

FTC And State Attorneys General: How To Avoid Being Investigated And What To Do (And Not Do) If Your Company Is

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FTC Overview



FEDERAL TRADE COMMISSION



FTC Overview

- **FTC pursues deceptive practices under Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45 *et seq*:**
 - Section 5 prohibits “unfair or deceptive acts or practices.”
 - Section 13(b) authorizes FTC to file suit in United States District Court.
 - Truth in Lending Act requires disclosure of terms of loans.
- **A representation, omission, or practice is *deceptive* if it is likely to:**
 - mislead consumers; and
 - affect consumers’ behavior or decisions about product/service.
 - Not required to prove actual deception
 - Marketing materials must be truthful, not misleading, and substantiated. The same rules apply to the Internet.
- **An act or practice is *unfair* if the injury it causes, or is likely to cause, is:**
 - Substantial; not outweighed by other benefits; and not reasonably avoidable.



How the FTC Interprets Ads

- From perspective of "reasonable consumer"
- Net impression of ad
- Analysis of "express" and "implied" claims
- What the ad does *not* say - that is, if the *failure* to include information leaves consumers with a misimpression about the product
- Is claim material? - important to a consumer's decision to buy or use the product
- Does the advertiser have proof *before* the ad runs? (substantiation)



Disclosures

- **Disclosures must be:**
 - sufficiently clear;
 - prominent; and
 - understandable to prevent deception.

- **Other factors:**
 - clarity of language;
 - relative type size;
 - proximity to the claim being qualified; and
 - an absence of contrary claims that could undercut effectiveness.



Disclosures

- **FTC has issued a Consumer Alert to inform customers of disclosure requirements for payday lenders.**

- **Payday lenders must comply with Truth in Lending Act.**
 - Trigger Terms
 - Amount or percentage of down payment
 - Amount of any payment (*i.e.*, \$20 per week)
 - Number of payments (*i.e.*, 4 biweekly)
 - Period of repayment (*i.e.*, one month)
 - Amount of any finance charge (*i.e.*, \$20 fee)
 - Required Disclosures
 - Amount or percentage of down payment
 - Terms of repayment
 - APR
 - Disclosure of variable rate feature



FTC Investigative and Enforcement Process

- May issue Civil Investigative Demand (“CID”) requiring production of documents and information;
- May file suit in United States District Court to enjoin any act or practice that is in violation of any law enforced by the FTC;
- Frequently will pursue a temporary restraining order (“TRO”) to freeze both business and personal assets;
- Propose settlement through “consent decree,” often requiring the cessation of the challenged business activities, consumer restitution and more.



FTC Actions Against Payday Lenders

- FTC settles with two payday loan lead generators who agree to disclose APR information in similar payday loan ads in the future and to comply in all other respects with the Truth in Lending Act.
 - Respondents advertised payday loans on their Web sites and collected information from consumers through online applications. Respondents sold this “lead” information to lenders that ultimately offer payday loans to consumers.
 - According to the FTC’s complaints, the respondents stated loan costs on their Web sites – a \$20 fee for a \$100 loan, for example – but failed to disclose the APR. For a typical 14-day pay period, consumers who obtained payday loans advertised by one respondent would pay an APR from 260 percent to 521 percent or higher, and consumers who obtained payday loans advertised by the other respondent would pay an APR of 782 percent. (6/24/2008)



FTC Actions Against Payday Lenders

- The FTC settled with three payday lenders that agreed to disclose APR in their Internet advertising.
 - The FTC noted that one respondent was charging a \$20 fee for a \$100 loan, for example – but failed to disclose the APR. For a typical 14-day pay period, consumers who obtain payday loans from the respondents would pay an APR of 460 percent, 520 percent APR, and up to 782 percent, respectively. According to the FTC, APR disclosure helps consumers comparison shop so they can make informed decisions in securing credit. (06/06/08)
- FTC challenged four companies that operated membership programs that provided credit line, along with cash-advance privileges.
 - FTC viewed these operations as “payday lending” and the companies agreed to cease engaging in such activities, disgorge \$350,000, and forgive \$1.6 million in outstanding consumer debts. (2000)



State Regulation of Payday Lenders

- Various state statutes regulate payday lending or “deferred presentment services”:
 - Payday lending regulation and licensing requirements;
 - Some States specify interest rates for payday lenders and relieve them from complying with state usury limits; other states have merged their payday lending interest caps into the state usury laws.
 - Consumer Protection Acts (Mini-FTC Acts).
 - States have adopted "mini-FTC Acts" that prohibit unfair and deceptive practices. States typically follow FTC precedent.



Payday Lending Regulation/Licensing

- **Over two thirds of the states allow payday lending but require payday lenders to be licensed.**
 - Applicable to any lender who lends monies to a citizen of the state.
- **Several states require special licenses for Internet payday lenders**
 - Alaska
 - Colorado
 - Illinois
 - Nevada
 - Virginia
 - Washington
- **Several prohibit payday lending (either by statute, case law, or policy)**
 - Arkansas
 - Connecticut
 - Georgia
 - New Jersey
 - New Mexico
 - Ohio
 - Pennsylvania
 - South Carolina (prohibits Internet payday lending)
 - West Virginia



Payday Lending Regulation/Licensing

- **State payday lending laws often address:**
 - Fee caps (range from 10% to unlimited in some states)
 - Extension of fees or “rolling over” i.e., the extension or deferral of the payment due date of a loan for the payment of additional fee
 - Maximum advances
 - Prohibit signature requirements
 - Deceptive practices and advertising
 - Prohibit lender from taking security or collateral for loan



Payday Lending Regulation/Licensing

Ex. Alabama (Deferred Presentment Services Act)

- No total payday loan amount may exceed more than \$500 from any lender at any location;
- Prohibits deferred presentment of personal check for less than 10 days or more than 31 days after contract date;
- Prohibits alteration/delete date on any check, accepting of undated checks, accepting checks dated with a date other than the date on which accepted;
- Prohibits unfair or deceptive acts, practices, advertising;
- Prohibits requiring that customer provide security or guaranty for transaction;
- Prohibits the paying of proceeds in form other than cash and directly to customer.



State Enforcement Process

- **Similar to FTC process:**
 - Power to issue CIDs;
 - May pursue temporary or permanent injunctions;
 - May pursue TROs.

- **For businesses that operate in more than one state there is risk of multiple or consolidated State actions.**



State Enforcement Actions

- **States that have aggressively pursued payday lenders**
 - **Arkansas**
 - Arkansas Attorney General sent letters to payday lenders asking them to stop the practice immediately. Attorney General advised that charging exorbitant interest rates on payday loans violates both the constitutional limit and the Arkansas Deceptive Trade Practices Act. (03/19/2008)
 - Arkansas Attorney General settles with companies offering payday loans through instant cash rebates for Internet service for \$1 million (\$800,000 in restitution/\$200,000 for consumer education fund). (2007)



State Enforcement Actions

- **States that have aggressively pursued payday lenders**
 - **West Virginia**
 - West Virginia Attorney General sued California-based Internet lender for predatory loans with interest rates of up to 99% APR. (10/08/2008)
 - West Virginia Attorney General announces settlements with 17 Internet payday lenders and 14 collection agencies, bringing the total obtained from his investigation of Internet payday lending to \$1.57 million in cash refunds and cancelled debts. (09/17/2008)
 - West Virginia Attorney General settles with 18 internet payday lenders that agreed to cease operations in WV and agreed to refund all unlawful fees and charges. (2006)



State Enforcement Actions

- **States that have aggressively pursued payday lenders**
 - **Colorado**
 - Colorado Attorney General settles with internet payday lender that agreed to refund more than \$150,000 in finance charges on nearly 2,300 loans. (03/13/08)
 - Colorado Attorney General settles with payday lender that agreed to refund two million dollars in finance charges. (2005)



State Enforcement Actions

- **Other State Actions against payday lenders**
 - **California**
 - California Attorney General filed a \$2 million-plus lawsuit against payday lender for violating a state law that prohibits payday loan businesses from suing for triple the amount of the check when customers' bank accounts do not hold sufficient funds to honor post-dated checks written to secure the loan. (08/01/2006)
 - **Maryland**
 - Maryland Attorney General settles with payday lender accused of operating a “ponzi scheme” that violated the antifraud provisions of the Maryland Securities Act. (12/13/2007)
 - **New York**
 - New York Attorney General settles with payday lender that agreed to cease operating in NY and agreed to release \$11,000 worth of loan obligations and provide \$14,000 in refunds. (2004)



State Enforcement Actions

- **Other State Actions against payday lenders**
 - **North Carolina**
 - North Carolina Attorney General signs agreements with last three operating payday lenders, meaning that all payday lending by major companies in North Carolina has come to a halt. (03/01/2006)
 - **Texas**
 - Texas Attorney General secured a court judgment against an unlicensed payday lender engaged in unlawful predatory lending activities. (06/29/2007)



Best Practices

- Design advertising and marketing materials to comply with FTC and State laws governing deceptive practices and consumer credit;
- Educate your employees (and former employees) to immediately contact your company's attorney if they are contacted by the FTC or a State Attorney General's Office;
- Educate employees not to talk with the FTC or a State Attorney General's Office without counsel present;
- If the FTC or a State Attorney General has initiated an investigation against your company, do not destroy or alter any document. "Document" includes email, databases, spreadsheets, notes, calendars, and much more.

