



Financial Services Management

Consumer-Financial Product Marketing Practices

Cite

CFPB: Consumer Financial Protection Circular 2024-01, Preferencing and Steering Practices by Digital Financial Intermediaries for Consumer Financial Products or Services

Recommended Distribution:

Retail Finance, Marketing, Risk Management, Compliance, Policy, Legal, Government Relations

Websites:

https://files.consumerfinance.gov/f/documents/cfpb_digital-intermediaries_circular_2024-02.pdf

Impact Assessment

- Providers offering digital comparison-shopping tools or working with third-party sites and lead generators now have considerable legal and reputational risk if recommendations and leads are not generated solely with the consumer's interest in mind and without direct or indirect remuneration.
- Consumers may be better protected from opaque conflicts, but also more likely to choose products from a known provider even if these are not in their best interests given broader market offerings of which they are unaware.
- Non-profit or other comparison-shopping tools might substitute for those now offered by third parties and providers.
- The Bureau has indicated it is developing a precedent-setting tool for certain markets and may thus take the place of retail institutions and for-profit entities.
- Providers may be free to offer comparison-shopping tools even if these are conflicted as long as the tool is not a digital one.

Overview

The CFPB has issued a circular essentially banning digital and perhaps all other consumer-finance comparison-shopping and lead-generation tools for credit cards and other products not covered by prior orders. These activities could continue, but only as long as the comparison or lead is completely objective as the Bureau may come to judge it under complex and sometimes conflicting standards. The circular follows similar CFPB actions outside the Administrative Procedure Act even though the agency clearly intends to enforce its new approach both directly and in concert with other state and federal agencies.

Impact

This circular essentially upends a longstanding marketing practice of pitching products and services based not only on how an offer can best be differentiated from competitors for desired customers, but also on which products and services best fit the offering entity's strategic plan or, if the comparison-shopping or lead-generation platform is operated by a third party, the entity's reward based on consumer choices or volumes generated absent active "steering" to predatory or abusive options. Under this circular, marketing systems that take account of direct and perhaps also indirect rewards to the provider, shopping-site operator, and/or lead generator are now effectively banned, especially and most clearly if tools are offered on or operated via digital media.

The key to which comparison-shopping and lead-generating services may be sanctioned is whether relative remuneration varies among products displayed or if "other benefits" accrue to the provider or lead generator. The rationale for this standard is the Bureau's belief that consumers reasonably rely on these entities to reflect the consumer's best interest, creating opportunities for providers to take "unreasonable advantage." Thus, any methodology that does not put the consumer first may be found to be abusive under the Bureau's stringent standards.¹ Indeed, even asking a consumer to state his or her preferences may be a UDAAP since the Bureau believes that providers who know preferences may steer consumers to products that only appear to meet them.

Comparison sites may thus need to include all offerings and all features in ways consumers may find confusing. Lead generators could only point to products available in a consumer's area or by other criteria that do not reflect what the consumer might actually want or qualify for.

Tools based on algorithms may be particularly problematic. Here, the circular reiterates much of what is already spelled out in a prior CFPB interpretive rule on digital marketing.² Phrasing in some parts of the circular suggests that, as in this rule, the new comparison-shopping/lead-generation policy only applies to digital tools, but the circular also speaks more broadly in some sections. Thus, it may still be possible for providers or others to give consumers paper or other product-choice recommendations outside the scope of these consumer-protection standards. This could put consumers in still more danger or give those hoping for assistance at least one readily-available tool for product choice based on whether providers are willing to take the risk of providing product offerings that may transgress at least some aspects of this complex circular's requirements.

Further, the circular in several places not only addresses remuneration but also "other benefits." The Bureau does not go into detail on what these other benefits may be, but it does note that, for example, a credit-card company's comparison-shopping site that lists its own offerings in conjunction with others is considered abusive on its face.

While the circular is said not to cover pop-up or banner ads, comparison sites that do so for purposes of recommending a provider's additional services (e.g., credit counselling) are within its scope, as are systems promoting more costly

¹ See **UDAP8**, *Financial Services Management*, April 6, 2023.

² See **FINTECH30**, *Financial Services Management*, August 15, 2022

products. Working with an affiliate (e.g., a university) that creates the appearance of trust may also be deemed abusive based on the nature of the comparison-shopping or lead-generating system.

Simply using a program such as a chatbot to solicit consumer preferences is also said to create a consumer's reasonable assumption that the system is acting in his or her best interests. Lead generators producing different leads for consumers with similar profiles are also presumed to be acting abusively. It is possible, however, that receiving compensation may not be UDAAP if compensation is not related to consumer choice or volumes of generated leads.

The statement accompanying the circular makes it clear that the agency's most immediate target is credit-card companies. Perhaps sparked by a pending card-company merger, the statement declares that credit-card lending is non-competitive and thus requires not only pending restrictions on late fees,³ but also a flat ban on the way in which comparison shopping and lead generation are often conducted by private entities. The Bureau plans to introduce its own credit-card shopping tool, an unusual venture for a government agency that may create significant market problems if providers do not think the agency's site is accurate or current. Such a Bureau tool may also be precedent-setting for other retail-finance sectors the Bureau thinks are insufficiently competitive.

What's Next

This circular was issued on February 29, effective immediately. It follows a CFPB advisory to mortgage bankers on "pay-to-play" lead generators and other enforcement actions aimed at digital "dark patterns." As noted, the CFPB plans to release a comparison-shopping tool for credit cards and similar sites for other retail-banking services are possible; timing for launch is provided.

Analysis

A. Legal Considerations

The circular first lays out the Bureau's legal rationale for reading its authorizing statute as treating comparison-shopping and lead-generator activities as UDAAP based on performance compensation or "other benefits." This is based on the agency's view that the law gives it authority over consumer-finance companies and entities providing services to them along with the fact that some covered activities may in their own right be providing financial advice. The circular states that the nature of a consumer's interaction with the covered tool will inform the Bureau's view of how a shopping tool functions, with even tools that do no more than offering to "match" a consumer with a desired product or service subject to sanction.

³ See **CREDITCARD36**, *Financial Services Management*, February 8, 2023.

B. Abusive Practices

Based on the complex guidance described above, the circular also includes a non-exhaustive list of preferencing actions that may be considered UDAAP. These are:

- product features (e.g., more dynamic content, fewer clicks) that lead consumers to preferred products, including self-preferencing;
- features reflecting payment for enhanced presentation;
- direction to consumers toward higher-fee products;
- payments related to lead-generator incentives such as the number of leads generated in a period of time resulting in steering to increase volume;
- use of dynamic bidding to result in demographic or similar preferences;
- representations that products presented are “relatively” comprehensive or based on criteria such as price when products are presented based on compensation or other benefits;
- shopping tools purporting to reflect consumer interests that actually present product subsets; and
- presentation of products that are inconsistent with the consumer’s expressed interests. Indeed, soliciting preferences creates a reasonable assumption that the site is in the consumer’s best interest when it is not by virtue of the action of asking for preferences.