



Financial Services Management

Digital Marketing

Cite

CFPB, Interpretive Rule, Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception

Recommended Distribution:

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https://files.consumerfinance.gov/f/documents/cfpb_time-or-space_interpretive-rule_2022-08.pdf

Impact Assessment

- CFPB enforcement powers pursuant to this policy could curb bigtech market power in customer-facing consumer finance if the policies defined here are enforced.
- All financial institutions will wish to ensure that third-party consultants, digital platforms, partnerships, and other relationships anticipate additional legal and reputational risk.
- Although directly applicable to digital marketers engaging in defined practices, financial institutions commingled with these activities or that retain them via third parties also face direct legal and reputational risk since the Bureau may hold them liable for the manner in which behavioral data, algorithms, and other data-driven consumer outreach are designed or deployed.

Overview

Continuing its practice of setting sweeping policy by administrative action without prior notice or comment, the CFPB has issued an interpretive rule sharply curtailing the extent to which digital advertising and market strategies are exempted from the legal and compliance obligations associated with most parties directly providing consumer financial products or services and those acting as servicers to these entities. The most immediate legal and reputational risk posed by this new policy is to technology-platform companies that use behavioral data to determine the products or services offered to consumers or those to whom consumers are directed. However, the new policy will have far broader reach if, as seems likely, the Bureau adds it to the arsenal already consisting of new policies stating its broad jurisdiction over nonbanks,¹ the use of artificial

¹ See CONSUMER41, *Financial Services Management*, April 27, 2022.

intelligence,² and the extent of its unfair and deceptive or abusive acts or practices (UDAAP) power.³

Impact

The same day this policy was released, CFPB Director Chopra gave a speech arguing that bigtech's power has virtually annihilated the "relationship banking" he believes essential to consumer protection. The Bureau is already seeking to protect relationship banking by targeting the level of big-bank consumer service,⁴ but the digital-marketing policy creates direct and immediate legal and reputational risk in contrast to the milder "request for information" the Bureau has so far deployed against the largest banks. As discussed below, the Bureau now believes that digital marketers provide their own platforms or financial-services companies with advertising and marketing targets that may be determined by opaque models that permit or even facilitate discrimination such as that cited in Mr. Chopra's speech with regard to Facebook's targeted rental-housing advertising subsequently found to violate the Fair Housing Act.

The Bureau asserts that its authorizing legislation gives it clear authority over "service providers," noting also that the law exempts service providers of "time or space" for advertising consumer-finance products via media also cited in law (e.g., print, "electronic media"). The Bureau argues that digital marketing, sometimes called "surveillance advertising," that commingles targeting and delivery of advertisements with activities such as algorithmic models or analytics and material involvement in content strategy (i.e., determining whom to target) do not fall within this "time and space" exception.

The rule also describes the manner in which granular data are used for advertising that may come under its authority, as well as noting traditional services from non-digital marketing and advertising providers such as deciding when to release an advertisement that may or may not fall under its purview. The distinction here for coverage by this rule appears to be use of models and AI/ML data that target consumers, but blurry boundaries between who is or is not a service provider may pose both compliance and enforcement challenges.

What's Next

This policy was released on August 10. It will be effective upon publication in the *Federal Register*. As with prior CFPB interpretive rules, this one asserts standing as a legal opinion that will guide future agency action that does not require public notice or comment. As with the other interpretive rules, it is likely that one or another company charged with a violation of this rule may challenge it on administrative-procedure grounds and perhaps even prevail. However, many companies will seek to avoid legal and reputational risk by ensuring compliance regardless of doubts about the Bureau's authority.

² See FAIRLEND11, *Financial Services Management*, June 1, 2022.

³ See CONSUMER39, *Financial Services Management*, March 22, 2022.

⁴ See CONSUMER43, *Financial Services Management*, June 16, 2022.

Analysis

The interpretive rule provides both background information and legal analysis supporting its conclusion that digital marketers are service providers subject to its authority. The gist of the distinction drawn between digital marketers that are service providers and those that are merely exempt advertisers is the extent to which “material” services such as targeting and delivery are performed in ways that identify or select prospective customers or select or place content to affect consumer engagement (e.g., purchases).

The Bureau in part supports this conclusion by noting that the “time and space” exemption is tied to one law for “ministerial” services and concludes that this guides its narrow reading of offering time and space to the equivalent of only a display function. The rule notes that traditional advertisers have long played a role deciding on matters such as which section of a newspaper should include a client’s advertisement, but it differentiates services such as these from content-strategy development.

The rule also notes that consultants and other third parties that provide marketing services may be service providers, with the rule providing some examples of when entities are or are not considered covered and thus under its authority.