LEGAL UPDATES

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CFPB Guidance on Digital Comparison-Shopping Tools, Round Two

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On February 29, 2024, the CFPB issued Consumer Financial Protection Circular 2024-01: Preferencing and steering practices by digital intermediaries for consumer financial products or services. The circular provides guidance on applying the "reasonable reliance" prong of the Consumer Financial Protection Act (CFPA) abusiveness prohibition, 12 U.S.C. § 5531(d)(2)(C), to operators of digital comparison-shopping platforms and lead generators. This is the second time in just over a year the CFPB has addressed digital comparison-shopping platforms for financial services products, following the February 2023 Real Estate Settlement Procedures Act (RESPA) Advisory Opinion. The circular offers fresh insights into the CFPB's interpretation of the abusiveness standard while expanding the principles underlying the RESPA Advisory Opinion to a broader array of consumer comparison-shopping tools.

Circular content

Summary of scope

CFPB question presented: Do digital comparison-shopping tool operators or lead generators violate the CFPA by preferencing products or services based on financial or other benefits to the operator?

CFPB response: Operators of digital comparison-shopping tools can violate the abusiveness prohibition if "they distort the shopping experience" by steering consumers to certain products or services based on remuneration to the operator, and lead generators can violate the prohibition if they steer consumers to one participating financial services provider instead of another

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based on compensation received. And where consumers reasonably rely on a shopping tool operator or a lead generator to act in their interests, the operator or lead generator can take unreasonable advantage of that reliance by giving preferential treatment to their own or other products or services through steering or enhanced product placement in exchange for financial or other benefits.

Statutory basis/abusive act or practice

The CFPA prohibits any covered person or service provider from engaging in an unfair, deceptive, or abusive act or practice. Under the CFPA's abusiveness prohibition, an act or practice is abusive if it "takes unreasonable advantage" of certain circumstances, including in the context of "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." The CFPB observes that a shopping tool operator or lead generator may qualify as covered persons under the CFPA depending on their role and other circumstances. The circular notes that in certain circumstances consumers may reasonably rely on operators or lead generators to act in their interests.

Reasonable reliance on platform to act in the consumer's interest

The circular describes how for digital comparison-shopping tool operators, the CFPB will look at several factors to determine whether a consumer reasonably relied on the operator to act in the consumer's interest. First, reasonable reliance may exist because consumers assume that the purpose of a shopping tool is to assist consumers in selecting products or services based on their interests. Further, operators may suggest either openly or latently that their shopping tool is aligned with consumer interests, which can lead consumers to reasonably expect that the tool's recommendations are made with their best interests in mind. An operator may expressly claim their advice is unbiased or imply it by highlighting "expertise," suggesting that their rankings are research-based, offering to assist in reaching financial objectives, or promising to match consumers with the best offers. The reputation of an associated trusted institution, such as a college or university, may reinforce the consumer's reasonable reliance.

For consumer-facing lead generators, the circular explains that consumer reliance may be produced through the lead generator's role as an intermediary between consumer and lender and via explicit or implicit communications to the consumer. The risk of consumer reliance increases in instances where lead generators obscure their true function in the market and present themselves as a tool to connect with reputable lenders or the best financial products or services, based on the consumer's interests.

The circular explains that consumer interests are not advanced when consumers are steered to more expensive or less favorable products, either because those products provide more revenue for the operator or its affiliates, or when lead generators steer them to such products based on higher bids from providers.

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Unreasonable advantage taking

The circular explains that shopping tool operators or lead generators may take unreasonable advantage of reasonable consumer reliance when their business models offer preferential treatment (including steering) towards certain consumer financial products or services to increase their own financial or other benefits. The circular encourages government enforcement agencies to closely examine "bounty" or bidding schemes. This concern may be partially mitigated when operators or lead generators are compensated by providers but do not consider that compensation in connection with decisions about placement or display of products or services. Unreasonable advantage taking may also occur when operators steer consumers towards products or services that may be more expensive or less favorable to the consumer, including their own products (or their affiliates' products). This includes operators using ties with reputable institutions to boost their income with recommendations misaligned with consumer interests.

Examples of preferencing or steering arrangements

The circular provides a non-exhaustive list of potentially problematic arrangements where, regardless of consumer interest, the operator of a digital comparison-shopping tool or lead generator might direct customers to particular financial products or services in order to gain financial or other benefits for themselves. These types of arrangements may become abusive when the operator or lead generator "takes unreasonable advantage of the consumer's reasonable reliance on the operator or lead generator to act in the interests of the consumer." The circular provides the following examples of such arrangements:

Highlighting products due to financial incentives to the operator/generator, such as a tool operator promoting a product with more visibility or ease of access because of the operator's financial considerations, including products of the operator themselves (i.e., self-preferencing).

Presenting certain products as "featured" because they are offered by the operator or paid for by a third-party provider. The circular elaborates in a footnote that consumers may be less likely to have the impression that a product is being presented as in their interest if the operator visually separates sponsored and advertised content from the tool's presentation of recommendations.

Preferring products that pay higher fees to the operator/generator, like a tool operator routinely matching consumers with a loan provider that pays the highest fee per application.

Using volume thresholds to drive steering, where an operator may only focus on a provider's products if they need to reach a certain number of leads within a time frame to receive payment.

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Implementing dynamic bidding or "bounty" systems to determine which offers are presented to consumers in a specific demographic or based on other characteristics.

Misrepresenting the breadth of choices available, by suggesting a tool's options are comprehensive based on criteria like price, terms, quality, or security when, in fact, inclusion is based on financial or other benefits obtained by the operator.

Misleading product matches based on consumer preferences, where operators create an appearance of objectivity but actually prioritize results that benefit them financially.

Distributing leads to lenders without regard for consistency, where consumers with similar characteristics may receive different offers.

Analysis and key takeaways

CFPB's first deep dive on reasonable reliance: The CFPB continues to take an evolutionary approach to abusiveness. The circular fills in some interpretive space on an element that hasn't received much attention to date. The 2023 Abusiveness Policy Statement included only a short discussion of reasonable reliance. The CFPB also has not relied upon this prong in any rulemakings, whereas "lack of understanding" and "inability to protect" were addressed in the CFPB's two payday rulemakings and the pending Non-Sufficient Funds Fee rulemaking. Thus, there is no prior rule preamble or UDAAP findings available to glean for interpretive meaning.

Overlap with RESPA Advisory Opinion: The circular creates a Venn diagram of coverage with the RESPA Advisory Opinion. A footnote clarifies that the shopping tools covered by the circular include the mortgage shopping platforms discussed in the Advisory Opinion. But unlike the Advisory Opinion, the circular explicitly applies to both lead generators and shopping-tool operators, together described as "digital intermediaries." The circular's concepts and examples largely track the Advisory Opinion, but the circular elaborates on them and offers additional examples. There also are complex substantive interplays between the RESPA section 8 requirements and UDAAP prohibitions.

Treatment of advertising: The circular asserts that the circular's scope does not cover arrangements involving payment for banner or pop-up ads that are "clearly set apart" from shopping tool content. A footnoted discussion describes potential factors the CFPB believes would impact whether an ad is considered separate from the tool's content, including (a) an evaluation of "whether

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content is completely visually separate from the presentation of product recommendations or results, such that paid content is not embedded or intertwined with [the] presentation of product rankings or recommendations," and (b) "whether paid content is presented as a recommendation" of the operator. But the CFPB then cautions that whether advertising content is separate from the shopping tool is "fact specific" and "will often include consideration of other factors." Therefore, the circular's carve-out for advertising may be more limited than it first appears.

Lead generation focus: The circular aligns with CFPB's renewed attention on lead generation issues. The pending Fair Credit Reporting Act rulemaking would address data brokers and aggregators. Some of the examples insinuate that lead generation platforms with prominently disclosed pricing arrangements nonetheless would take unreasonable advantage of consumers' reasonable reliance. The circular also refers back to an enforcement action against a lead aggregator under the CFPA in the CFPB's early years (D&D Marketing), which did not involve the reasonable-reliance prong but may provide color as to one set of lead generation practices with which the CFPB is concerned.

No consideration of disclosures: Many comparison-shopping tools and lead generator websites conspicuously disclose the fact that they may receive payment from the providers of the products or services included. They may further explain whether any amount or receipt of payment impacts the inclusion, ranking, or placement of the various products or services. Interestingly, the circular omits any mention of the role proper disclosures may play in the compliance evaluation. This does not accord with how the insufficiency of disclosure is frequently cited by the CFPB and the FTC as a primary reason that an act or practice may be viewed as a UDAAP. Thus, this circular provides zero guidance on what role such disclosures may play in addressing any of the identified concerns. Moreover, from a statutory interpretation perspective, the sufficiency of a disclosure naturally impacts the "reasonableness" of the consumer's reliance, yet this point is unaddressed in the circular.

Another compliance check needed: The CFPB's incremental approach to guidance in this area will create burdens on shopping tool platform operators and participants to perform another compliance review just over a year after the RESPA Advisory Opinion came out. The CFPB did signal the potential for future guidance by discussing potential UDAAP issues in the RESPA Advisory Opinion, and the circular's accompanying press release references prior CFPB guidance addressing

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related concerns, including around "dark patterns." Nevertheless, digital comparison-shopping tool operators and participants should review the two CFPB guidance documents in tandem and consider re-evaluating their contractual arrangements and tool design and content elements to ensure compliance.

Choice of guidance vehicle: The CFPB released the guidance as a circular. This is a vehicle that the CFPB characterizes as a policy statement and that is addressed, not to the industry as guidance, but rather to parties with authority to enforce federal consumer financial law. CFPB has stated that circulars are intended to "promot[e] consistency in approach across the various enforcement agencies and parties" (see "About Consumer Financial Protection Circulars" on the CFPB's website). In contrast, the CFPB issued the RESPA Advisory Opinion as an interpretive rule. The circular and RESPA Advisory Opinion overlap in important ways as noted above, but the latter is a more formal guidance vehicle. It is possible the CFPB chose the circular format to encourage other federal and state regulators to exert enforcement authority in this area. Practically speaking, however, the industry often does not distinguish between the different types of CFPB guidance issuances, and the CFPB's messaging apparatus doesn't emphasize these fine legal distinctions. As a result, the effect is largely the same regardless of the vehicle used, which the CFPB undoubtedly understands.

Contact us

Husch Blackwell attorneys are available to help companies across the consumer financial services industry navigate the circular, its interplay with the RESPA Advisory Opinion, and its application to the multitude of business arrangements and technology platforms in today's market. One of the co-authors of this client alert was the CFPB's team lead for the RESPA Advisory Opinion and helped draft several CFPB rulemakings and policy statements utilizing abusiveness authority. If you have questions, contact Chris Friedman, Mike G. Silver, Leslie Sowers, Jake Huston, or your Husch Blackwell attorney.

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