

# To the Point!

legal, operations, and strategy briefs for financial institutions

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## Student Loan Servicers to Be Supervised by the CFPB

The Dodd-Frank Act gave the Consumer Financial Protection Bureau (the “CFPB”) express authority to supervise nonbank entities engaged in residential mortgage lending, private education lending and payday lending. The CFPB was also authorized to supervise other “larger participants” involved in markets for other consumer financial products and services. To date, the CFPB has exercised this authority over larger participants in the consumer credit reporting and debt collection markets.

The CFPB recently published a proposed rule that defines larger participants in the student loan servicing market that will allow the CFPB to supervise nonbank servicers of private and federal student loans with an “account volume” that exceeds one million (1,000,000) (including their affiliates’ accounts) for compliance with federal consumer financial laws. The CFPB has estimated that under the proposal seven (7) servicers (and their sub-contractors) will be subject to the CFPB’s jurisdiction and that such servicers service approximately fifty million (50,000,000) student loans, or up to 94 percent of the nonbank student loan servicing market.

The CFPB has previously identified student lending as an important and growing concern, as the costs of a higher education continue to rise. In earlier actions the CFPB appointed a student loan ombudsman, created educational tools for consumers shopping for a student loan, opened its online complaint system to consumers with complaints regarding student loans and issued examination guidance for those larger banks and nonbank private student lenders over which it has supervisory authority. As a result of this proposal, the CFPB will also use this examination guidance in its exams of those larger participants involved in student loan servicing.

This proposal to extend its regulatory authority over nonbank student loan servicers is consistent with the CFPB’s stated desire to exercise oversight over the “complete cycle of student loan debt” and according to the CFPB should provide “evenhanded oversight” of the student loan servicing industry. Banks that are not subject to the CFPB’s direct supervision but are engaged in the student loan market should be aware that their servicers may be subject to the CFPB’s direct supervision as a result of this proposal. These banks should take steps to ensure that the policies and procedures in place to service their student loans comply with the CFPB’s examination guidance in addition to applicable federal consumer financial laws.



## FTC Updates “Dot Com Disclosures”

The Federal Trade Commission (the “FTC”) recently released its revised guidance “.com Disclosures How to Make Effective Disclosures in Digital Advertising” (the “Guidance”) on advertising online and considerations to ensure compliance with existing law. The Guidance addresses new issues that arise in advertising with changing technology and challenges that arise across new mediums by applying the same principles and existing consumer protection laws.

The Guidance emphasizes that the prohibition on “unfair or deceptive acts or practices” applies to online advertising, marketing and sales generally and should be considered in all online activities. Advertisers are advised to incorporate limitations and qualifying information into the underlying claim, rather than having a separate disclosure for the limitation or qualifying information.

Necessary disclosures must be clear and conspicuous, and advertisers should follow these guidelines:

- Place the disclosure as close as possible to the triggering claim;
- Any necessary disclosures should be sufficient to prevent the ad from being misleading when viewed on that device or platform;
- If it is not possible to incorporate or make a disclosure in a space-constrained ad, it may be acceptable to make the disclosure clear and conspicuous on the page to which the ad links;
- When hyperlinks are used to lead to a disclosure, make the link obvious, label it appropriately, use styles consistently, place the hyperlink as close as possible to the relevant information, take consumers directly to the disclosure on the click-through page, and assess the effectiveness of the hyperlink by monitoring click-through rates and time spent on the linked disclosure page;
- Design ads so “scrolling” is not necessary to view a disclosure, or use text or visual cues to encourage consumers to scroll to view the disclosure;
- Keep abreast of empirical research about where consumers do or do not look on a screen;
- Recognize and respond to any technological limitations of the communication method when making disclosures;
- Repeat disclosures on lengthy websites, with repeated claims or where there are multiple routes through a website;
- If a product or services promoted can be purchased from a brick-and-mortar store or other Internet store, the disclosure should not be included on the purchase page where it will not be viewed by all customers;
- Evaluate the size, color, and graphic treatment of the disclosure in relation to the rest of the website;
- Review the entire ad to assess whether the disclosure is effective;
- Do not combine disclosures with unrelated text that makes it more difficult for the consumer to identify the disclosure;
- Use audio disclosures when making audio claims, and present them in a volume and cadence so that consumers can hear and understand them;
- Display visual disclosures for a duration sufficient for consumers to notice, read and understand them; and
- Use plain language and syntax.

The Guidance affirmatively states that obtaining a consumer’s click on an “I agree” button does not demonstrate that the disclosure was clear and conspicuous. The Guidance also states that if a disclosure is necessary to prevent an ad from being unfair and deceptive, and it is not possible to make the disclosure clear and conspicuous, then the ad should not be released. Specifically, if a particular platform does not allow for clear and conspicuous disclosures, then that platform should not be used to present ads that require disclosures.

In addition to advertising requirements contained in consumer financial laws (TILA and TISA), the requirements provided in the Guidance highlight issues applicable to and should be considered by financial institutions in designing their own ads. Together with requirements on staying abreast of empirical research in terms of consumers’ behavior, monitoring click-throughs and understanding the technological limitations of communication methods, the Guidance expects advertisers to invest in technology and stay current with technological advances affecting their advertising. Finally, although the FTC may not regulate financial institutions directly, the principles and requirements presented in the Guidance may be relied upon by the financial institutions’ prudential regulators in assessing unfair, deceptive or abusive acts and by state Attorneys General in taking action regarding advertising activities.

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