

Articles + Publications | February 2024

# Regulatory Oversight Newsletter — February 2024

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## REGULATORY OVERSIGHT BLOG

Make sure to visit Troutman Pepper's [Regulatory Oversight](#) blog to receive the most up-to-date information on regulatory actions and [subscribe](#) to our mailing list to receive a monthly digest.

Regulatory Oversight will provide in-depth analysis into regulatory actions by various state and federal authorities, including state attorneys general and other state administrative agencies, the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC). Contributors to the blog will include attorneys with multiple specialties, including regulatory enforcement, litigation, and compliance.

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## 2023 State AG Year in Review

### 2023 STATE AG YEAR IN REVIEW

By [Troutman Pepper State Attorneys General Team](#)

State attorneys general (AGs) continue their role as innovators, shaping the regulatory environment by utilizing their expertise and resources to influence policy and practice. The public-facing nature of the AGs' office across the U.S. compels responses to constituent concerns on abbreviated timetables. This political sensitivity, coupled with the AGs' ability to bring the full power of the sovereign to address local and national issues alike, demonstrates why the AGs may be the most formidable authority in the current regulatory environment.

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## 2023 Privacy Year in Review

### NAVIGATING THE PRIVACY LANDSCAPE: INSIGHTS FROM TROUTMAN PEPPER'S 2023 PRIVACY YEAR IN REVIEW

By [James Koenig](#), [Ronald I. Raether, Jr.](#), [Ashley L. Taylor, Jr.](#), [Stephen C. Piepgrass](#), [Joshua Davey](#), [Kim Phan](#),

Angelo A. Stio III, Gene Fishel, Laura Hamady, Joel Lutz, Zie Alere, Karla Ballesteros, Rachel Buck, Robyn Lin, Carson Cox, Natasha Halloran, Natalia Jacobo, Marnishia Jernigan, Namrata Kang, Susie Lloyd, Alexandria Pritchett, McKayla Riter, Whitney Shephard, Trey Smith, Edgar Vargas, Daniel Waltz & Mac McCullough

In an era where privacy, security, and artificial intelligence are at the forefront of many business operations, staying informed about the latest developments is crucial. Our *2023 Privacy Year in Review* is an in-depth analysis of the past year's significant advancements and challenges in these areas.

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## Podcast

### SNOOPING SADIA TALKS TO FORMER OFFICIAL GENE FISHEL

*Unauthorized Access* Podcast

Troutman Pepper's Gene Fishel joins Sadia after discovering that she was snooping around his office hoping to snag a challenge coin. Sadia uncovers its meaning, but more importantly discusses Gene's 20-year career as chief of the Computer Crime Section in Virginia's Office of Attorney General, and his time as a special assistant U.S. attorney. The discussion delves into Gene's views on leading cyber investigations, managing forensics units, handling breach notifications, and what he has learned since deciding to play defense.

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## Privacy Updates

### NJ CHARGES INTO 2024 WITH NEW PRIVACY LAW

By James Koenig, Ronald I. Raether, Jr., Kim Phan, Stephen C. Piepgrass, Gene Fishel & Robyn Lin

On January 16, New Jersey became the first state this year to enact a comprehensive privacy law, S332, which applies to businesses conducting operations in the state or targeting its residents. As noted in this [article](#) by our privacy team, similar to other state comprehensive privacy laws, S322 grants consumers the right to confirm, correct, delete, obtain a copy of their personal data, and opt out of its processing for targeted advertising, sale, or profiling. Controllers and processors are obligated to limit data collection, establish security practices, and provide a privacy notice. They are also required to conduct a data protection assessment for processing activities that pose a heightened risk of harm to consumers. The New Jersey Attorney General's Office has exclusive authority to enforce violations, treating them as "unlawful practices" under the New Jersey Consumer Fraud Act. The law takes effect on January 16, 2025, with an 18-month grace period for organizations to correct violations before enforcement actions are taken.

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## State AG Investigation v. Standard Civil Litigation

### NAVIGATING STATE AG INVESTIGATIONS: LESSONS FROM TIKTOK'S EXPERIENCE

By [Ashley L. Taylor, Jr., Robert Angle](#) & Mackenzie W.J. Jessup

In a recent case involving TikTok and the state of North Carolina, the social media giant was compelled to produce detailed information for 98,000 meetings, despite its claim that this violated its Fourth Amendment rights. As noted by Troutman Pepper's Ashley Taylor, Robert Angle and Mackenzie Jessup in a recent [article for Law360](#), this case highlights the differences between responding to state investigations and standard civil litigation.

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## Antitrust Updates

### **FTC AND BIPARTISAN STATE AGS WIN LANDMARK CASE AGAINST 'PHARMA BRO' MARTIN SHKRELI OVER DARAPRIM MONOPOLY**

By [Troutman Pepper State Attorneys General Team](#)

On January 23, the U.S. Court of Appeals for the Second Circuit [affirmed a district court ruling](#) that Martin Shkreli, CEO of Vyera Pharmaceuticals (Vyera), violated federal and state laws by engaging in illegal and anticompetitive behavior.

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### **AMID ONGOING REGULATORY SCRUTINY, WASHINGTON AG FILES FIRST LAWSUIT TO BLOCK MERGER OF STATE'S LARGEST SUPERMARKETS**

By [Troutman Pepper State Attorneys General Team & Zie Alere](#)

On January 15, Washington Attorney General (AG) Bob Ferguson filed a [complaint](#) in King County Superior Court, seeking to block the merger of The Kroger Co. (Kroger) with its supermarket competitor, Albertsons Companies, Inc. (Albertsons).

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### **AG FERGUSON PUSHES FOR INCREASED ANTITRUST PENALTIES**

By [Troutman Pepper State Attorneys General Team](#)

Washington Attorney General (AG) Bob Ferguson [announced](#) that he has proposed legislation — [H.B. 2072/S.B. 5994](#) — to enhance the state's maximum penalty for antitrust violations like price fixing and collusion.

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## Consumer Protection Updates

### **MICHIGAN AG DANA NESSEL SUES TO DISSOLVE DETROIT LANDSCAPING AND SNOW REMOVAL COMPANIES**

By [Troutman Pepper State Attorneys General Team](#)

Michigan Attorney General (AG) Dana Nessel filed a lawsuit seeking injunctive relief and dissolution of several limited liability companies owned by John and Michele Church. The Churches' companies have allegedly violated the Michigan Consumer Protection Act (MCPA) by engaging in unlawful business practices related to their residential snow removal, lawn care, and landscaping services.

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## **VERMONT AG REACHES SETTLEMENT OVER MOTEL PROGRAM SECURITY DEPOSIT WITHHOLDINGS**

By [Troutman Pepper State Attorneys General Team](#)

Vermont Attorney General (AG) Charity Clark recently [announced](#) the resolution of an investigation into the withholding of security deposits across five motels that were participating in the state's Transitional Housing Program, also referred to as the "Motel Program." The settlement establishes a \$310,000 restitution pool to provide payments to impacted Vermonters who stayed in motels owned by Anil Sachdev (or companies he controls), along with injunctive relief. Sachdev will also be required to pay \$523,600 to the state, which will be suspended for cooperation with the resolution of the matter, including putting adequate funds toward the repair, maintenance, and improvement of the properties he owns.

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## **MASSACHUSETTS AG SETTLES WITH MAJOR STUDENT LOAN SERVICER FOR \$1.8M OVER FAULTY NOTICES**

By [Troutman Pepper State Attorneys General Team](#)

On January 11, Massachusetts Attorney General (AG) Andrea Joy Campbell announced a \$1.8 million settlement with Nelnet, Inc. (Nelnet), one of the largest federal student loan servicers in the U.S., for allegedly sending written notices to borrowers about renewing income-driven repayment (IDR) plans that failed to meet certain regulatory requirements and, in some cases, failing to send the required notices altogether.

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## **MASSACHUSETTS AG SETTLES \$3.5M COVID-19 DELIVERY FEE CASE WITH GRUBHUB**

By [Troutman Pepper State Attorneys General Team](#)

On January 12, Massachusetts Attorney General (AG) Andrea Joy Campbell announced [a settlement](#) with Grubhub Holdings Inc. and Grubhub, Inc., (Grubhub) for allegedly repeatedly violating a statutory limit on the fees that third-party delivery companies could charge during the COVID-19 state of emergency.

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## FTC TO HOLD HEARING ON PROPOSED RULE TO BAN FAKE REVIEWS

By [Clayton Friedman](#), Drew Mann, Tim Bado & Abbey M. Thornhill

Most products with an online marketing presence generally have “customer reviews.” However, today’s consumers cannot always trust that those reviews are from real purchasers or provide honest feedback about the quality of a product. The Federal Trade Commission (FTC) has sought to address these concerns, proposing a [new rule](#) aimed at stopping marketers from using illicit review and endorsement practices, including using fake reviews, suppressing honest negative reviews, and paying for positive reviews. Proponents of the rule argue these types of practices deceive consumers who are looking for honest feedback on a product or service.

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## AI Updates

### AGS URGE THE FEDERAL GOVERNMENT TO REGULATE AI IN TELEMARKETING

By [Troutman Pepper State Attorneys General Team](#)

North Carolina Attorney General (AG) Josh Stein led a bipartisan effort urging the federal government to impose stricter regulations on the use of artificial intelligence (AI) in telemarketing. The collective push involved 26 state AGs who jointly submitted a letter in response to the Federal Communication Commission (FCC’s) Notice of Inquiry (NOI) for “Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts. The FCC’s NOI furthers efforts by the Federal Government to better understand the impact of emerging AI technologies as it aims to protect consumers from unwanted and illegal telephone calls and text messages, as stipulated under Telephone Consumer Protection Act (TCPA).”

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### ILLINOIS AG WARNS CONSUMERS ABOUT AI FRAUD

By [Troutman Pepper State Attorneys General Team](#)

Illinois Attorney General (AG) Kwame Raoul recently issued a consumer [alert](#) to Illinois consumers regarding the use of artificial intelligence (AI) by phone scammers. According to the alert, phone scammers are regularly employing AI technology to mimic the voice of consumers’ loved ones to manipulate consumers into giving financial payments.

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## Tobacco Updates

### EN BANC FIFTH CIRCUIT SOLIDIFIES CIRCUIT SPLIT ON FLAVORED ENDS PRODUCT MDOS

By [Bryan Haynes](#), [Agustin Rodriguez](#) & [Zie Alere](#)

In early January, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc in *Wages & White Lion Investments, L.L.C. v. U.S. Food & Drug Administration*, [held](#) that the U.S. Food and Drug Administration's (FDA) marketing denial order (MDO) of petitioner's premarket tobacco applications (PMTAs) violated the Administrative Procedure Act (APA).

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## MULTIPLE STATES CONSIDER ESTABLISHING VAPOR PRODUCT DIRECTORIES

By [Bryan Haynes](#), [Agustin Rodriguez](#) & [Zie Alere](#)

This year, several state legislatures will consider bills to establish vapor product directories. Amid heightened scrutiny of illicit vapor products by the U.S. Food and Drug Administration (FDA), these product directory bills would create a mechanism for states to bar the sale of products that are not FDA-authorized or subject to a pending premarket application. Like state cigarette directories implemented in connection with the tobacco Master Settlement Agreement, these directories would specify which vapor products are permitted to be sold in the state.

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## FDA'S CENTER FOR TOBACCO PRODUCTS RELEASES ANNUAL REGULATORY AGENDA

By [Bryan Haynes](#), [Agustin Rodriguez](#) & [Nick Ramos](#)

We recently [discussed](#) the U.S. Food and Drug Administration's (FDA) Center for Tobacco Products' (CTP) strategic plan intended to guide CTP's activity for the next five years. On the same day, CTP released its annual regulation and policy guidance agenda, which "outlines rules and guidance documents that are in development or planned for development." Below, we discuss CTP's current priorities for new regulations. CTP's policy agenda is important because it identifies the areas CTP views as most in need of regulation or guidance, and the key actions it plans to take in those areas.

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## Cannabis Updates

### FROM "HIGH POTENTIAL FOR ABUSE" TO "ACCEPTED MEDICAL USE": TRACKING DEVELOPMENTS AND POSSIBLE OUTCOMES OF FEDERAL CANNABIS RESCHEDULING IN THE U.S.

By [Jean Smith-Gonnell](#) & [Cole White](#)

Whether you believe that cannabis legalization has occurred too quickly or too slowly, one thing is certain: recent developments herald a potentially seismic shift in federal cannabis policy in the U.S. Reflecting on our article from September, which discussed the [U.S. Department of Health and Human Services' \(HHS\) recommendation to the Drug Enforcement Administration \(DEA\) to reschedule cannabis from Schedule I to Schedule III of the Controlled Substances Act \(CSA\)](#), it is clear that the landscape continues to evolve rapidly. Since that publication, numerous noteworthy developments have unfolded, along with a growing discourse on the potential unintended consequences of such a reclassification. This article aims to catch readers up on the latest developments in

federal cannabis legalization.

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## **VIRGINIA ADVANCES TOWARD NEW MEDICAL CANNABIS LICENSE APPLICATION WITH NEW REGULATIONS**

By [Agustin Rodriguez](#), Jean Smith-Gonnell & Christina Sava

The Virginia Cannabis Control Authority (CCA), which assumed oversight of Virginia's medical cannabis program from the Board of Pharmacy as of January 1, has [promulgated regulations](#) to govern medical cannabis operations in the Commonwealth. The regulations are largely similar to those that existed under the Board of Pharmacy, but they bring the Commonwealth one step closer to opening applications for the state's single unlicensed health service area (HSA).

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## **PENNSYLVANIA SEEKS TO INCREASE COMPETITION AMONG MEDICAL CANNABIS LICENSEES WITH SB773 PASSAGE**

By Christina Sava, Jean Smith-Gonnell & [Agustin Rodriguez](#)

Recently enacted [Pennsylvania Senate Bill 773 \(SB773\)](#) introduces several amendments intended to expand opportunities and increase competition among existing cannabis licensees in Pennsylvania. The bill seeks to support independent licensees in the state and is a response to the consolidation among licensees that many states have seen as state-legal marijuana operators struggle under the weight of federal prohibition and competition from the unregulated marketplace.

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## **NAVIGATING CRYPTOCURRENCY IN THE MARIJUANA INDUSTRY: RISKS AND TECHNOLOGICAL SOLUTIONS**

By Jean Smith-Gonnell & [Trey Smith](#)

The marijuana industry has seen exponential growth over the past few years. However, the federal prohibition of marijuana poses significant challenges for businesses in this sector, in terms of payment processing and banking. As explained in a previous [article](#), cryptocurrencies present a potential solution to these issues, enabling marijuana businesses to send and receive payments without the need for third-party intermediaries.

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## **NAVIGATING THE STORM: RECEIVERSHIPS IN THE CANNABIS INDUSTRY**

By Jean Smith-Gonnell & [Cole White](#)

With rapid technological advances, expanded regulatory oversight, and constantly shifting market dynamics, owning and operating a business in the modern world has become an increasingly difficult challenge. Chief among the challenges that business owners face is the likelihood of financial distress, a daunting scenario that can arise from market downturns, management issues, or unexpected crises. When a business finds itself in financial turmoil, it is crucial that business owners and investors have viable options for navigating these challenges. Traditionally, bankruptcy is the primary avenue of relief for distressed businesses, offering a structured way to address financial woes and creditor claims.

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## THE CONTINUING NEGATIVE IMPACT OF FEDERAL AND STATE TAXATION ON THE CANNABIS INDUSTRY; WHERE DO WE GO FROM HERE?

By Jean Smith-Gonnell & Randy Varner

The cannabis industry has experienced significant growth over the past decade, with increasing numbers of states legalizing both medical and recreational use. Currently, cannabis is legal for adults in 24 states and the District of Columbia, and medical cannabis is legal in 38 states and the District of Columbia. However, despite the industry's rapid expansion, it faces a unique and significant challenge in the form of Internal Revenue Code Section 280E (IRC §280E).<sup>[1]</sup> This federal tax code provision has a profound negative impact on the profitability of cannabis businesses and causes those businesses to constantly evaluate their operational strategies. In addition to IRC §280E and other federal tax challenges, the industry also faces significant state tax burdens.

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## REDACTED CANNABIS RESCHEDULING LETTER IGNITES FOIA EXEMPTION DEBATE

By [Stephen C. Piepgrass](#), [Agustin Rodriguez](#), Jean Smith-Gonnell & [Cole White](#)

The U.S. Department of Health and Human Services (HHS) has drawn criticism for heavily redacting a recommendation letter to the U.S. Drug Enforcement Administration (DEA) concerning the rescheduling of cannabis. HHS said the redactions were justified under Exemption 5 of the Freedom of Information Act (FOIA), which protects inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency. As Stephen C. Piepgrass, Agustin E. Rodriguez, Jean Smith-Gonnell, and Cole White noted in a [recent article](#) published by *Law360*, this has sparked debates about the balance between necessary secrecy and the public's right to government information. Legal challenges to these redactions are expected. The deliberative process privilege, which safeguards deliberative discussions within government corridors, is often invoked in the context of FOIA.

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Stephanie Kozol, Senior Government Relations Manager – State Attorneys General, and [Mac McCullough](#), Senior Privacy & Security Advisor, also contributed to this newsletter.

*Our Cannabis Practice provides advice on issues related to applicable federal and state law. Marijuana remains*

*an illegal controlled substance under federal law.*

## **RELATED INDUSTRIES + PRACTICES**

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