Agency Actions Show Shared Focus On Digital Ad Tactics

By **Kyle Tayman and Tierney Smith** (February 1, 2023, 4:54 PM EST)

Coordinated actions taken by federal regulators and enforcement agencies over the last year have demonstrated a new focus on assailing two distinct practices in digital advertising: the use of algorithms for targeting specific consumers and deceptive online marketing techniques, or dark patterns.

With a panoply of federal statutes and regulations at the agencies' disposal to hold parties accountable, and an interagency enforcement agenda that is more aligned now than ever, companies creating and facilitating digital advertisements should pay close attention.

Enforcement priorities among the Consumer Financial Protection Bureau, the Federal Trade Commission and the U.S. Department of Justice have not always been in sync, with the agencies sometimes taking a critical view of how the others allocate resources.
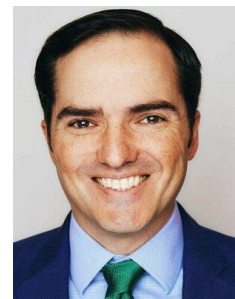
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However, following key personnel appointments within CFPB leadership that took effect in early 2021 — namely the appointment of former FTC Commissioner Rohit Chopra as director, and of former DOJ civil rights attorney Eric Halperin as assistant director for the Office of Enforcement — the agencies have fallen into step with one another, at least as to certain areas of enforcement focus.

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Among these areas are two practices uniquely affecting the digital advertising space.

The first is the use of algorithms to produce targeted digital advertisements. Over the course of 2022, the CFPB, FTC and DOJ embarked on a string of efforts that forecast a crackdown on companies using algorithms to target consumers with ads, based on the policy perception that the practice permits bias and discrimination.

The second practice is the use of dark patterns — or manipulative design techniques — to subvert choice and deceive. The agencies' alignment on these two digital advertising practices indicates both a fundamental belief that the practices are likely to result in consumer harm, and a commitment to curbing them on a widespread basis.

In this article, we connect the trail of interagency efforts that reflect a coordinated enforcement agenda, and highlight for industry members the specific digital advertising practices that we expect federal

regulators and enforcement agencies will increasingly scrutinize over the coming months.

Algorithms

The use of algorithms and other artificial intelligence tools in offering products and services to consumers has been under attack since at least mid-2022 when the CFPB issued a number of guidance documents warning of their use in consumer-lending decisioning.

For example, the CFPB issued a report in May focused on the potential for algorithmic bias and fair lending risk in automated valuation models, or computerized models used by mortgage originators to determine the collateral worth of certain mortgages.[1]

It also issued a circular warning later that month that "creditors who use complex algorithms, including artificial intelligence or machine learning, in any aspect of their credit decisions must still provide a notice that discloses the specific principal reasons for taking an adverse action."[2]

In both instances, the CFPB's message was clear: "Algorithms are black boxes behind brick walls," and they deprive consumers and industry-regulators of the visibility necessary to ensure "a fair and competitive market free from bias."[3]

Also mid-year, both the CFPB and FTC began publicly focusing on the potential for bias in targeted advertising generally, and not yet specifically as to algorithms.

In March 2022, the CFPB announced that its exam manual had been updated to include that the agency will monitor whether financial institutions "engage in targeted advertising or marketing in a discriminatory way."[4]

In June, the FTC announced its plan to update and reissue a guidance document on digital advertising, and asked the public whether and how it should address "issues unique to specific audiences or demographics" such as microtargeted advertisements.[5]

Finally, in August, the CFPB issued an interpretive rule extending the definition of "service providers" under the Consumer Financial Protection Act to cover digital marketers, thereby bringing them within the reach of the agency's enforcement powers.[6]

As a result of the rule, digital marketers and advertisers involved in "the identification or selection of prospective customers," i.e., lead generation or affiliate marketing, "or the selection or placement of content to affect consumer engagement," e.g., content creation or ad placement,[7] may be held liable for any unfair, deceptive, or abusive act or practice.

The clear impetus behind the interpretive rule was to counter the potential for biased advertising by carving out an exception to the CFPA's general exemption from liability for persons providing time or space for a financial services advertisement. That exemption, the rule explains, does not apply to financial service advertisers and marketers who target and deliver digital ads to particular users or users with certain characteristics.[8]

The marriage between the FTC's and CFPB's initiatives as to both algorithms and discriminatory advertising manifested in June 2022 as the DOJ's settlement with Facebook-owner Meta Platforms Inc. for purported Fair Housing Act violations.[9]

In the U.S. v. Meta suit, the DOJ alleged that the social media company employed tools that prevented certain of its users from seeing housing and credit advertisements based on data the company collected regarding users' FHA-protected characteristics, including their race, color, religion, sex, disability, familial status and national origin.

Importantly, the DOJ claimed that Meta's use of a machine-learning algorithm constructed targeted audiences for the advertisers based on the collected data.[10] Although the CFPB was not outwardly involved in the Meta suit, its actions leading up to and following the settlement indicate that the suit was an aligned agency action.

Chopra publicly praised the settlement, referring to Facebook's ad delivery system as discriminatory.[11] Moreover, the CFPB seems to have had its eye on the social media giant for similar purposes. Back in November 2021, the CFPB issued a series of orders to Big Tech companies, including Facebook, seeking information about their use of consumer payments data, including any use for behavioral-targeting.[12]

Together, these aligned agency initiatives — i.e., the CFPB's update to its exam manual and new interpretative rule, the FTC's request for public comment about targeted ads and the DOJ's Meta suit — suggest that the Meta settlement might just be the tip of the iceberg when it comes to enforcement at the intersection of discrimination, advertising and algorithmic targeting.

In particular, while the Meta settlement focused on the company's compliance with the FHA, several other consumer financial protection laws at the federal level could be used in the future to hold liable companies engaged in discriminatory advertising. Earlier this month, the DOJ **said** it will supervise Meta until 2026 to ensure compliance with their agreement.

For example, the Equal Credit Opportunity Act and its implementing regulation, Regulation B, make it unlawful for a creditor to discriminate against an applicant in any aspect of a credit transaction on the basis of race, color, national origin or other prohibited bases. Together, the ECOA and Regulation B prohibit any statements, acts or practices that would discourage on a prohibited basis a prospective applicant from applying for credit.

As a result, using an algorithm to produce targeted digital advertisements for credit — such as by targeting only consumers with particular credit characteristics for a credit card with a higher set of rewards features to the exclusion of other consumers that are predominately members of a protected class — could garner regulatory scrutiny.

Additionally, the CFPA's broad UDAAP prohibition may be used to hold liable any provider of a consumer financial product or service, or any service provider, for engaging in any unfair, deceptive, or abusive act or practice related to discriminatory advertising.

As described above in connection with the CFPB's new interpretive guidance, this means that even companies that do not directly conduct advertising, unlike Meta, can be held liable.

For example, in light of the CFPB's guidance stating that UDAAP covers digital marketing providers involved in the identification of prospective customers, lead generators — and the companies who purchase leads — could be among the subjects of the first wave of enforcement actions under the CFPA related to targeted advertisements.[13]

Dark Patterns

When the FTC issued its request for public comment in June 2022 seeking comments on its digital advertising guidance document, it asked the public whether it should address not only microtargeted advertisements, but also the use of dark pattern techniques in digital advertising.[14]

According to the FTC's own report on dark patterns, which it issued in September 2022,[15] dark patterns are manipulative design practices that "can have the effect of obscuring, subverting, or impairing consumer autonomy and decision-making."[16]

Dark patterns include, by way of example:

- "Advertisements deceptively formatted to look like independent, editorial content and purportedly neutral comparison-shopping sites that actually rank companies based on compensation";

- "Hiding or obscuring material information from consumers, such as burying key limitations of the product or service in dense Terms of Service documents that consumers don't see before purchase" or "trick[ing] people into paying hidden fees";

- "Tricking someone into paying for goods or services that they did not want or intend to buy, whether the transaction involves single charges or recurring charges"; and

- "Obscur[ing] or subvert[ing] consumers' privacy choices" such as through "a purported choice offered to consumers related to their data, except that choice is illusory and presented in a way that nudges consumers toward increased data sharing."[17]

Although such practices can and do occur within direct mail marketing and at brick-and-mortar retail locations, the FTC's report warns that:

> Companies that market online can experiment with digital dark patterns more easily, frequently, and at a much larger scale than traditional brick-and-mortar retailers, to determine which design features most effectively influence consumer behavior.

Thus, the report suggests that the FTC's focus for enforcement against dark patterns going forward may center on the digital space.[18] And, in fact, federal agency actions throughout 2022 have indicated that enforcement against companies using digital dark patterns is on the rise.

In April 2022, the CFPB filed a lawsuit in the U.S. District Court for the Northern District of Illinois against consumer reporting agency TransUnion LLC, alleging that the company relied on an array of digital dark patterns to trick people into recurring payments, and to make it difficult to cancel the payments.[19]

For example, the complaint alleges that when consumers clicked on a button online appearing to promise consumers their free credit score through TransUnion, they were signed up for recurring monthly charges using credit card information they had previously provided.[20]

Likewise, in November 2022, the FTC filed a complaint and proposed consent order, including a $100 million settlement, in the U.S. District Court for the District of New Jersey to address internet phone service provider Vonage Holdings Corp.'s purported use of dark patterns to make it difficult for

consumers to cancel their Vonage service.[21]

According to the complaint, "[d]espite allowing online enrollment for all customers, Vonage did not allow online cancellation for any of them" after 2017, which is when "Vonage deliberately removed an online cancellation form previously available for its business customers to reduce cancellations and retain more customers."[22]

As part of the consent order to resolve the suit, Vonage agreed that if any of its consumers entered into an agreement to purchase its service over the internet or a mobile app, it would allow those customers to cancel their service through the same mechanism.[23]

Further, we have already seen attention on digital dark patterns continue into 2023. In the same vein as the action against Vonage, in January 2023 the CFPB issued a circular to address dark patterns, negative option marketing and other alleged tricks to keep consumers enrolled in, and prevent consumers from canceling, recurring subscriptions.[24]

Also in January, the FTC finalized a consent order with credit services company Credit Karma over allegations that the company deployed dark patterns to misrepresent that consumers were "pre-approved" for credit card offers.[25]

In light of this coordinated attention, the question is not whether we will see enforcement actions in 2023 surrounding dark patterns, but rather who will be affected, on what basis, and the number of such actions.

As the FTC's report on dark patterns notes, there are a series of federal regulations with requirements surrounding consumer disclosures and access to information that could provide the basis for an enforcement action on dark patterns. Indeed, the report ends with a statement that:

> Firms that employ dark patterns, take notice: where these practices violate the FTC Act, ROSCA, the TSR, TILA, CAN-SPAM, COPPA, ECOA, or other statutes and regulations enforced by the FTC, we will continue to take action.[26]

And consistent with the CFPB's never-ending jurisdictional expansion and its recent statements in its circular on negative option marketing, we anticipate that the agency will use its UDAAP prohibition to find unfair or deceptive various practices engaged in by digital marketers who, before last year, were not within the CFPB's jurisdictional crosshairs.

For example, we can also envision a CFPB enforcement action against advertising agencies that assist lead generators in designing the websites used to collect consumer information, if the websites use dark pattern tactics to manipulate customers into sharing their information.

Conclusion

Given the coordinated actions taken by the CFPB, DOJ and FTC over the last year relating to the use of algorithms for targeting specific consumers and digital dark patterns, now is the time for companies engaged in digital marketing to revisit their practices related to online consumer-targeting and website design.

With respect to their use of algorithms for targeting consumers online, companies might consider using

the Meta settlement as a template for using algorithms without incurring enforcement agencies' scrutiny.

For example, the settlement agreement requires Meta to cease offering to advertisers targeting options with names that describe persons in protected classes, and to develop a system to reduce variances as to sex and race/ethnicity between targeted audiences and actual audiences in its display of ads.[27]

And as to use of companies' use of dark patterns, companies would be wise to become familiar with the FTC's dark patterns report and the CFPB's recent circular as a check against their own practices.

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[1] "Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Automated Valuation Model (AVM) Rulemaking," available at https://files.consumerfinance.gov/f/documents/cfpb_avm_final-report_2022-05.pdf (May 13, 2022).

[2] CFPB 2022-03, Adverse action notification requirements in connection with credit decisions based on complex algorithms, available at https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/ (May 26, 2022).

[3] https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/ (Oct. 22, 2021).

[4] See https://www.consumerfinance.gov/compliance/supervision-examinations/unfair-deceptive-or-abusive-acts-or-practices-udaaps-examination-procedures/ (Mar. 16, 2022).

[5] https://www.regulations.gov/document/FTC-2022-0035-0001.

[6] See Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. 50,556 (Aug. 17, 2022).

[7] Id. at 50,557.

[8] Id. at 50,557-50,559.

[9] Settlement Agreement, U.S. v. Meta Platforms, Inc. f/k/a Facebook, Inc., No. 1:22-cv-05187 (S.D.N.Y. filed June 21, 2022), available at https://www.justice.gov/opa/press-release/file/1514031/download (hereinafter the "Meta Settlement"). The FHA makes it unlawful to discriminate against any person in making available residential real estate-related credit transactions, or in the provision of services in connection with a real estate dwelling sale, on the basis of race, color, national origin, and other characteristics. 42 U.S.C. §§ 3604(a)-(b), 3605(a).

[10] https://www.justice.gov/crt/case-document/file/1514111/download, at 2.

[11] https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-at-the-2022-national-association-of-attorneys-general-presidential-summit/ (Aug. 10, 2022).

[12] See https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/.

[13] The FTC has already demonstrated its focus on lead generation, which is consumer data collection for sale to other companies offering direct-to-consumer services or products, by taking a number of enforcement actions against entities for using deceptive tactics in lead generation over the past several years. See p. X, infra.

[14] https://www.regulations.gov/document/FTC-2022-0035-0001.

[15] https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf (hereinafter "FTC Staff Report").

[16] FTC Staff Report at 1.

[17] Id. at 4, 7, 10, 15.

[18] Id. at 2.

[19] https://files.consumerfinance.gov/f/documents/cfpb_transunion_complaint_2022-04.pdf.

[20] Id. at ¶¶ 122-137.

[21] https://www.ftc.gov/system/files/ftc_gov/pdf/Vonage-Complaint.pdf.

[22] Id. at ¶¶ 23-25.

[23] https://www.ftc.gov/system/files/ftc_gov/pdf/Vonage-Stipulated-Final-Order.pdf.

[24] Consumer Financial Protection Circular 2023-01, available at https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/.

[25] https://www.ftc.gov/system/files/ftc_gov/pdf/2023138-credit-karma-combined-final-consent-without-signatures.pdf.

[26] FTC Staff Report at 20.

[27] Meta Settlement at ¶¶ 9-10.