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On August 10, 2022, the Consumer Financial Protection Bureau issued an interpretive rule stating that digital marketing providers that "commingle" the targeting and delivery of advertisements to consumers on behalf of financial services companies are subject to the CFPB's jurisdiction. The interpretive rule arguably builds the jurisdictional groundwork for further action in connection with the CFPB's market monitoring initiatives around technology company data collection. It also expands the scope of entities that are "service providers," pursuant to the Consumer Financial Protection Act, and therefore subject to the CFPB's authority to prohibit unfair, deceptive, or abusive acts and practices (UDAAP), which the CFPB also now interprets as encompassing discrimination.

Overview of CFPB's interpretive rule

As a general matter, the CFPB has jurisdiction over a "covered person," which is an entity that offers or provides a financial product or service for use by consumers primarily for personal, family or household purposes. The CFPB also has some jurisdiction, including with respect to prohibiting unfair, deceptive, and abusive acts or practices, over "service providers," which are entities that provide a material service to a covered person in connection with their offering of a consumer financial product or service. However, Congress carved out from the definition of a "service provider" an entity that provides ministerial support to covered persons or "time or space" for an advertisement for a financial product or service through print, newspaper or electronic media.

Under this new interpretation, the CFPB indicates that digital marketing providers are providing a material service, and are therefore service providers when they identify or target prospective customers and/or select or place content to affect consumer engagement. The CFPB also states that a digital marketing company that does more than provide "time or space" for advertisements falls outside the scope of the congressional service provider exception, and therefore comes under the aegis of the CFPB. As an example, the CFPB offers that a digital marketing provider would come under its jurisdiction as a service provider if it targets or delivers advertisements to users with certain characteristics – even if those characteristics are chosen by the financial services provider – or if it plays a role in delivery and audience selection, such as through algorithms or use of data analytics.

CFPB's tying of UDAAP to discrimination becomes more critical for digital marketing companies

While certain areas of CFPB jurisdiction are murky – for instance, the CFPB is currently litigating over the reach of the Equal Credit Opportunity Act (ECOA) to marketing practices – one area is crystal clear: The CFPB has asserted that it has the authority to take action to prevent a service provider from committing or engaging in UDAAP. Notably, on March 16, 2022, the CFPB decreed that a discriminatory act, such as engaging in targeted advertising or marketing in a discriminatory way, constitutes an "unfair" practice. Thus, even if a digital marketing company's practices are not subject to ECOA, the CFPB could claim that the company's strategies were nevertheless discriminatory, and therefore unfair and a violation of federal law. (The Department of Justice recently entered into a settlement over allegedly discriminatory digital marketing practices pursuant to the Fair Housing Act, but without reference to ECOA, the latter of which being the law within the CFPB's jurisdiction.)

What to expect?

Financial services companies have long monitored their own marketing activities for fair lending and UDAAP risk, and also have sought to oversee their vendors' practices. While this announcement generated headlines about what it means for Big Tech, there are numerous lead generators and marketing strategy companies that will, based on the CFPB's pronouncement, find themselves subject to potential scrutiny. Furthermore, in unveiling the interpretive rule, CFPB Director Rohit Chopra reiterated that state attorneys general can bring cases under the Consumer Financial Protection Act, and invited them to pursue claims against digital marketing companies.

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