

CFPB's New Interpretive Rule Sets Sights on Digital Marketing Vendors

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On August 10, the CFPB issued an interpretive rule stating that digital marketing providers that are involved in the identification or selection of prospective customers or the selection or placement of content to affect consumer engagement including purchase or adoption behavior, are subject to the CFPB's jurisdiction. The rule ostensibly clarifies the scope of companies that are "service providers" under the CFPB's authority to include digital marketing providers, and thereby subjecting them to the CFPB's authority to prohibit UDAAPs.

The CFPB's jurisdiction applies generally to a "covered person," which is "any person that engages in offering or providing a consumer financial product or service." The Bureau's jurisdiction also extends to "service providers" that provides a "material service" to a covered person in connection with the offering a consumer financial product or service. However, the term "service provider" does not include those providing either (i) "a support service of a type provided to businesses generally or a similar ministerial service" or (ii) "time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media."

The interpretive rule states that digital marketing providers are service providers to the extent they are involved in the development of content strategy, identify or select prospective customers or select or place content in order to encourage consumer engagement with advertising. The CFPB also stated that digital marketers engaged in this type of ad targeting and delivery are not merely providing ad space and time, and they do not qualify under the "time or space" exception.

The rule also explains that "states, and other consumer protection enforcers can sue digital marketers" that may be liable for UDAAPs. In a related statement, CFPB Director Rohit Chopra stated that "[w]hen Big Tech firms use sophisticated behavioral targeting techniques to market financial products, they must adhere to federal consumer financial protection laws.

Putting It Into Practice: The rule is critical for third-party purveyors of data, including numerous marketing strategy companies that will find themselves subject to potential scrutiny, particularly if the

CFPB views the data as a conduit for discrimination, which the CFPB recently deemed to be a UDAAP (see our previous blog post [here](#)). In addition, the CFPB has routinely held service providers accountable for knowingly or recklessly providing “substantial assistance” to companies that violate consumer financial services laws. Such substantial assistance is deemed to be in violation of the law to the same extent as the person to whom such assistance is provided. Within the context of digital marketing providers, the use of the substantial assistance enforcement mechanism may re-emerge as a common way for the CFPB to go after parties that might not otherwise appear to have engaged directly in any illegal activity.

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National Law Review, Volumess XII, Number 230

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