

## ***The Consumer Finance Podcast: Analyzing the CFPB's Stance on Comparison Shopping and Lead Generation Websites***

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### **Chris Willis:**

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice, and today I'm going to be talking about the CFPB's recent circular on comparison shopping and lead generation websites. But before I get into talking about that, let me remind you to visit and subscribe to our blogs, [TroutmanPepperFinancialServices.com](https://www.troutmanpepper.com/financial-services) and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com). And don't forget about our other podcasts. We have lots of great ones. We have the [FCRA Focus](#), all about credit reporting, [The Crypto Exchange](#), about all things crypto, we have [Payments Pros](#), which is all about the payments industry, and finally, [Unauthorized Access](#), which is our privacy and data security podcast.

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So head over to your app store and give it a try. Now, as I said, today I'm going to be talking about a recent circular that the CFPB released asserting that certain practices related to comparison shopping websites and lead generation websites are abusive under the meaning of Dodd Frank UDAAP. Now, what the CFPB has said in this circular is that it is abusive to consumers for the operators of comparison shopping websites or lead generation platforms to influence their display or ranking of consumer financial products and services because of compensation they receive from the product providers.

So in other words, if I run a shopping site that compares various loan offers from consumer creditors, and some of them pay me more than others, the CFPB is saying that if I display those with more prominence or something like that, then it may be abusive and therefore a violation of Dodd Frank UDAAP for me to do that. To display them in a particular order or with one as featured or something like that.

And the CFPB goes on at some length to talk about why it feels that is abusive, because it takes the position that consumers will reasonably rely on the expertise or good faith of the site to act in consumers best interests and make the best recommendation for them instead of the recommendation that would be most profitable for the operator of the site.

But the thing that's really remarkable about this circular is that the CFPB wades into the middle of the discussion of these websites pretending as if the last few years of regulatory guidance about them just didn't exist. And what I mean by that is the Federal Trade Commission has been addressing how to advertise all kinds of products and services, not just financial ones, on these comparison shopping and lead generation sites for years, and the FTC has addressed it as a disclosure issue.

So the FTC has released guidance and also engaged in enforcement related to sites like this, essentially saying that if you falsely represent that these are the best products or these are independently reviewed or whatever, then that could be a deceptive act or practice under section five of the FTC Act.

But conversely, if there's an appropriate and appropriately prominent disclosure that says, "Hey, we get paid by displaying these ads and the payments we receive may influence which products we display and in which order" - according to what we understand from the FTC's enforcement activity and from its newly revised endorsement guides, just revised last year, then that's okay. And the thing is, you've had a large industry of comparison shopping and lead generation websites set up for consumer financial services in reliance on that concept from the Federal Trade Commission - that when we disclose, again, clearly and prominently, that the website's display of products is being influenced by compensation received from the product offerors, then that's okay.

The CFPB circular comes into this conversation and reaches the conclusion that the business model is essentially abusive, but the CFPB doesn't address at all the disclosure point. And the thing is, that's the way the whole industry operates today. We have to ask ourselves, why is the CFPB not talking about disclosure? And what is the effect of the Bureau not discussing disclosure? Well, in terms of the why, obviously, only the Bureau knows that. But it seems unlikely to have been an accident, in my mind, that the Bureau omitted a discussion of those disclosures. Because, as I said, the FTC is focused on them quite heavily in its guidance and enforcement activity related to this issue. And the use of such disclosures is very commonplace in the industry.

I only can draw the conclusion that the CFPB omitted a discussion of the disclosures because I think it was desiring to create some fear in the industry, both the advertisers on these sites and the operators of the sites themselves, that the business model is just inherently abusive and therefore potentially illegal under Dodd Frank.

So I think the failure to discuss disclosures is a significant omission. But I think it's a feature, not a bug, in terms of the way that the CFPB designed the circular that just came out because I think the Bureau wanted to sidestep it, and in doing so, to try to imply that the disclosures are irrelevant because the Bureau presumably would argue "Well, I'm making a claim of abusiveness under Dodd Frank. The FTC doesn't have abusive authority. It's stuck with deceptive and unfair. And so disclosures may help with deception, but they don't help with an abusive claim." That's probably the gist that the CFPB wants the industry to absorb from this circular.

So I guess the question in my mind is, is that really so? Is it true that disclosures are irrelevant to whether a practice is abusive under Dodd Frank? And I think, from my own personal standpoint, the answer to that has to be no. Because The CFPB's entire analysis in the circular is predicated on the idea that under the prong of abusive, about taking unreasonable advantage of consumer's reasonable reliance on a product provider to act in the consumer's best interest, we have the phrase reasonable reliance. And if there is a clear and prominent disclosure as part of the shopping experience that says "We're displaying products in a way that is influenced by our compensation," how can the consumer be said to reasonably rely on the proposition that the website operator is purporting to act in the best interest of the consumer when they're clearly disclosing that they're not - that they're being influenced by the compensation that they receive. I think the existence of a disclosure is highly material to the question of whether there's reasonable reliance by consumers on a website operator's supposedly acting in the consumer's best interest.

And so, I think that's why the FTC has dealt with this issue in the way that it has. And it seems to me that is the ultimate answer to the CFPB's omission of the disclosure issue from the circular. The question then becomes, what is the industry likely to do? Is a whole industry of lead generation and comparison shopping sites just going to shut down because of the CFPB's circular?

I think it's unlikely to do so because the omission of the disclosure issue, and the lack of credibility, I think from the circular's omission of that issue, will lead the industry to conclude that making appropriate disclosures is still an appropriate way to deal with this issue. So I think the industry will continue as before and continue with the understanding that making appropriate disclosures is necessary and that that is the appropriate way to make sure consumers are not abused in the way that the CFPB hypothesizes that they will be.

The other thing that I wanted to comment about, though, with respect to this circular, is a larger point. Because it seems to me that the circular isn't significant just because of its treatment of these lead generation and comparison shopping websites, but it's symptomatic of a larger sort of initiative by the CFPB to try to change the rules on which commerce is based and use it by using the novelty of calling them abusive when in the past they might have been considered in terms of whether they were unfair or deceptive. And the CFPB seems to think that because abusive hasn't been used that much that it has the opportunity to write on a completely blank slate and change regulatory guidance from the past or change industry practices that are reliant on past interpretations of regulators, both the CFPB and others.

And so what I sense in the circular is a desire by the CFPB to give itself an easy button. To basically say, any practice that I don't like is abusive, whether or not it's unfair or deceptive, and whether or not it actually is harmful to consumers or deceptive to consumers. But since there hasn't been much interpretation of abusive, I can just decide that something is abusive at will.

And of course, when the CFPB released its policy statement on abusiveness back in 2023, it certainly attempted to leave itself as much latitude as possible in that regard, and we commented on that on our blog when it came out as such. But the thing is, I don't think the CFPB's proposition is true. I don't think that something is automatically abusive just because the CFPB says so.

And I think that the statute has requirements in it about things like reasonable reliance or the customer's lack of understanding of a product or things like that. And the CFPB can't simply avoid thinking about disclosures because they may impact whether a consumer understands a product or whether a consumer is reasonably relying on a provider of a product.

Disclosures, in fact, seem to go to the heart of whether that is factually the case or not. So from an industry standpoint, I don't think we're in the position of having to accept the CFPB's edict that practices are abusive just because the Bureau says so. I think we can continue to rely on disclosures because they go right to the elements of what constitutes an abusive act or practice under the statute.

And my feeling is that industry needs to take advantage of those definitions and the use of disclosures, even when the CFPB wants to minimize or discount the use of disclosures. Those are some of my thoughts about the circular, both in terms of its application to the narrow subject matter that it's addressed to, but also the greater issue that it raises with respect to the CFPB's attempt to minimize the impact of disclosures on consumer understanding and behavior, which I think is not very legitimate or credible.

So I appreciate you joining me for today's episode. Thanks for tuning in. And of course, don't forget to visit and subscribe to our blogs, [TroutmanPepperFinancialServices.com](https://www.troutmanpepper.com/financial-services) and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com). And while you're at it, why not go over to [Troutman.com](https://www.troutman.com) and add yourself to our consumer financial services email list.

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