks monetary, injunctive and other relief, as well as an imposition of civil money penalties.

FTC Settles with Online Day-Trading Investment Firm for Allegedly Misleading Advertising. On **April 19**, the FTC announced that it filed suit and reached a settlement with Warrior Trading, Inc. (Warrior Trading) in the U.S. District Court for the Western District of Massachusetts, alleging violations of the Federal Trade

Commission Act (FTC Act) and the Telemarketing Sales Rule (TSR). The complaint alleges that Warrior Trading's advertising showcased the trading results of its CEO and founder and made misleading claims that his strategies were both "profitable" and "scalable." The complaint alleges that in fact most customer accounts actually lost money, with numerous consumers losing thousands of dollars trading in addition to the thousands they paid to Warrior Trading. The stipulated order provides for injunctive relief and requires Warrior Trading to pay \$3 million in consumer redress.

Upcoming Comment Deadlines and Events

FTC Requesting Comment on Earnings Claims ANPRM. Comments are due **May 10** on an Advance Notice of Proposed Rulemaking (ANPRM) regarding a potential rule to address purported deceptive or unfair marketing pertaining to earnings claims made by money-making ventures. The ANPRM states that the "use of such [misleading earnings] claims both deprives consumers of the ability to make informed decisions and unfairly advantages bad actors in the marketplace at the expense of honest businesses."

CFPB Seeking Input on Proposed Rule Changes to Implement FCRA Amendments. Comments are due **May 9** on a Proposed Rule that makes several changes to the CFPB's Fair Credit Reporting Act (FCRA) regulations. The CFPB is proposing the changes to implement newly added Section 605C of the FCRA. Section 605C prohibits a consumer reporting agency (CRA) from furnishing a report containing any adverse information that resulted from a "severe form" of human trafficking or sex trafficking where the consumer has provided documented evidence of trafficking to the CRA. Specifically, the Proposed Rule would establish procedures to implement the new prohibition, including procedures for consumers to submit the required documentation to CRAs, and recordkeeping requirements for CRAs.

More Analysis from Wiley

FTC Takes Action Against Company for Collecting Children's Personal Information Without Parental Permission

Lawmakers Continue to Scrutinize Algorithm Use Directed at Youth

Webinar: Preparing for New State Privacy Frameworks

NIST Seeks Feedback on Draft AI Risk Management Framework in Connection with Extensive Stakeholder Workshop

Utah to Add Fourth Omnibus Privacy Law to the Growing State Patchwork

Federal Efforts Introduced to Protect Non-HIPAA Health Data

Webinar: FTC's Revised Safeguards Rule: How To Navigate New Information Security Requirements

Podcast: Mandatory Cyber Incident Reporting: Pros, Cons, and Next Steps

'An Avalanche of Rulemakings' - The FTC Gears Up for an Active 2022

EU and U.S. Reach Agreement in Principle on New Data Privacy Framework for EU-U.S. Data Transfers

Steps to Take in 2022 To Prepare for New State Privacy Laws

The Top 5 Cyber Issues for 2022

Podcast: Ransomware, Geopolitical Tensions, and the Race to Regulate

2022 Cyber Watch List: A look at 2021 and What's to Come in the Year Ahead

Podcast: Why the FTC Matters for Fintech

White House Seeks to Develop AI Bill of Rights and Calls for Feedback on Use of Biometric Data

Podcast: Cyber in 2022: What Happened and What is Coming

Podcast: Artificial Intelligence Can Do Really Dumb Things With Personal Information

Duane Pozza Discusses Emerging Regulatory Approach to Crypto and DeFi

Latest Changes at FTC Will Drive Federal Action on Privacy, Data Security, and AI

FTC Policy Statement Signals Increasing Scrutiny on the Protection of Sensitive Personal Health Information

Download Disclaimer: Information is current as of May 2, 2022. 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.