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## CFPB Uses UDAAP Oversight Authority to Focus on Digital Marketers

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Continuing a recent trend, the CFPB has asserted that its oversight authority regarding unfair, deceptive, and abusive practices (UDAAP) to assert that certain digital marketers, including what it refers to as “Big Tech,” face potential UDAAP liability and oversight from the CFPB.

### **Digital Marketers, Including “Big Tech,” Who Are “Materially Involved” in Content Creation for Consumer Financial Products Are Subject to CFPB and Other Regulators’ Oversight and Enforcement, and Can Face UDAAP Liability**

In a recent Interpretive Rule, the CFPB clarified when digital marketers and digital providers of financial products would be subject to consumer financial services regulations. The CFPB pointed out specifically that this would apply to Big Tech firms that engage in such practices.

The rule applies to a digital marketer that “offers or provides a financial product or service for use by consumers primarily for personal, family or household purposes,” and who provide services such that they have “material involvement” with the party for whom they market. “Material involvement” of the marketer includes assisting with the identification or selection of prospective customers and placing content that affects consumer engagement or purchase behavior, the rule states. In its announcement of the Rule, the CFPB stated:

Digital marketers that are involved in the identification or selection of prospective customers or the selection or placement of content to affect consumer behavior are typically service providers for purposes of the law. Digital marketers acting as service providers can be held liable by the CFPB or other law enforcers for committing unfair, deceptive, or abusive acts or practices as well as other consumer financial protection violations.

The Interpretive Rule stated that this applies to digital marketers when their advertisements, algorithms and programs enable the company marketing to identify marketing targets "with the desired characteristics and determine whether and/or when specific consumers see an advertisement."

The CFPB made it clear that this Interpretive Rule applies to Big Tech. CFPB Director Chopra said: "When Big Tech firms use sophisticated behavioral targeting techniques to market financial products, they must adhere to federal consumer financial protection laws. Federal and state law enforcers can and should hold these firms accountable if they break the law."

There is an exception for entities that in traditional fashion, provide or arrange "time and space" for an advertisement through traditional media. In noting the limitations of the exception, the CFPB stated:

Digital marketing providers have transformed advertising. Traditional advertising relies on getting a product or service out to as wide an audience as possible ... Digital marketers, on the other hand, seek to maximize individuals' interactions with ads." Thus, digital marketers go beyond the traditional roles of "traditional media source" marketing companies.

### **The CFPB's Recent Use of UDAAP Authority to Expand Its Scope Without the Use of the Formal Rulemaking Process**

By asserting that UDAAP gives it authority to regulate entities, the CFPB has been setting forth expansive views of its oversight and enforcement authority without the need to do a proposed rule that would require public comment and adherence to the Administrative Procedures Act. Buchalter has recently done Client Alerts about this use of UDAAP authority to claim oversight or enforcement authority without the issuance of a proposed rule in regard to:

- [Financial institution data security](#); and
- [Discrimination regarding financial services products beyond the loan products it traditionally oversaw](#)

As the CFPB continues to be ever-more active and assertive, its use of UDAAP as an authority-expanding tool may grow more frequent.

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