

CFPB Warns Digital Marketers About ‘Abusive’ Steering Practices

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On February 29, 2024, the Consumer Financial Protection Bureau (CFPB) issued [Circular 2024-01](#), warning operators of “digital comparison-shopping tools” and “lead generators” that they may be “covered persons” subject to CFPB jurisdiction **and** their activities may put them at risk of engaging in “abusive” acts or practices in violation of federal law.

Specifically, the circular describes in detail how certain advertising compensation models that incentivize the promotion of products in the operator or lead generator’s financial interest over that of the consumer’s may constitute an abusive act or practice. In light of this circular – and the CFPB’s [recent push to expand jurisdiction](#) over nonbank providers of financial services – operators, their affiliates, and other financial institutions using online product comparison tools should review their marketing practices and third-party relationships.

CFPB asserts jurisdiction over comparison-shopping websites

Many consumers visit operators to compare costs, features, or other terms for a set of comparable financial products or services. Similarly, lead generators may advertise financial products to consumers, and then sell information they collect through consumer engagement with these advertisements to third-party financial services providers.

The Consumer Financial Protection Act prohibits “covered persons” and “service providers” from engaging in any abusive act or practice. As a predicate to its guidance, the CFPB describes how operators and lead generators can either be “covered persons” or “service providers” – and therefore subject to CFPB supervision and enforcement, depending in part on their business model. The CFPB takes the position that certain operators or lead generators may be sufficiently engaging with consumers such that they are “brokering” a credit product – an activity that is expressly regulated by the CFPB. However, even if the entity is not actually brokering loans, the CFPB also could claim the operator or lead generator is providing consumers with “financial advisory services,” another defined activity that brings an entity under the CFPB’s purview as a covered person. Failing that, the CFPB previously has indicated it considers certain of these businesses to be “service providers” to actual providers of financial services, and therefore subject to CFPB jurisdiction (as [addressed in more detail in a 2022 interpretive rule](#)).

When is a digital comparison-shopping presentation ‘abusive’?

An act is “abusive” when, among other things, it takes “unreasonable advantage” of the consumer’s “reasonable reliance” on the institution to act in the interests of the consumer. (For a refresher, check out our [April 2023 client alert](#) on the CFPB’s abusiveness policy statement.) As highlighted in the circular, operators of “digital comparison-shopping tools” may have a higher risk of being accused of engaging in allegedly abusive acts or practices where their stated goal is to help consumers make informed decisions about available financial products and services. When an operator presents more expensive or less favorable products to consumers based on the operator’s own financial interests, the CFPB suggests there is risk of abusive conduct. The CFPB also warns it considers an operator or lead generator’s ability to gather data as a benefit relevant to its abusive analysis. The circular further indicates that the CFPB will carefully consider any affirmative (or implicit) representations made by operators to consumers

about the nature of their services in evaluating potential abusiveness.

To illustrate its concerns, the CFPB details eight hypothetical abusive presentation models. A number of the examples merely highlight the practice of promoting a particular product based on financial gain to the operator rather than the consumer's interest, particularly when the consumer can identify product features of importance to them. However, the CFPB suggests that other presentation features intended to influence consumer choice, such as a dynamic user interface or requiring fewer clicks to access product information, also will be evaluated. The circular also indicates that steering consumers to certain products to satisfy advertising volume allocations, or using dynamic bidding or a "bounty system" to determine the presentation of offers to consumers with certain demographic or other characteristics, could be abusive.

Looking ahead

This circular is part of the CFPB's multiyear push to target dark patterns in the offering of financial products and services, and to make unfair, deceptive, or abusive acts and practices (UDAAP) concepts relevant to today's digital marketplace. Importantly, one of the reasons the CFPB issues circulars is to promote consistency in approach across enforcement agencies. To that end, the circular provides guidance specifically directed to other enforcement agencies – including the Federal Trade Commission (FTC), which has aggressively pursued alleged dark patterns, and state attorneys general, all of which are empowered to enforce the CFPB's abusiveness standard (in addition to their independent enforcement authority over unfair and deceptive practices).

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