

## Advertising, Marketing & Promotions Alert

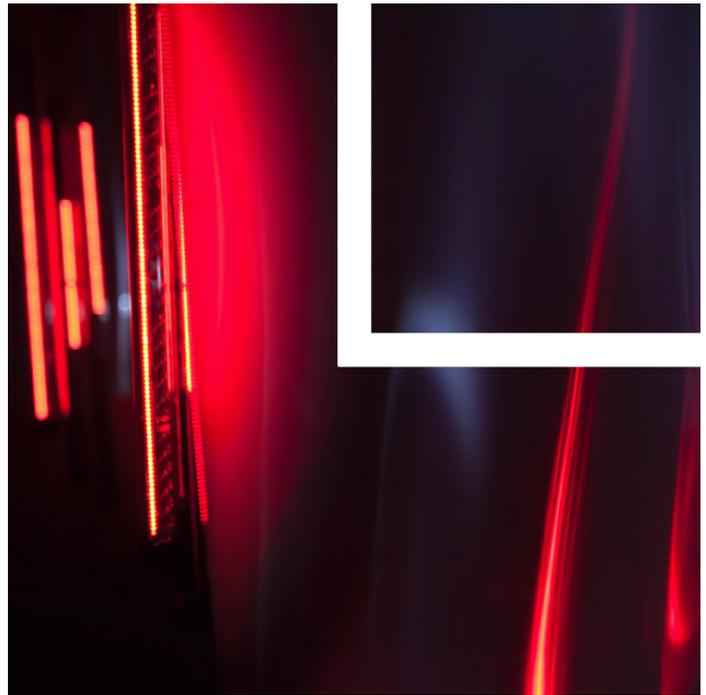
August 2022

# CFPB Clarifies “Time or Space” Exception and Scope of Service Provider

The Consumer Financial Protection Bureau (CFPB) recently issued an interpretive rule to clarify when digital marketers are exempt from the Consumer Financial Protection Act (CFPA) for merely providing “time or space” to financial services companies and when they are providing services beyond time or space, such as targeting and delivery services, which would subject them to direct liability under the CFPA.

The intent of the interpretive rule seems to have been to delineate when a digital marketer that provides time or space for an advertisement is—and is not—exempt from the CFPA. The rule also clarifies that digital marketers that provide digital content strategy for a financial services client, specifically identifying or selecting prospective customers or selecting or placing content in order to encourage consumer engagement with the client’s advertising—services commonly provided by media, creative, and other advertising or marketing agencies that do not provide time and space—are subject to the CFPA as service providers. The CFPA defines a service provider as “any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service.” The rule takes the position that digital marketing service providers offering targeted advertising and content strategy services fall within the scope of the CFPB’s unfair, deceptive, and abusive acts or practices (UDAAP) enforcement authority.

The CFPB clarified with this interpretive rule that digital marketers that provide additional services beyond time or space—i.e., beyond airtime or physical space for the ad—do not qualify for the exception. Specifically, the CFPB noted that those that provide digital space for advertising and ad targeting, as well as delivery services, are not solely providing airtime or physical space for ads and are



therefore not exempt from the CFPA. According to the CFPB, these entities are subject to the CFPA because the digital marketers’ ad targeting and delivery algorithms identify the audience with the desired characteristics and determine whether and when specific consumers see an advertisement. These digital marketers are subject to the CFPA even where the advertiser identifies to the digital marketer the exact audience set it wants to see its advertisements, because the digital marketers’ ad targeting and delivery algorithms select the audience with the desired characteristics and determine whether and when specific consumers see an advertisement. This is true even if the advertiser identifies particular users by name, because the digital marketer targets and delivers the advertisements to those users at specific times to increase or maximize engagement.

The CFPB goes even further by clarifying that any service provider that provides content strategy is subject to the CFPA. The definition that the CFPB uses for content strategy comes from an article on Digital.gov and is quite broad and vague—“the strategy for the distribution of th[e] content’ as well as ‘the set of methods and guidelines for the development and curation of content.”

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This definition arguably covers services provided by an agency. Indeed, the CFPB clarified that any entity providing lead generation, customer acquisition, or digital marketing analysis or strategy for a financial services client is involved in identifying or selecting prospective customers or selecting or placing content in order to encourage consumer engagement with the client's advertising, and therefore will be considered a service provider subject to the CFPB. The rule was less clear as to whether a creative agency that develops the content of the advertisement for a financial services client would also be a service provider and consequently have to comply with the CFPB. The CFPB seems specifically concerned about discriminatory acts and UDAAPs in the selection and placement of financial service advertising, so agencies should pay particular attention to their services in that space.

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## Related Professionals

Brian Heidelberger . . . . . bheidelberger@loeb.com  
Eyvonne Mallett . . . . . emallett@loeb.com  
John R. Monterubio Jr. . . . . jmonterubio@loeb.com

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