

CFPB Warns Digital Marketers, Loops In State AGs

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In a recent interpretive rule announced on August 10, 2022,—and unveiled at a summit of the National Association of Attorneys General—the CFPB stated that digital marketers are subject to the CFPB’s jurisdiction, and expressly warned that it may take enforcement action against these entities. Such enforcement is likely to concern anti-discrimination provisions, and the new rule notes that State Attorneys General have jurisdiction to enforce these rules as well.

Prior to the CFPB’s August 10 rule, digital marketers—companies that market to consumers through social media, websites, and other online and digital channels—may have considered themselves outside the reach of the Consumer Financial Protection Act of 2010 (CFPA), which provides that an entity is not a covered “service provider” if it provides “time or space” for an advertisement for a consumer financial product or service through print, television, or electronic media.

In its new interpretive rule, however, the CFPB announced that it believes digital marketers are *not* exempt if they are “materially involved” in the development of a “content strategy” for the marketing of financial products, and thus are covered service providers under the CFPA. The CFPB noted the evolution of modern digital ad targeting, describing how instead of just providing a forum for an ad, digital marketers are increasingly involved in the selection of prospective customers or the placement of content to affect consumer behavior, often based on the gathering of consumer data. Whereas the former practices would not be covered, the CFPB contends that the latter are more similar to conduct that would typically be performed by persons covered by the CFPA. The rule singled out practices such as lead generation, customer acquisition, and other marketing analysis or strategy using data and technology, as amounting to “material” involvement and thus covered behavior.

The new rule is a signal that the CFPB will be increasing enforcement in this area. In its accompanying press release, it described the new rule as a “warning” to digital marketing providers, and CFPB Director Rohit Chopra stated, “When Big Tech firms use sophisticated behavioral targeting techniques to market financial products, they must adhere to federal consumer protection laws. . . . Federal and state law enforcers can and should hold these firms accountable if they break the law.”

In his remarks at the rule’s unveiling, Chopra also encouraged state attorneys general to pursue claims under the Consumer Financial Protection Act for any misconduct involving consumer financial products or services, including as to digital marketers.

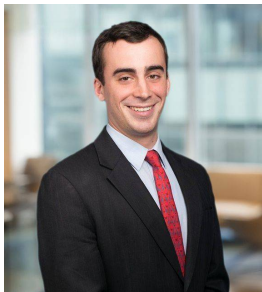
The rule’s reference to “state law enforcers” is notable. The rule was first unveiled by Director Chopra during a summit of the National Association of Attorneys General, on consumer protection in the digital world. In his prepared remarks, Chopra emphasized the “role of state enforcers in policing unlawful conduct at the intersection of consumer finance and digital marketing.” The interpretive rule notes state AG jurisdiction, and the CFPB has stated previously that state enforcement authorities also have jurisdiction to enforce the CFPB.

Substantively, a stated purpose of this effort by the CFPB is to address discrimination, which the CFPB has raised as a concern with regard to AI and machine learning. The new rule warns that the UDAAP provision (unfair, deceptive and abusive acts/practices) will be used to combat the use of protected characteristics to make marketing decisions (*i.e.* digital redlining).

The CFPB has taken other actions directed towards discrimination more broadly. It recently updated its Examination Manual to include discrimination as a part of UDAAP, and the agency is currently litigating the reach of ECOA (Equal Credit Opportunity Act) to digital marketing. In July 2019, we publicly highlighted the use of UDAAP and similar authority as a basis for enforcement actions alleging discrimination in the use of digital tools.

Companies involved in digital marketing should review the new interpretive guidance carefully, re-review their practices to consider whether they may be potentially subject to enforcement action at the state or federal level, and be on the lookout for any potential challenges to the new rule.

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