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INSIDE

GUIDING YOUR BUSINESS THROUGH UNCHARTED WATERS

There has never been a more exciting or challenging time to be in the consumer and business lending sectors, as the underlying technology and regulatory framework changes on a daily basis. We combine an in-depth knowledge of the online lending industry with our nationally recognized practices in the areas of financial services, regulatory compliance, privacy and data protection, consumer protection, legislative advocacy, and litigation to provide clients with solutions that efficiently and effectively resolve their unique business challenges.

REGULATORY COMPLIANCE

We counsel and advise online consumer and business lenders, and their service providers on the applicability of federal and state regulations across the lending industry and the legal risks and potential penalties associated with compliance questions covering not only the business of providing loans but also associated industries that support lenders, including advertisers, marketers, lead generators, payment providers, and debt buyers and collectors.

Our lawyers in Washington, DC and across the country have you covered at all of the agencies across the “alphabet soup” of financial services regulations and consumer protection laws, whether your concern is advertising and marketing,

underwriting and loan disclosures, “true lender” and investor agreements, BSA/AML compliance, OFAC, cybersecurity, payments and electronic fund transfer laws, debt collection, or due diligence. Our experience includes product reviews, mock-compliance audits and examinations, designing compliance management systems, assisting clients through supervisory examinations, responding to examination findings and appeals, and advising on state licensing and regulatory requirements. Many of our attorneys formerly served as government regulators and their experience enables us to help our clients understand and comply with the evolving expectations of federal and state regulators, including the CFPB and FTC.

LAW ENFORCEMENT INVESTIGATIONS AND ACTIONS

Venable counsels clients across the non-bank financial services sectors in responding to federal and state civil investigative demands, subpoenas, and general requests for information. We regularly advise clients before the FTC, CFPB, U.S. Department of Justice, and state regulatory agencies and Attorneys General, on appropriate strategies and tactics when responding to government requests about compliance with financial services laws and regulations. When clients face an investigation or enforcement action, we work across the enterprise to provide knowledgeable, creative, and

tenacious defense counsel. This approach has helped numerous clients avoid or minimize overly burdensome and potentially damaging discovery responses to government investigative demands, and has put Venable at the forefront of legal arguments central to the online lending industry.

BUSINESS, CLASS ACTION AND GOVERNMENT LITIGATION

Venable’s litigators, among the best in the nation, are well versed in the nuances and complexity of the financial services industry, and relevant government regulatory agencies. From business disputes to class actions and government litigation, we have helped numerous lenders and service providers fight for their interests and defend their businesses.

PRIVACY AND DATA SECURITY

Venable’s privacy team comprises more than a dozen attorneys that focus their practices, on the laws, regulations, and policies governing ecommerce and the ever-expanding use and protection of consumer data by corporations and other entities. We assist clients with the implementation of best practices and compliance with U.S. and international legal requirements, deployment of anti-fraud technology, legislative advocacy, internal and public responses to data breaches, and defending clients in government enforcement actions and private litigation.



FINTECH AND MARKETPLACE LENDERS UNDER SCRUTINY

FinTech and marketplace lenders are fast realizing that the CFPB, FTC, and even state regulators are focused on their activities. Recent announcements that the CFPB is taking consumer complaints on marketplace lenders and has established an office of small business lending means that lenders and service providers should prepare for the possibility of investigations and examinations in the not too distant future. At the same time, the FTC is hosting a series on “*Financial Technology Forum on Marketplace Lending*” to explore the growing world of marketplace lending and its implications for consumers. And, at the state level, the California Department of Business Oversight recently released a survey on marketplace lending in California finding that consumer and small business lending increased by 936% from 2010-2014, to \$2.3 billion.

All of these developments point to increased federal and state regulatory scrutiny of FinTech lending and their service providers. Below are four tips for managing enforcement and compliance risk.

Increased Scrutiny Means Investigations and Possibly Enforcement Actions: The CFPB has investigations under way that span the full breadth of the Bureau’s enforcement authority over providers of financial products and services and their vendors. The process of responding to a civil investigative demand (CID) from the CFPB (or even the FTC) is challenging and resource intensive, but critical. We’ve got you covered with materials on our firm’s website such as a primer on negotiating the scope of the CID and navigating examinations. We also reveal the CFPB’s enforcement settlement principles to illustrate exactly how the CFPB implements its regulation by enforcement agenda.

Advertising, Marketing, and Lead Generation Are Being Scrutinized: Online lead generation continues to face increased scrutiny and regulation on multiple fronts, including from consumer groups, state regulators, the FTC, and the CFPB. This squeeze is being felt by all participants—publishers, aggregators, and buyers—and, notably, the lines of legal responsibility and accountability continue to

blur. Because of this pressure, the viability of some forms of online lead generation is in jeopardy. Regulators will continue to most actively pursue: (1) use of deceptive advertisements to generate leads; (2) how sensitive consumer data is stored and whom it is shared with; and (3) whether, and the extent to which, publishers and lead aggregators are liable for the end users’ legal compliance.

Service Provider Liability Can Be Minimized by Strong Vendor Due Diligence and Compliance Monitoring Programs: Federal and state regulators expect lenders to manage their service providers for compliance with applicable laws and regulations. One of the first things the CFPB or a state regulator will ask for during an investigation or examination is a list of the regulated entity’s service providers. Failing to conduct vendor due diligence and monitor service providers is a surefire way to put your company at risk. On the flip side, the CFPB has been targeting service providers using its “substantial assistance” authority, which allows the CFPB to bring an action against any person it believes knowingly or recklessly provided substantial assistance to actors that fall under the CFPB’s jurisdiction. The result is an environment in which covered entities and their service providers are expected to police each other’s regulatory compliance.

Collecting Accounts Receivable: The CFPB (teaming with the FTC) has taken aim at first-party and third-party debt collection activities, including enforcement settlements with lenders and collectors. In November 2015, federal, state, and local regulators and enforcement agencies announced Operation Collection Protection, a national initiative that targets debt collectors. This program complements recent CFPB enforcement, supervisory, and rulemaking efforts focused on the debt collection industry, including first-party creditors and billing services, and on the intersection of data furnishing and debt collection. In addition, the CFPB continues to work on developing proposed rules for debt collection following publication of its advanced notice of proposed rulemaking in November 2013.

- Jonathan L. Pompan, Andrew E. Bigart,
and Alexandra Megaris

A LOOK INSIDE THE OFFICIAL CFPB ENFORCEMENT POLICIES AND PROCEDURES MANUAL

ENFORCEMENT
POLICIES AND
PROCEDURES
MANUAL

Since its launch in 2011, the CFPB has developed a reputation for its aggressive investigation and litigation tactics. The Bureau’s Enforcement Policies and Procedures Manual for its enforcement staff provides a peek behind the curtain at how CFPB enforcement actions unfold.

Despite the CFPB’s push for transparency, a copy of the 390-page document is not available on its otherwise comprehensive website. (By comparison, the Federal Trade Commission (FTC) has for many years made available its Operating Manual as a public record.)

Following sections on document maintenance and retention policies, the manual includes a discussion of its policies governing the conduct of investigations, litigation, remedies, adjudicative proceedings, working with other law enforcement partners, practice guidance, and administrative issues, as well as model forms and sample language used in investigations and litigation by CFPB enforcement staff.

A memo written by then Enforcement Director Richard Cordray (now Director) setting out the “enforcement action process” also is included, which sets out the notification, consultation, and approval policies and procedures that the Office of Enforcement follows when taking critical action throughout the various stages of the enforcement process.

The manual also describes the steps CFPB staff are supposed to follow when opening an enforcement matter and how staff identify subjects for investigations in the first place. For example, triggers for an inquiry can come from a number of sources, including informants, news media, market observation, supervisory examinations, and law enforcement partners. While the manual includes extensive discussion of the process for consultation between enforcement staff and other CFPB divisions, there’s no

specific instruction to consider the cost to companies from the disruption caused by an investigation or the length of time an investigation may take.

Enforcement matters are divided into two categories: (1) the “Research Matter” and (2) the formal “Investigation.” According to the manual, an enforcement matter may be opened at any stage, whether it is the research, the investigation, or when the CFPB is ready to approach a subject to settle or file a complaint. The decision process of whether to conduct a Research Matter or Investigation is considered in light of its impact on (1) Bureau resources; (2) the market in general; (3) the potential subject(s); (4) other Bureau divisions; (5) the Office of Enforcement Strategic Plan; and (6) law enforcement partners.

The FTC and the Bureau have overlapping jurisdictions over a number of nonbank entities and share the ability to enforce a number of the same federal consumer financial laws. Pursuant to the Consumer Financial Protection Act and a memorandum of understanding, staff are required to notify the FTC upon approval of a Research Matter and at least five days before opening an Investigation of nonbanks.

In the manual, enforcement staff are reminded that the CFPB is authorized to investigate merely on suspicion that any person has violated any provision of federal consumer financial law, or to seek assurance that a violation has not occurred, which is a practice that has come under criticism. Based on petitions to quash CIDs published by the CFPB, the practice of investigating “any person” appears to continue to be standard operating procedure.

As part of the litigation policies section of the manual, staff are told to consider whether alleged violations fall within the applicable statute of limitations, and whether it would be prudent to seek an agreement tolling the application limitations period. The manual also sets out the Bureau’s view on the legal standards for seeking extraordinary remedies, including temporary restraining orders, asset freezes, and receiverships. There’s also

a section on remedies, including the detailed framework for civil money penalties.

Last, there are detailed policies on the sharing of information with law enforcement, criminal investigations, and storage of materials obtained during an investigation. There’s also ethical guidance provided to staff, including when and how information may be obtained from the consumer response office, which handles consumer complaints for the Bureau.

The manual was released in response to a Freedom of Information Act request, and portions of the copy made available to us were redacted. The Enforcement Policies and Procedures Manual is available for download on the Venable website.

The manual includes a blanket disclaimer stating that “it is not intended to nor should it be construed to (1) restrict or limit in any way the CFPB’s discretion in exercising its authorities; (2) constitute an interpretation of law; and (3) create or confer, upon any person, including one who is subject of a CFPB investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.” The manual does not include dates or details concerning its revision history, if any.

- Jonathan L. Pompan, Andrew E. Bigart, and Alexandra Megaris

FTC RELEASES STAFF PERSPECTIVES ON LEAD GENERATION

The staff of the FTC Bureau of Consumer Protection released a much-anticipated paper on lead generation in September 2016. The 13-page report provides staff perspectives on the information covered at the FTC’s October 2015 workshop on lead generation, “Follow the Lead.” Below are a few of the paper’s themes:

The paper describes the mechanics of lead generation and how it functions in the modern economy, including such topics as:

- What is Lead Generation?
- Who is Collecting Leads Online, and What happens to Them After Consumers Press “Submit”?, with descriptions of leads collected by a publisher or affiliate, leads transmitted to aggregators, leads sold to end-buyer merchants, and leads verified or supplemented with additional information.

- A deep dive into the online lending sector’s “ping tree” model (an auction-style approach) that allows consumers to be quickly matched with lenders that can underwrite and fund loans.
- Potential benefits to consumers and competition, including allowing interested consumers and merchants to maximally and efficiently connect with each other; and the ability to connect consumers quickly with multiple merchants, and their associated offers, that consumers may not find on their own.

The paper also covers potential concerns for consumers and competition, and shares a number of suggestions to lead buyers and sellers for avoiding consumer protection concerns—and, in some cases, potentially unlawful conduct:

- Disclose clearly to consumers who you are and how you will share information.
- Monitor lead sources for deceptive claims and other warning signs like complaints.
- Avoid selling remnant leads to buyers with no legitimate need for sensitive data.
- Vet potential lead buyers and keep sensitive data secure.

The paper promotes the benefits of industry efforts to adopt policies to help protect consumers, including references to the Advertising Self-Regulatory Council’s Electronic Retailing Self-Regulation Program established by the Electronic Retailing Association, and the Online Lenders Alliance’s “Best Practices.”

“As FTC staff has noted previously, for self-regulatory programs to be effective, industry participants should ensure that such programs include mechanisms for robust monitoring and enforcement, such as dismissal from the program and referral to the FTC for companies that fail to comply with the standards outlined in the code.”

Lead generation has become a key marketing technique used in a variety of industries, particularly lending (including credit cards, marketplace, small-dollar/short-term, and mortgage), postsecondary education, and insurance. Considering how common online lead generation is, because of its benefits for consumers and merchants, it is important to understand how it operates, the types of legal and regulatory requirements that potentially apply, and ways to avoid government scrutiny.

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- [FinTech and Marketplace Lenders Under Scrutiny](#)
- [A Look Inside the Official CFPB Enforcement Policies and Procedures Manual](#)
- [FTC Releases Staff Perspectives on Lead Generation](#)

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