

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



Division of Financial Practices

May 30, 2019

Paul Sanford, Assistant Director
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Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20552

Dear Mr. Sanford:

This letter responds to your request for information concerning the Federal Trade Commission's (Commission or FTC) enforcement activities related to compliance with Regulation Z (the Truth in Lending Act or TILA); Regulation M (the Consumer Leasing Act or CLA); and Regulation E (the Electronic Fund Transfer Act or EFTA) (collectively "the Regulations").¹ You request this information for use in preparing the Bureau of Consumer Financial Protection's (CFPB) 2018 Annual Report to Congress. Specifically, you ask for information concerning the FTC's activities with respect to the Regulations during 2018. We are pleased to provide the requested information below.²

I. FTC Role in Administering and Enforcing the Regulations

The Dodd-Frank Act, signed into law on July 21, 2010, substantially restructured the financial services law enforcement and regulatory system. Among other things, the Act made important changes to the TILA, CLA, and EFTA, and other consumer laws, such as giving the

¹ The TILA is at 15 U.S.C. § 1601 *et seq.*; the CFPB's Regulation Z is at 12 C.F.R. Part 1026; and the Federal Reserve Board's (Board's) Regulation Z is at 12 C.F.R. Part 226. The CLA is at 15 U.S.C. § 1667 *et seq.*; the CFPB's Regulation M is at 12 C.F.R. Part 1013; and the Board's Regulation M is at 12 C.F.R. Part 213. The EFTA is at 15 U.S.C. § 1693 *et seq.*; the CFPB's Regulation E is at 12 C.F.R. Part 1005; and the Board's Regulation E is at 12 C.F.R. Part 205. Our understanding is that your request encompasses the CLA, an amendment to the TILA.

² A copy of this letter is being provided to the Board's Division of Consumer and Community Affairs, in connection with its responsibility for some aspects of the Regulations after the transfer date of July 21, 2011. Among other things, the Board retained responsibility for implementing the Regulations with respect to certain motor vehicle dealers, under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010). *See, e.g.*, Dodd-Frank Act, § 1029 and Subtitle H.

CFPB rulemaking and enforcement authority for the TILA, CLA, and EFTA. Under the Act, the FTC retained its authority to enforce the TILA and Regulation Z, the CLA and Regulation M, and the EFTA and Regulation E. In addition, the Act gave the Commission the authority to enforce any CFPB rules applicable to entities within the FTC's jurisdiction, which include most providers of financial services that are not banks, thrifts, or federal credit unions.³ In accordance with the memorandum of understanding that the Commission and the CFPB entered into in 2012, reauthorized in 2015, and extended in 2018, and consistent with the Dodd-Frank Act, the Commission has been coordinating certain law enforcement, rulemaking, and other activities with the CFPB.⁴

II. Regulation Z (the TILA) and Regulation M (the CLA)

In 2018, the Commission engaged in law enforcement; rulemaking, research and policy development; and consumer and business education, all relating to the topics covered by the TILA and Regulation Z and the CLA and Regulation M, including the advertisement, extension, and certain other aspects of consumer credit and leasing.⁵

A. Truth in Lending and Consumer Leasing: Enforcement Actions

In 2018, the Commission's law enforcement efforts against those who market or extend non-mortgage credit included actions involving automobile financing, payday loans, and financing of consumer electronics.

1. Automobiles (Credit and Leasing)

In 2018, the FTC continued its efforts to combat deceptive automobile dealer practices, including by filing one case and obtaining substantial refunds in conjunction with another settlement – both federal court actions - involving the TILA and Regulation Z (credit) and the

³ The FTC has authority to enforce the TILA and Regulation Z, the CLA and Regulation M, and the EFTA and Regulation E, as to entities for which Congress has not committed enforcement to some other government agency. *See* 15 U.S.C. § 1607(c) (the TILA and Regulation Z, and the CLA and Regulation M) and 15 U.S.C. § 1693o (the EFTA and Regulation E).

⁴ *See* FTC, *Memorandum of Understanding between the Consumer Financial Protection Bureau and the Federal Trade Commission*, Jan. 20, 2012, available at <https://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf>, and FTC, *Memorandum of Understanding between the Consumer Financial Protection Bureau and the Federal Trade Commission*, Mar. 6, 2015, available at https://www.ftc.gov/system/files/documents/cooperation_agreements/150312ftc-cfpb-mou.pdf. In 2018, the FTC and CFPB extended the current MOU to facilitate completion of the reauthorization in progress. *See* FTC, *Extension of Memorandum of Understanding between the FTC and the CFPB*, May 2018, available at https://www.ftc.gov/system/files/documents/cooperation_agreements/second_extension_of_mou_between_ftc_and_the_bcfp_5-15-18.pdf. *See also* Dodd-Frank Act, § 1024.

⁵ Your letter also asks for specific data regarding compliance examinations, including the extent of compliance, number of entities examined, and compliance challenges experienced by entities subject to the FTC's jurisdiction. The Commission does not conduct compliance examinations or collect compliance-related data concerning the non-bank entities within its jurisdiction. As a result, this letter does not provide this information.

CLA and Regulation M (leasing). In one federal court action, the FTC filed a complaint alleging that a group of four auto dealers operating in Arizona and New Mexico, near the border of the Navajo Nation, engaged in a range of illegal activities including falsifying consumers' income and down payment information on vehicle financing applications and contracts submitted to third-party financing companies, and misrepresenting important financial terms in vehicle advertisements.⁶ According to the complaint, Tate's Auto Center (Tate's) often prevented consumers from reviewing the income and down payment information on forms, such as by rushing consumers through the process of reviewing and signing financing applications and by failing to give them portions of the application containing the income and down payment information before signing. In other instances, Tate's allegedly altered financing documents after consumers signed them, without their knowing. Additionally Tate's allegedly deceived consumers about the nature and terms of financing or leasing offers, including by advertising discounts and incentives without adequately disclosing limitations or restrictions that would prevent many customers from qualifying. The complaint charges Tate's Auto with violating the TILA and Regulation Z (credit) and the CLA and Regulation M (leases) by failing to disclose required terms in social media advertisements.⁷

In a second action previously reported on that involved a federal court settlement, the FTC provided redress in 2018 that exceeded \$3.5 million to consumers harmed by nine dealerships and owners (collectively, Sage Auto Group).⁸ The FTC's complaint had alleged that Sage used deceptive and unfair sales and financing practices, deceptive advertising, and deceptive online reviews, and violated the TILA and Regulation Z (credit) and the CLA and Regulation M (leases) by failing to clearly and conspicuously disclose required information in their advertising. The FTC mailed 43,456 checks for the redress to consumers subjected to the deceptive and unfair sales and financing tactics by the Sage Auto Group and its owners. The FTC's settlement with the defendants involved a stipulated order with a monetary judgment, and required payment of \$3.6 million and prohibited the defendants from making misrepresentations relating to their advertising, add-on products, financing, and endorsements or testimonials, barred the defendants from engaging in other unlawful conduct when a sale is cancelled, and prohibited the defendants from violating the TILA and Regulation Z, and the CLA and Regulation M.

⁶ See FTC, Press Release *FTC Charges Auto Dealerships in Arizona and New Mexico with Falsifying Consumers' Information on Financing Documents*, Aug. 1, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/08/ftc-charges-auto-dealerships-arizona-new-mexico-falsifying>.

⁷ *FTC v. Tate's Auto Center of Winslow, Inc.*, No. 18-cv-08176 (D. Ariz. filed July 31, 2018), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3207/tates-auto-center>.

⁸ See FTC, Press Release, *FTC Returns More Than \$3.5 Million to Consumers Subjected to Deceptive and Unfair Sales and Financing Tactics by Los Angeles-Area's Sage Auto Group*, Dec. 6, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/12/ftc-returns-more-35-million-consumers-subjected-deceptive-unfair>.

2. Payday Lending (Credit)

The U.S. Court of Appeals for the Ninth Circuit affirmed the record-setting \$1.3 billion district court judgment and order that the FTC obtained against Scott Tucker and several of the corporate defendants for violating the FTC Act and the TILA, for deceiving consumers across the country and illegally charging them undisclosed and inflated fees.⁹ The appellate court panel found that the district court correctly concluded that AMG's loan document was likely to mislead consumers acting reasonably under the circumstances. The appellate court panel held that the loan note was deceptive because it did not accurately disclose the loan's terms: the TILA's box "total of payments" value was deceptive and the fine print's oblique description of the loan's terms did not cure the misleading "net impression" created by the TILA box. Litigation continues in this appellate matter. Additionally, the FTC, jointly with the Department of Justice ("DOJ") mailed 1,179,803 refund checks totaling more than \$505 million to people deceived by the massive payday lending scheme operated by AMG Services, Inc. and Scott A. Tucker.¹⁰

The Commission also mailed 72,836 checks totaling more than \$2.9 million to people who lost money to an alleged scheme that trapped them into payday loans they never authorized or whose terms were deceptive.¹¹ The refunds stem from a previously reported on settlement of charges alleging that Timothy A. Coppinger, Frampton T. Rowland III, and their companies, including CWB Services, targeted online payday loan applicants. The charges included that, using information from lead generators and data brokers, the defendants deposited money into the applicants' bank accounts without their permission, and told consumers they had agreed to, and were obligated to pay for, the unauthorized "loans." To support their claims, the defendants provided consumers with fake loan applications or other loan documents purportedly showing that the consumers had authorized the loans, which misstated the loans' finance charge, annual percentage rate, payment schedule, and total number of payments, while burying the loans' true costs in fine print, violating the FTC Act and TILA, among other laws. The stipulated orders, among other things, banned the defendants from any aspect of the consumer lending business, including collecting payments, communicating about loans, and selling debt.

3. Consumer Electronics Financing (Credit)

The Commission continued litigating in connection with a 2010 contempt order against BlueHippo Funding LLC, a consumer electronics retailer, for violating a prior FTC consent

⁹ *FTC v. AMG Capital Management, LLC*, No. 16-17197 (9th Cir. Dec. 3, 2018).

¹⁰ See FTC, Press Release, *FTC and DOJ Return a Record \$505 Million to Consumers Harmed by Massive Payday Lending Scheme*, Sept. 27, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/09/ftc-doj-return-record-505-million-consumers-harmed-massive-payday>. The refunds are based on funds obtained by the FTC and Department of Justice related to the FTC's and U.S. Attorney's Office's settlements with three Native American tribes involved in Tucker's operation, and from criminal convictions obtained by the U.S. Attorney's Office against Tucker and his attorney, Timothy Muir.

¹¹ See FTC, Press Release, *FTC Returns Money to Consumers Harmed in Alleged Payday Loan Scheme*, Feb. 15, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/02/ftc-returns-money-consumers-harmed-alleged-payday-loan-scheme>.

order.¹² In 2018, a federal bankruptcy court ruled that the CEO and sole owner of BlueHippo, Joseph Rensin, could not use a bankruptcy filing to shield himself from complying with a district court order requiring him to pay \$13.4 million in compensatory damages for violating a 2008 FTC order.¹³ The consent order settled charges that the company had, among other things, violated the TILA and Regulation Z by failing to provide required written disclosures and account statements to consumers. In the contempt action, the FTC alleged that the company failed to provide advertised financing for computer purchases and did not order or ship the computers to purchasers in the promised timeframe. The district court found BlueHippo Funding LLC, BlueHippo Capital LLC, and Rensin in contempt for operating a deceptive computer financing scheme in violation of the consent order, and entered judgment against BlueHippo and Rensin for \$13.4 million (the harm consumers suffered as a result of the scheme), and the appellate court affirmed the district court ruling for the FTC.¹⁴ Other litigation in this matter continues.

B. Truth in Lending and Consumer Leasing: Rulemaking, Research, and Policy Development

1. Automobiles (Credit)

In 2018, the FTC continued work on a qualitative study of consumers' experiences related to buying and financing automobiles at dealerships.¹⁵ The auto study, which includes in-depth consumer interviews and review of consumers' purchase and finance documents, is designed to assist the FTC by providing useful insights into consumer understanding of the automobile purchasing and financing process at dealerships, such as financing terms and additional products and services the dealer may have offered.¹⁶ Assessment and review of information pertaining to the study is currently continuing. While the results will not be generalizable to the U.S. population, the FTC believes that the study will offer meaningful information about the consumers' experience, and help focus FTC initiatives in this area, including regarding the FTC Act, TILA, and CLA.

¹² *FTC v. BlueHippo Funding, LLC*, No. 1:08-cv-1819 (S.D.N.Y. July 27, 2010) (contempt order entered), *appeal docketed*, No. 11-374 (2d Cir. Feb. 1, 2011); (2d Cir. Feb. 12, 2014) (appellate order vacating district court ruling and remanding case).

¹³ *FTC v. Rensin*, No. 17-ap-1185 (Bankr. S.D.Fla. Dec. 14, 2018).

¹⁴ *FTC v. Rensin*, 687 Fed. App'x 3 (2d Cir. Apr. 12, 2017) (judgment), (2d Cir. June 5, 2017) (mandate).

¹⁵ For more information about the study, see FTC, Press Release, *FTC Announces Second Federal Register Notice on Proposed Study of Consumers' Experiences Buying and Financing Automobiles from Auto Dealers*, Sept. 13, 2016, available at <https://www.ftc.gov/news-events/press-releases/2016/09/ftc-announces-second-federal-register-notice-proposed-study>, reported on last year. In that release, the Commission noted it had brought more than 25 cases in the auto purchase and financing area since 2011, including those in a federal-state effort that yielded more than 200 actions for fraud, deception, and other illegal practices.

¹⁶ Interview participants and their personal identifying information, including credit scores, are anonymized in the information received by the FTC, and protected by the study firm.

2. Military (Credit and Leasing)

Protecting military consumers is a priority for the FTC. In 2018, the FTC's Military Task Force, which includes a cross-section of agency representatives, continued work on military consumer protection issues.¹⁷ The Task Force represents part of the agency's collaborative effort to provide resources for military consumers and is aimed at identifying their needs and formulating initiatives to empower servicemembers, veterans, and their families, including through law enforcement actions. Additional information concerning FTC initiatives in 2018 to assist military consumers is included below.

a. A Closer Look at the Military Consumer Financial Workshop, Staff Perspective

In February 2018, FTC staff issued a Staff Perspective on the military consumer financial workshop that the FTC held in San Antonio in July 2017, which brought together military consumer advocates, consumer groups, government representatives (local, state, and federal), military legal services and legal clinics (including at universities), all service branches, and industry representatives to examine financial issues and scams that can affect military consumers, including active duty servicemembers and veterans.¹⁸ The Staff Perspective included discussion of servicemembers buying or leasing a vehicle for the first time, that an automobile purchase may be servicemembers first big, complex financial transaction, and that servicemember may have little time to shop around and compare deals. The Staff Perspective also noted that servicemembers are taught to trust authority – important for military readiness – but they can have a difficult time temporarily “turning off boot camp training,” making it less likely that they will ask questions and scrutinize offers from dealers. This means servicemembers can benefit from consulting available financial counselors on base before – not just after – financial transactions. The Staff Perspective also noted it is important for servicemembers to think carefully before agreeing to purchase add-on products and services during the automobile sale process, including by closely examining the products' cost. In addition, the Staff Perspective discussed that servicemembers should be aware of military counseling services to assist them in advance decision-making and in evaluating credit options. The Staff Perspective also discussed various federal financial consumer protection laws, including the TILA, CLA, and Military Lending Act (MLA), and FTC resources available to military consumer advocates and representatives on financial readiness and fraud prevention.¹⁹

¹⁷ See FTC, *Military Task Force*, available at <https://www.ftc.gov/policy/advocacy/military-task-force>.

¹⁸ See *FTC Staff Perspective Examines Key Financial Issues That Affect Military Consumers* (Feb. 2, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/02/ftc-staff-perspective-examines-key-financial-issues-affect>.

¹⁹ See FTC, *A Closer Look At The Military Consumer Financial Workshop: The Federal Trade Commission Staff Perspective* (February 2018), available at https://www.ftc.gov/system/files/documents/reports/closer-look-military-consumer-financial-workshop-federal-trade-commission-staff-perspective/military_consumer_workshop_-_staff_perspective_2-2-18.pdf.

b. Navy Legal Services

The FTC participated in a Navy Legal Services Training Program in Norfolk, VA in July 2018, for servicemembers and their families. The training included discussion of protections under the TILA and Regulation Z, such as credit cost disclosures and terms, the Fair Credit Billing Act (part of TILA), as to protections related to billing errors and unauthorized use of credit cards, the CLA and Regulation M, and the MLA and Department of Defense (DoD) military lending rule (which in part relates to Regulation Z).

c. ABA Legal Assistance for Military Personnel

In addition, the FTC staff worked with the American Bar Association's Standing Committee on Legal Assistance for Military Personnel ("ABA LAMP" or "committee"). The FTC serves as a liaison to ABA LAMP, and staff coordinates on FTC initiatives to assist military consumers, and provides training to servicemembers' and veterans' representatives in conjunction with the committee on consumer financial issues, including the MLA and the DoD military lending rule, consumer credit and TILA-related matters, and consumer leasing and CLA-related matters.

d. Department of Defense Military Lending Task Force

The FTC Staff also participated in an interagency group that coordinates with the DoD on issues pertaining to the MLA and DoD's military lending rule implementing the MLA, which includes issues related to the TILA and other credit matters.²⁰

3. Bureau of Economics Consumer Protection Economics Symposium, Jointly-Held with *Economic Inquiry* (Credit)

The FTC's Bureau of Economics hosted a one-day symposium on the economics of consumer protection with the academic journal *Economic Inquiry*, which had issued a call for papers for a special symposium on consumer protection economics.²¹ The goal of the conference was to improve the application of economics to consumer protection policy analysis and law enforcement and further the FTC's dual mission to protect consumers and promote competition.

The symposium also celebrated the 40th anniversary of the creation of a division within the Bureau of Economics devoted to consumer protection, and highlighted differences between the development of competition economics and consumer protection economics.

²⁰ The MLA requires the DoD to coordinate with several federal agencies, including the FTC, in prescribing regulations and not less than every two years thereafter. 10 U.S.C. § 987.

²¹ See *FTC Consumer Protection Economics Symposium*, Dec. 7, 2018, available at <https://www.ftc.gov/news-events/events-calendar/consumer-protection-economics-symposium>. A webcast and event materials are available at that site.

In discussing the current state of consumer protection economics, panelists addressed, among other things, policy research by FTC economists. The discussion included reference to FTC economists' controlled experiments that had been previously conducted to assess consumer understanding of mandated disclosures, such as mortgage disclosures research showing that some government mandated disclosure terms were confusing, leading to people misunderstanding the costs of loans and also showing how consumer research substantially improved consumer comprehension.²² Other participants discussed the development of, and current studies and research questions related to, small-dollar credit markets (such as pawnbroker transactions, vehicle title pawns, payday loans, and finance company personal cash installment loans), including, among other things, the Consumer Credit Protection Act and its Title I, the TILA.²³

C. Truth in Lending and Consumer Leasing: Consumer and Business Education

1. Automobiles (Credit and Leasing), Military (Credit), and Payday Lending (Credit)

The Commission issued several blog posts discussing the FTC's cases and other initiatives in the areas of automobiles, military consumer issues, and payday lending noted above. For example, the FTC issued a blog post for businesses on the complaint filed in the Tate's case.²⁴ The blog post discussed Tate's alleged deceptive financing and advertising and failures to disclose terms required by the TILA and the CLA, and it provided guidance on FTC compliance resources for car dealers.

²² See Presentation of Janis Pappalardo, FTC, in *Panel: The State of Consumer Protection Economics, FTC Consumer Protection Economics Symposium – Part 1* (video and slides), available at <https://www.ftc.gov/news-events/audio-video/video/consumer-protection-economics-symposium-part-1> (video) and https://www.ftc.gov/system/files/documents/public_events/1420757/20181206d_cp_econ_symposium_combined_slidedeck.pdf (slides).

²³ See Presentation of Thomas Miller, Jr., Mississippi State University, *Paper Session 2, FTC Consumer Protection Economics Symposium – Part 2* (video and slides), available at <https://www.ftc.gov/news-events/audio-video/video/consumer-protection-economics-symposium-part-2> (video), and J. Brandon Bolen, Mississippi College, Gregory Elliehausen, Board of Governors, FRB, Tom Miller, Jr., Mississippi State University, *A Review of Current Studies and Some Remaining Research Questions in Four Small-Dollar Credit Markets*, available at https://www.ftc.gov/system/files/documents/public_events/1420757/20181206d_cp_econ_symposium_combined_slidedeck.pdf (slides). See also Presentation of Brian Rowe, FTC, *Paper Session 2, FTC Consumer Protection Economics Symposium – Part 2* (video and slides), available at <https://www.ftc.gov/news-events/audio-video/video/consumer-protection-economics-symposium-part-2> (video) and https://www.ftc.gov/system/files/documents/public_events/1420757/20181206d_cp_econ_symposium_combined_slidedeck.pdf (slides).

²⁴ See Lesley Fair, *FTC alleges car dealers falsified consumers' income on financing forms*, FTC BUSINESS CENTER BUSINESS BLOG (Aug. 1, 2018), <https://www.ftc.gov/news-events/blogs/business-blog/2018/08/ftc-alleges-car-dealers-falsified-consumers-income-financing>.

2. Other (Credit and Leasing)

The Commission issued a blog post warning consumers about card skimming at the gas pump.²⁵ The blog post explained that skimmers are illegal card readers attached to payment terminals, including those accepting credit cards, which take data off the card's magnetic stripe without consumers' knowledge; criminals sell the data or use it to make online purchases. Consumers are usually unaware of the problem until they receive a card statement. The blog post offered consumers tips to safeguard their information from card skimmers. This includes: making sure the pump panel does not show signs of tampering, observing the card reader and whether it appears to have something attached or have loose components, and closely monitoring credit card and account statements for unauthorized charges. The blog post also noted that Federal law (i.e., TILA) limits consumers' liability for unauthorized credit card purchases.

In addition, the FTC issued a blog post informing businesses about a relatively new practice: pet leasing, whereby consumers can take a pet home in exchange for a small up-front payment and an agreement to make monthly payments.²⁶ Unbeknownst to consumers, however, the transaction is a lease, not a financed purchase. The blog post addresses that pet leases extend for a set period – typically one to three years – and that customers must make set monthly payments that will total more than the pet's list price – sometimes by large amounts. At the end of the transaction, the customer does not own the pet and must pay additional amounts if they wish to buy it; otherwise they must return the animal. Missed payments could lead the company to repossess the animal; if the pet is lost, stolen or dies, or if the customer can no longer keep the pet, they may still have to make payments through the lease period or pay a large early termination fee. Failure to make required payments can be reported on the customer's credit report and lead to collection actions. The blog post notes that pet sellers offering pet leases should be familiar with the CLA, and describes its requirements to provide essential lease information in writing, clearly and conspicuously, to consumers before they sign the agreement. Also, retailers that advertise pet leases – even with a store display of low upfront payment amounts – must include additional information in the advertisement, such as that the deal is a lease, the total amount due at lease signing and the number, amount and timing of payments. The blog post also refers retailers to CLA guidance available on the FTC's website, to facilitate compliance with the law.

III. Regulation E (the EFTA)

²⁵ See Colleen Tressler, *Watch out for card skimming at the gas pump*, FTC BUREAU OF CONSUMER PROTECTION BLOG (Aug. 7, 2018), <https://www.consumer.ftc.gov/blog/2018/08/watch-out-card-skimming-gas-pump>.

²⁶ See Seena Gressin, *A lease on a leash? Pet stores are leasing pets*, FTC BUSINESS CENTER BUSINESS BLOG (July 9, 2018), <https://www.ftc.gov/news-events/blogs/business-blog/2018/07/lease-leash-pet-stores-are-leasing-pets>.

In 2018, the FTC had seven new or ongoing cases pertaining to the EFTA and Regulation E. The Commission also engaged in research and policy work and educational activities involving the EFTA and Regulation E.

A. Electronic Fund Transfers: Enforcement Actions

1. Negative Option Cases

Six of the Commission's cases alleging violations of the EFTA and Regulation E arose in the context of "negative option" plans.²⁷ Under these plans, a consumer typically agrees to receive various goods or services from a company for a trial period at no charge or at a reduced price. The company also obtains, sometimes through misrepresentations, the consumer's debit or credit card number. If the consumer does not cancel before the end of the trial period, the shipments of goods or provision of services continue, and the consumer incurs recurring charges. The EFTA and Regulation E prohibit companies from debiting consumers' debit cards, or using other electronic fund transfers to debit their bank accounts, on a recurring basis without obtaining proper written authorization for preauthorized electronic fund transfers and without providing the consumer with a copy of the written authorization.

In 2018, the FTC filed a complaint and obtained a temporary restraining order and asset freeze, halting a group of San Diego-based Internet marketers from deceptively advertising free trial offers and not only charging consumers full-price for the trial product, but also enrolling them in expensive, ongoing continuity plans without their knowledge or consent.²⁸ The defendants marketed and sold a variety of products online, including skin creams and electronic cigarettes. Consumers who ordered the free trial for \$4.95 or less, ended up being charged as much as \$98.71 for the trial shipment, followed by enrollment in the negative option plan without their consent. The complaint also alleged that the defendants used deceptive order confirmation pages to trick consumers into ordering additional products, which similarly enroll consumers in additional negative-option plans, and that the defendants make it difficult to cancel the negative option plans, or stop or avoid the charges. The FTC's complaint charged the defendants with violating the FTC Act, the EFTA and Regulation E, and the Restore Online

²⁷ Negative option plans can involve the use of debit cards, credit cards, or both. The EFTA and Regulation E apply to debit cards; the TILA and Regulation Z apply to credit cards.

²⁸ See FTC, Press Release, *FTC Halts Online Marketers Responsible for Deceptive "Free Trial" Offers* (July 3, 2018), available at, <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-halts-online-marketers-responsible-deceptive-free-trial>.

Shoppers' Confidence Act (ROSCA).²⁹ The Commission also obtained a preliminary injunction against the defendants.³⁰ Litigation in this matter is ongoing.

In a second negative option case, the FTC filed a complaint and obtained a temporary restraining order halting an alleged Internet marketing scam. The Commission alleged that the defendants marketed supposedly "free trial" offers for personal care products and dietary supplements online but charged consumers the full price of the products and enrolled them in negative option continuity plans without their consent.³¹ The Commission charged the defendants with violations of the FTC Act, the EFTA, and ROSCA.³² The FTC also obtained stipulated preliminary injunctions, and litigation continues in this matter.³³

In a third negative option case, the FTC filed a complaint and obtained a temporary restraining order halting a company's advertising of three dissolvable oral film strips that the Commission alleges were deceptively marketed as effective smoking cessation, weight-loss, and sexual-performance aids.³⁴ The Commission charged the defendants with violations of the FTC Act, the EFTA, the Telemarketing Sale Rule, and ROSCA, and the FTC obtained preliminary injunctions in this matter; litigation is ongoing.³⁵

²⁹ *FTC v. Triangle Media Corp.*, No. 18-cv-1388 (S.D. Cal. filed June 25, 2018), (S.D. Cal. June 29, 2018) (order granting in part and denying in part plaintiff's ex parte motion for temporary restraining order with asset freeze, appointment of a receiver, other equitable relief, and order to show cause why preliminary injunction should not issue), available at <https://www.ftc.gov/enforcement/cases-proceedings/172-3108/ftc-v-triangle-media-corporation>. https://www.ftc.gov/system/files/documents/cases/triangle_media_complaint_for_perm_injunctn_bcp_litigation.pdf.

³⁰ See *id.* (S.D. Cal. Aug. 24, 2018); *appeal docketed, sub nom., FTC v. Hardwire Interactive, Inc.*, No. 18-56161 (9th Cir. Aug. 28, 2018).

³¹ See FTC, Press Release, *Court Temporarily Halts International Operation that Allegedly Deceived Consumers through False Claims of "Free Trial" Offers and Imposed Unauthorized Continuity Plans*, Nov. 28, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/11/court-temporarily-halts-international-operation-allegedly>.

³² *FTC v. Apex Capital Group, LLC.*, No. 18-cv-09573 (C.D. Cal. filed Nov. 14, 2018) (civil minutes memorializing order granting plaintiff's ex parte application for (1) temporary restraining order with asset freeze, appointment of a receiver, other equitable relief, and order to show cause why a preliminary injunction should not issue and (2) order waiving notice requirement) (C.D. Cal. Nov. 16, 2018), available at https://www.ftc.gov/system/files/documents/cases/apex_complaint_filed.pdf.

³³ See *id.* (stipulated preliminary injunction with asset freeze, receiver, and other equitable relief against corporate defendants and defendant Phillip Peikos) (C.D. Cal. Dec. 18, 2018), (stipulated preliminary injunction with asset freeze, receiver, and other equitable relief against defendant David Barnett) (C.D. Cal. Dec. 18, 2018).

³⁴ See FTC, Press Release, *At FTC's Request, Court Stops False Advertising and Unauthorized Billing Scheme* (Oct. 24, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/10/ftcs-request-court-stops-false-advertising-unauthorized-billing>.

³⁵ *FTC v. Jason Cardiff (Redwood Scientific Technologies, Inc.)*, No. 18-cv-02104 (C.D. Cal. filed Oct. 3, 2018) available at https://www.ftc.gov/system/files/documents/cases/redwood_scientific_technologies_complaint_-_conformed_copy.pdf. See also *id.* (preliminary injunction with asset freeze, receiver, and other equitable relief against Redwood Scientific Technologies, Inc.(CA), Redwood Scientific Technologies, Inc. (NV), Redwood Scientific Technologies, Inc. (DE); Identify, LLC; Advanced Men's Institute Prolongz LLC, Run Away Products,

In a fourth negative option case, a health products company and its owner agreed to settle charges that they deceived consumers with promises that their products could treat everything from arthritis to memory loss.³⁶ The settlement order bars the defendants from engaging in a wide range of business practices that the FTC and State of Maine previously alleged caused financial injury to consumers. The complaint included allegations that the defendants misrepresented the terms of a “risk free” trial period and enrolled consumers in auto-renewal plans without adequately disclosing the practice in violation of the FTC Act, obtained and charged consumers’ debit card numbers without authorization in violation of EFTA, and failed to disclose material terms and conditions for third party upsells and material terms of their refund and cancellation policy, in violation of the TSR. In addition to providing injunctive relief, the settlement imposes a judgment of \$3.7 million, part of which is suspended based on the defendants’ financial condition.³⁷ In 2018, the FTC also mailed 16,596 checks totaling more than \$750,000 to consumers who bought two of the defendants’ deceptively marketed dietary supplements, NeuroPlus and BioTherapex; the average refund amount was \$44.34.³⁸

In a fifth negative option case, which was previously filed, the Commission obtained court orders permanently barring the two remaining defendants from the deceptive marketing and billing tactics they allegedly used in connection with selling skincare products offered to consumers with supposedly “risk-free” trials, and from failing to obtain written authorizations in a manner that complies with EFTA.³⁹ The court orders also impose a \$320,665 judgment against the defendants (suspended based on their financial condition).⁴⁰

In a sixth negative option case, which was previously filed, the FTC mailed 2,116 refund checks totaling more than \$355,000 to people who bought CogniPrin, a deceptively marketed ‘memory improvement’ supplement; the average check amount was \$168.08, and represented

LLC; and Carols Place Limited Partnership) (C.D. Cal. Oct. 4, 2018); (stipulated preliminary injunction as to Defendant Danielle Cadiz) (C.D. Cal. Nov. 7, 2018); and (preliminary injunction with asset freeze, receiver, and other equitable relief against Jason Cardiff and Eunjung Cardiff) (C.D. Cal. Nov. 8, 2018).

³⁶ See *FTC and State of Maine v. Health Research Laboratories, LLC*, No. 17-cv-00467 (D. Me Jan. 16, 2018).

³⁷ The full judgment will become due if the defendants are found to have misrepresented their financial condition.

³⁸ See FTC, Press Release, *FTC Returns more than \$750,000 to Consumers Who Bought Two Deceptively Marketed Supplements from Health Research Laboratories, LLC*, Nov. 29, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/11/ftc-returns-more-750000-consumers-who-bought-two-deceptively>.

³⁹ See FTC, Press Release, *FTC Obtains Court Order Barring Remaining AuraVie Skincare Sellers from Deceptive Marketing and Billing Practices*, June 29, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-obtains-court-order-barring-remaining-auravie-skincare>.

⁴⁰ *FTC v. Bunzai Media Group, Inc.*, No. 15-cv-04527 (C.D. Cal. June 27, 2018) (amended order for permanent injunction and monetary judgment as to stipulating defendants Alan Argaman and Secured Merchants, LLC). The full judgment will become due if the defendants are found to have misrepresented their financial condition.

full refunds.⁴¹ The court previously entered stipulated final orders resolving charges by the FTC and State of Maine with all of the nine defendants engaged in violations of the FTC Act and the EFTA.

2. Other Cases

As described above, the Commission continued litigating in connection with a 2010 contempt order against BlueHippo Funding LLC, a consumer electronics retailer, for violating a prior FTC consent order.⁴² The FTC's underlying complaint against BlueHippo included allegations that the defendants conditioned the extension of credit on mandatory preauthorized transfers in violation of the EFTA, and the 2008 order had prohibited the defendants from violating the EFTA and Regulation E.

B. Electronic Fund Transfers: Rulemaking, Research, and Policy Development

The FTC does not have rulemaking authority under the EFTA but in 2018 engaged in research and policy work that addressed EFTA-related issues.

The FTC worked with the DoD interagency group and with ABA LAMP as discussed above, on electronic funds transfer issues. Among other things, the FTC staff coordinated with the DoD interagency group on issues related to preauthorized electronic fund transfers (EFTs) in the military lending rule. The FTC also provided input to ABA LAMP, and conducted trainings for judge advocates general and others in conjunction with ABA LAMP trainings, on EFTs, FTC cases in this area, and the EFTA requirements.

As also discussed above, the FTC issued a Staff Perspective summarizing key takeaways from the 2017 “Military Consumer Financial Workshop: Protecting Those Who Protect Our Nation” in San Antonio, Texas, which included issues pertaining to electronic funds transfers in discussion of legal rights and remedies for military consumers.⁴³

C. Electronic Fund Transfers: Consumer and Business Education

⁴¹ See FTC, Press Release, *FTC Sending Refund Checks Totaling More Than \$355,000 to Consumers Who Bought CogniPrin ‘Memory Improvement’ Supplement*, Apr. 2, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-sending-refund-checks-totaling-more-355000-consumers-who>. See also *FTC and State of Maine v. XXL Impressions LLC*, No. 17-cv-00067 (D. Me. filed Feb. 22, 2017), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3024-162-3033-162-3036/xxl-impressions-llc-j2-response-llp>.

⁴² See *supra* notes 12-14.

⁴³ See *supra* notes 18-19.

In 2018, the FTC issued blog posts for consumers and businesses providing guidance about negative option plans and “free” trial offers and recent cases on these issues, including addressing EFTA and Regulation E violations and offering tips to consumers to avoid incurring automatic debits to their accounts.⁴⁴ In addition, the blog post described above on card skimming also addresses problems caused by skimmers for debit and ATM cards. It notes that Federal law includes liability protections against unauthorized electronic fund transfers.⁴⁵

* * * *

We hope that the information discussed above responds to your inquiry and will be useful in preparing the CFPB’s Annual Report to Congress.⁴⁶ Should you need additional assistance, please contact me at (202) 326-2972, or Carole Reynolds at (202) 326-3230.

Sincerely,

Malini Mithal
Associate Director
Division of Financial Practices

⁴⁴ See Emma Fletcher, *Don’t let “FREE” cost you*, FTC BUREAU OF CONSUMER PROTECTION BLOG (July 3, 2018), <https://www.consumer.ftc.gov/blog/2018/07/dont-let-free-cost-you>, Lisa Lake, *Smoking out bogus product claims*, FTC BUREAU OF CONSUMER PROTECTION BLOG (Oct. 24, 2018), <https://www.consumer.ftc.gov/blog/2018/10/smoking-out-bogus-product-claims>, Lesley Fair, *Complaint alleges unauthorized charges and credit card laundering put consumers through the spin cycle*, FTC BUSINESS CENTER BUSINESS BLOG (Nov. 28, 2018), <https://www.ftc.gov/news-events/blogs/business-blog/2018/11/complaint-alleges-unauthorized-charges-credit-card>, Lesley Fair, *Three films not on our Top 10 list*, FTC BUSINESS CENTER BUSINESS BLOG (Oct. 24, 2018), <https://www.ftc.gov/news-events/blogs/business-blog/2018/10/three-films-not-our-top-10-list>, Lesley Fair, *Time for a ROSCA recap: FTC says “risk free trial” was risky – and not free*, FTC BUSINESS CENTER BUSINESS BLOG (July 3, 2018), <https://www.ftc.gov/news-events/blogs/business-blog/2018/07/time-rosca-recap-ftc-says-risk-free-trial-was-risky-not-free>.

⁴⁵ See *supra* note 25.

⁴⁶ Your letter also requests information regarding compliance by credit card issuers with the Federal Trade Commission Act (FTC Act). The Commission does not have jurisdiction over banks or Federal credit unions, and in 2018, the Commission did not have enforcement or other activity regarding compliance with the FTC Act by nonbank credit card issuers over which it has jurisdiction.