Articles + Publications | October 2023

Regulatory Oversight Newsletter — October 2023

WRITTEN BY

Cole White | Molly S. DiRago | Stephen C. Piepgrass | Amy Pritchard Williams | John S. West | Ashley L. Taylor, Jr. | Bryan M. Haynes | Ryan J. Strasser | Avi Schick | Hilary S. Cairnie | Jean E. Smith-Gonnell | Samuel E. "Gene" Fishel | Michael A. Lafleur | Judith "Judy" Jagdmann | Drew Mann | Trey Smith | Michael Yaghi | Clayton S. Friedman | Susan N. Nikdel | Natalia A. Jacobo | John Sample | Whitney L. Shephard | Namrata Kang | Michael B. Jordan | Christina Sava | Ketan D. Bhirud | Nicholas Ramos | Timothy J. "Tim" Bado | Agustin E. Rodriguez | Christopher Carlson | Dan Waltz

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.

LEGISLATION UPDATES

MITIGATING THE ECONOMIC RISK IN THE EVENT OF A GOVERNMENT SHUTDOWN – NEAR TERMS STEPS FOR GOVERNMENT CONTRACTORS

By Hilary Cairnie on September 28, 2023

As the end of fiscal year 2023 approaches, the potential for a shutdown looms due to Congress not passing necessary spending bills. Our partners provide guidance for government contractors on mitigating economic risks in the event of a shutdown.

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RIDING THE WAVE OF RIGHT TO REPAIR: CALIFORNIA JOINS THE MOVEMENT

By Stephen C. Piepgrass and McKayla Riter* on September 21, 2023

As predicted in our previous articles, the "right to repair" movement continues to garner support as more state governments consider legislating in this area. We previously reported that in 2021, 27 states had pending legislation addressing "right to repair" laws (discussed in our previous article here). Already this year, 33 states have considered some form of "right to repair" legislation. The latest of these legislative efforts comes out of California, where on September 13, the Senate unanimously passed SB-244, the Right to Repair Act. Once Governor Newsom signs the bill into law, California will join Colorado, New York, and Minnesota as the fourth

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state to enact the “right to repair” legislation. We expect more states to follow.

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ENVIRONMENTAL UPDATES

MICHIGAN AG BRINGS PFAS LAWSUIT AGAINST THE GERALD R. FORD INTERNATIONAL AIRPORT AUTHORITY

By Troutman Pepper State Attorneys General Team on September 21, 2023

Michigan Attorney General (AG) Dana Nessel has filed suit against the Gerald R. Ford International Airport Authority to enforce demands by the Michigan Department of Environment, Great Lakes, and Energy (EGLE) related to alleged per- and polyfluoroalkyl substance (PFAS) contamination of the regional drinking water supply caused by the airport authority.

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TENNESSEE-LED COALITION OF 22 STATE AGS SENDS WARNING LETTER TO FINANCIAL SERVICE PROVIDERS COMMITTED TO “NET-ZERO” EMISSIONS

By Troutman Pepper State Attorneys General Team on September 19, 2023

On September 13, Tennessee Attorney General (AG) Jonathan Skrmetti sent a letter to members of the Net Zero Financial Service Providers Alliance (NZFSPA) warning that their commitment to support “global net zero greenhouse gas emissions by 2050 or sooner” may violate state and federal law. Specifically, Skrmetti — and the 22 AGs who co-signed his letter — expressed “concerns” that NZFSPA’s commitments “may run afoul of” federal antitrust and state consumer protection statutes. The AGs request that NZFSPA members respond by October 13, providing detailed information regarding their “commitments and related policies.”

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ALCOHOL AND TOBACCO UPDATES

“PLACES OF BUSINESS” MATTER IN THE VIRGINIA ALCOHOLIC BEVERAGE CONTROL ACT

By John West and Nick Ramos on October 2, 2023

As we previously reported, most states authorize direct-to-consumer (DTC) shipments of wine if the shipper has obtained the correct license, but this area of law has continued to evolve through litigation. Recently, the Virginia Court of Appeals decided a case involving whether an out-of-state online wine retailer (the retailer) was required to maintain multiple licenses for multiple out-of-state locations. This case should be of interest to any multistate wineries, breweries, or retailers selling and shipping wine or beer to consumers.

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FDA RAMPS UP ENFORCEMENT AGAINST FLAVORED DISPOSABLE E-CIGARETTES AS EXTERNAL

PRESSURES MOUNT

By Bryan Haynes, Agustin Rodriguez, Michael Jordan, and Zie Alere* on September 29, 2023

In September, the U.S. Food and Drug Administration (FDA) issued two new rounds of warning letters to online retailers, manufacturers, and distributors for reportedly selling or distributing unauthorized e-cigarette products. Notably, FDA's most recent letters target several popular disposable flavored products, including Elf Bar, EB Design, Lava, Cali, Bang, and Kangertech, which FDA states are particularly appealing to youth. FDA also sought civil money penalties against 22 retailers for failing to comply with prior warning letters and, for the first time, sought the maximum penalty allowed by law.

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FTC UPDATES

ADDRESSING COMPETITION CONCERNS IN THE DEVELOPING GENERATIVE AI INDUSTRY: KEY INSIGHTS FROM THE FTC'S ANALYSIS

By Ketan Bhirud, Drew Mann, and Trey Smith on September 19, 2023

Ketan Bhirud, Drew Mann, and Trey Smith discuss the Federal Trade Commission's role in competition enforcement, contextualize the FTC's analysis of the generative AI industry and provide key takeaways for stakeholders to consider during a period of regulatory uncertainty.

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FTC JUDGE RULES THAT INTUIT'S "FREE" SERVICE ADS VIOLATED THE FTC ACT

By Troutman Pepper State Attorneys General Team on September 15, 2023

On September 8, the Federal Trade Commission's (FTC) Chief Administrative Law Judge D. Michael Chappell issued an initial decision ruling that Intuit Inc. (Intuit) "engaged in deceptive advertising in violation of Section 5 of the FTC Act" by misleading consumers with its "free" service claims. In the decision, which is subject to appeal to the full commission, Judge Chappell found that Intuit deceptively marketed TurboTax, its online tax preparation filing software, "when it ran ads for 'free' tax products and services for which many consumers were ineligible."

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BIPA UPDATES

ILLINOIS COURT ELIMINATES ANOTHER BIPA DEFENSE

By Molly DiRago, Ketan Bhirud, and John Sample on September 18, 2023

This summer, the U.S. District Court for the Southern District of Illinois further bolstered Illinois' Biometric Information Privacy Act's (BIPA) nearly unfettered private right of action in *Lewis v. Maverick Transportation*. In a

simple but firm four-page ruling, Judge Rosenstengel denied the defendant's motion to dismiss, holding that a cause of action under BIPA does not require a plaintiff to plead that data collected is used for identification purposes. The ruling serves to highlight the apparent lack of any real technical defenses to the statute — making it imperative that companies focus on strict compliance before they find themselves in court.

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CANNABIS UPDATES

STATE ATTORNEYS GENERAL PUSH FOR FEDERAL ACTION ON CANNABIS BANKING REFORM

By Jean Smith-Gonnell, Agustin Rodriguez, and Cole White on September 27, 2023

State attorneys general (AG) are continuing their push for cannabis banking reform, underscoring the need for action to promote public health and safety in legal cannabis markets. On Wednesday, a bipartisan group of 22 state AGs sent a letter to Congress urging passage of the Secure And Fair Enforcement Regulation (SAFER) Banking Act, coinciding with the bills' advancement through the Senate Banking Committee and on to the Senate floor. The act would create a safe harbor for financial institutions, which provide services to state-legal cannabis businesses or service providers, enabling the industry to access basic financial services more easily.

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SENATE BANKING COMMITTEE TO ADVANCE SAFER BANKING ACT

By Agustin Rodriguez, Jean Smith-Gonnell, and Christina Sava on September 26, 2023

The Senate Banking Committee is scheduled to mark up a new version of the SAFE Banking Act, now known as the "Secure And Fair Enforcement Regulation Banking Act" or the SAFER Banking Act (SB 2860). The revised bill addresses concerns around potential bad actors, but also establishes guardrails in the case that federal regulators may want to put pressure on banks to not service certain customers, such as "marijuana-related businesses" or other high-risk industries.

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THE EVOLVING CANNABIS INDUSTRY IN NEW YORK: FINAL REGULATIONS AND THE TRUE PARTY OF INTEREST RULE

By Agustin Rodriguez, Jean Smith-Gonnell, and Cole White on September 25, 2023

On September 12, the New York Cannabis Control Board (CCB) approved final regulations governing the adult-use cannabis industry in New York, marking a long-awaited moment for industry participants and state regulators alike. The CCB's approval signifies a significant step forward for the state's cannabis market. The regulations are designed to govern all aspects of the industry, from cultivation and processing to distribution, retail, on-site consumption, and delivery services. Among these regulations, one rule stands out for its complexity and potential impact on industry participants: the definition of a "true party of interest."

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LEGAL CANNABIS ON TRIAL: FEDERAL PREEMPTION AND CONNECTICUT'S CANNABIS CHALLENGE

By Agustin Rodriguez, Jean Smith-Gonnell, and Cole White on September 25, 2023

On August 9, a lawsuit was filed in Connecticut that aims to stop all legal cannabis activity in the state and declare the state's 2021 legalization framework as unconstitutional. The complaint, filed by a local homeowners advocacy group against the Zoning Board of the City of Stamford and the Stamford Mayor, alleges that Connecticut's legalization framework, the Responsible and Equitable Regulation of Adult-Use Cannabis Act (RERACA), violates both the state and federal constitutions by legalizing federally prohibited conduct, and is therefore preempted under both. In addition, the complaint alleges that the state's social equity council violates the Connecticut constitution by providing exclusive public emoluments or privileges to certain groups based on race, and that the approval by certain board members of changes in zoning regulations was invalid due to several board members terms having previously expired.

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HHS PROPOSES RESCHEDULING CANNABIS TO SCHEDULE III – WHAT IT MEANS FOR THE INDUSTRY

By Agustin Rodriguez, Jean Smith-Gonnell, and Cole White on September 11, 2023

The cannabis industry in the U.S. is on the cusp of a potential transformation. On August 29, the U.S. Department of Health and Human Services (HHS) made a significant recommendation that could reshape the legal and regulatory landscape surrounding cannabis. In this post, we will delve into HHS's groundbreaking proposal to reschedule cannabis from its current classification as a Schedule I substance to Schedule III under the Controlled Substances Act (CSA), and the effect that rescheduling may have on cannabis industry participants. While this recommendation represents only the first step in the rescheduling processes, it is essential to understand the implications for various stakeholders.

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STATE AG UPDATES

MAKING AN IMPACT: STATE ATTORNEYS GENERAL RACES IN 2023 AND BEYOND

By Ketan Bhirud, Chris Carlson, Michael Lafleur, John Sample, and Whitney Shephard on September 7, 2023

State Attorneys General (AGs) uniquely wield power to enforce the law, direct policy, and effectuate political goals. Exercising their civil prosecutorial authority, State AGs have redefined priorities of paramount concern to CEOs and in-house legal counsel that impact the corporate and commercial landscape.

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STATE AGS SETTLE WITH CHOICE HOTELS OVER HIDDEN "RESORT" FEES

By Troutman Pepper State Attorneys General Team on September 28, 2023

Four state attorneys general (state AGs) – Colorado, Oregon, Pennsylvania, and Texas – have announced resolutions with Choice Hotels International, Inc. (Choice Hotels), a prominent hotel conglomerate known for operating brands like Quality Inn, Sleep Inn, and Econo Lodge related to the company's practice of charging hidden "resort" fees.

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CALIFORNIA AG REACHES SETTLEMENT WITH BIOTECH COMPANY OVER MARKETING OF ITS GENETIC TESTING

By Troutman Pepper State Attorneys General Team on September 27, 2023

On September 25, California Attorney General (AG) Rob Bonta announced a settlement with Biora Therapeutics, Inc. (Biora) regarding misleading claims the company made concerning the cost of its genetic testing services. Under the settlement agreement, Biora must waive all California customers' outstanding debts and pay $200,000 in penalties.

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AGS CALL FOR CONGRESS ACTION ON AI-GENERATED CHILD ABUSE CONTENT

By Troutman Pepper State Attorneys General Team on September 12, 2023

On September 5, the attorney generals (AGs) of 54 U.S. states and territories called on Congress to address bad actors who generate child sexual abuse material (CSAM) using artificial technology (AI). Framing the issue as a "race against time," the letter highlights the harms of AI-generated CSAM, and asks Congress to study and propose solutions.

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Stephanie Kozol, Senior Government Relations Manager – State Attorneys General, also contributed to this newsletter.

** Zie Alere and McKayla Riter are not licensed to practice law in any jurisdiction; bar application pending.*

Our Cannabis Practice provides advice on issues related to applicable federal and state law. Marijuana remains an illegal controlled substance under federal law.

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