



Improving Compliance and Building Trust While Working with Affiliate Marketing and Lead Generation

Wednesday, July 22, 2020, 2:15 pm – 3 pm

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Important Information

This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

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Presenting Today

VENABLE



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The Good Stuff About to be Covered

- Evolving Legal and Regulatory Landscape
- How to expand your view of what consumers experience and how they enter the marketplace
- The role contract terms can play in compliance
- Better practices for vendor management of third-party lead generators and marketers
- How lenders can use what the consumer experience is to improve compliance and conversions
- How to use data to optimize your marketing spend

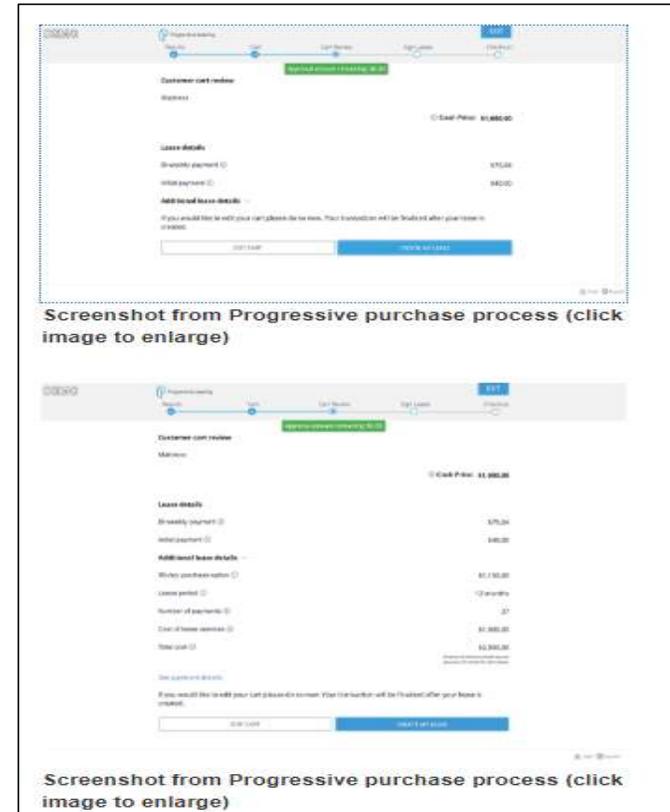
Evolving Legal and Regulatory Landscape

The Federal Trade Commission

- **Enforcement:** Business kind of as usual
 - Advertising:
 - FTC v. LendingClub – Could be going to trial if SJ doesn't sort it out
 - The intersection of UDAP and TILA and “hidden fees”
 - FTC v. Progressive Leasing
 - FTC will look at companies more than once, digital design of disclosures important, monitor service providers / vendors
 - In the matter of LendEDU
 - UDAP, Regulation E, and TILA
 - FTC v. Lead Express, et al. (Harvest Moon Financial) – Payday lending and tribal enterprise
- **Commissioner disagreements out in the public.**
- **Cases to watch:** Supreme Court to consider FTC's ancillary equitable authority

FTC v. Progressive Leasing

- Rent-to-own payment plans in retail stores
- Alleged misleading marketing of payment plans, e.g., “same as cash,” or “no interest.”
- Alleged company was aware of consumer confusion with > 15k complaints in 15 month-period
- \$175m settlement for refunds, prohibition on misrep. the cost, terms, or nature of its plans, and must get consumers’ express, informed consent before charging or billing them; monitoring of third party, such as retailers.
- Dissent - Commissioner Rebecca Kelly Slaughter contended that the proposed settlement does not adequately remediate harm or achieve appropriate deterrence. She advocated for (i) higher monetary relief, closer to the total amount Progressive charged consumers over the cash price—in excess of \$1 billion; (ii) individual liability for Progressive’s CEO because he participated directly in the allegedly illegal practices or had authority to control them and because Progressive’s parent company, Aaron’s, had been subject to prior FTC actions; and (iii) charging Progressive with a violation of the Restore Online Shoppers’ Confidence Act (ROSCA).
- **Takeaways:** FTC will look at company more than once; importance of disclosure and digital design; responsibility for third parties, such as retailers (e.g., lead generators for financing)



Consumer Financial Protection Bureau

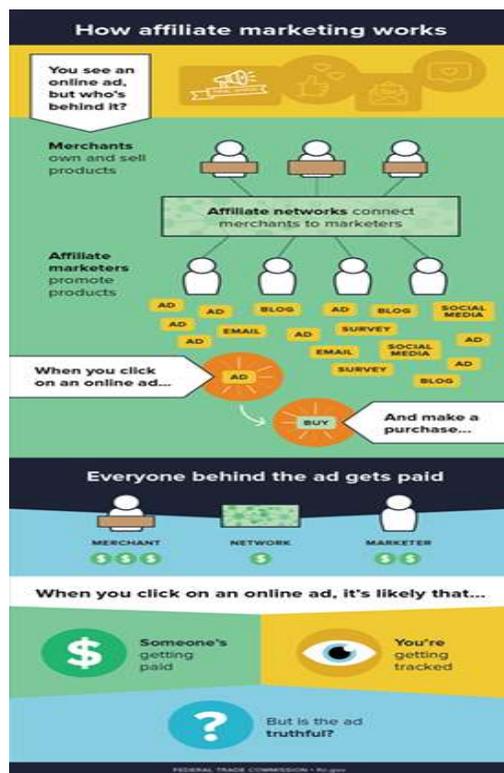
- Seila Law v. CFPB & Ratification
- Providing guidance and regulatory relief – not just on the phone
 - 2 No Action Letters issued in March (mortgage servicing loss mitigation software and small dollar lending)
- Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic
- Awaiting Debt Collection Final Rule
 - Debt collection rule: Time barred debt allowable with disclosures (open for comment)
- Guidance to financial firms during the pandemic (billing error responsibilities and change in account terms w/o notice) – Supervisory Examinations

The CFPB: Still going

- Enforcement focus:
 - Oversight of vulnerable populations more likely to result in new lawsuits (debt, elderly, servicemembers, students).
 - Ongoing litigation will continue dependent on courts and opposing parties.
 - Continuing investigations with no in-person contacts – e.g., data requests (CIDs).
- Recent cases:
 - Cross-selling incentives and account opening issues.
 - Advertised mortgages, but provided leads to student loan debt relief companies.
 - Credit repair offers and services.
 - Key takeaways: State what you mean, strengthen and review compliance, analyze customer complaints—don't just answer them.

The Legal Intersection and your Requirements: Lead Generation and Affiliate Marketing

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- The FTC and CFPB are watching the use of lead generation
 - If you use affiliate marketing, make sure you know what your advertisers are telling your customers to get them in the door
 - Watch out for free offers, gifts, subscriptions, and competitions
- FTC Advertising Disclosure Guidance for Online Influencers
- Endorsement Guide Update on Horizon
- Small Business Financing Forum

Follow the Lead

An FTC Workshop on Lead Generation



In the Matter of LendEDU, et al.

- Website compares student loans and other financial products
- Alleged misleading marketing that led consumers to believe website provided objective product information, when in fact they provided higher rankings and ratings to companies that paid for placement.
- FTC’s complaint alleged operators of LendEDU.com falsely claimed that the website provided “objective,” “accurate,” and “unbiased” information about consumer financial products, such as student loans, personal loans, and credit cards. Specifically, LendEDU misrepresented that the information on its website was not affected by compensation from advertisers. Also, alleged made-up consumer reviews.
- \$350k settlement and prohibition on making the alleged misreps.
- **Takeaways:** Disclose material connection, and endorsements; disclosure and placement of influence of compensation on content or other material connections; disclosure and placement of any material connection between endorser and advertiser.

**Top 9 Companies for Student Loan Refinancing:
In-Depth Reviews**

1. SoFi

SoFi  Reduce your payment and interest rate. Members save \$22,359 in 15 minutes!  VISIT SITE →

- ✓ Refinance and consolidate both federal and private student loans
- ✓ Rates as low as 2.89% for variable rates
- ✓ Rates as low as 3.25% for fixed rates
- ✓ 5, 7, 10, 15, 20 year repayment terms
- ✓ No application fees, origination fees, or pre-payment fees
- ✓ Unemployment protection is available
- ✓ Easy application process

2. Earnest

earnest  You could save a boat load. Customers save \$21,810 on average!  VISIT SITE →

- ✓ Refinance and consolidate both federal and private student loans
- ✓ 5 - 20 year repayment terms
- ✓ Variable rates as low as 2.57%
- ✓ Fixed rates as low as 3.25%
- ✓ Data-driven customer evaluation helps you get qualified
- ✓ Zero application fees, origination fees, or pre-payment fees

3. LendKey

LendKey  You deserve a better student loan. Average client saves \$36,657!  VISIT SITE →

LendEDU's Allegedly Paid-For Student Refinancing Rankings

Regulatory Consumer Protection Priorities: Federal and State

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- **Material Terms** - Disclose clearly to consumers who you are and how you will share their information.
- **Claim Substantiation** - Monitor lead sources for deceptive claims and other warning signs like complaints.
- **Joint Liability/Service Provider/Substantial Assistance** - Vet lead buyers / sellers and avoid buying remnant leads with no legitimate need for sensitive data.
- **Privacy & Data Security** - Keep sensitive data secure.
- **State Licensing, Valid When Made & True Lender**
 - California Consumer Finance Lenders Law
 - Developments in light of Madden v. Midland Fallout
 - FDIC and OCC Rulemakings
 - True Lender TBD
 - Colorado / California Examples
 - State Usury and CFPB Enforcement
 - Conference of State Bank Supervisors

Enforcement Priorities Examples

Deceptive Claims

- Who can be held liable
 - ✓ Publisher
 - ✓ Affiliate Network
 - ✓ Service Provider

(FTC v. LeanSpa, FTC v. Inbound Call Experts, FTC v. Five Star Auto, CFPB v. ZP)

Unfair Sale of Sensitive Data

- Payday Loan Applications
 - *(FTC v. Sequoia One, FTC v. Sitemsearch)*
- Confidential Phone Records
 - *(FTC v. Accusearch)*
- Debt Portfolios
 - *(FTC v. Cornerstone, FTC v. Bayview Solutions)*

State Regulatory Agencies

- CA Dept. Business Oversight

Best Practices for Vendor Management

Best Practices for Vendor Management

- What tools are most effective to police your lead generators?
- The importance of third-party vendor vetting
- How can you ensure lead generators are actually doing what they say?
- What remedies do you have to address bad action?
- How to use your marketing spend to reward good partners
- Understanding how consumer behavior explains marketing patterns

Contract Terms: and How they Can Enhance Legal Compliance

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- Exercise Due Diligence Pre-Contract
- Establish Contractual Requirements and Service-Level Standards for Compliance and Performance
- Reserve Audit Rights
- Representations and Warranties
- Monitor Vendors and Take Action; and
- Require Vendors to Maintain Same Standards with Subcontractors

Expert Analysis - Opinion

Companies Must Manage Lead Generators Responsibly

By Andrew Smith

Law360 (September 25, 2019, 4:44 PM EDT) -- Successful

manufacturers make supply chain management a top priority – asking questions about the source of raw materials they buy, building product specs into their contracts, reserving audit rights, exercising oversight authority, and insisting that vendors hold subcontractors to the same high standards. Recent law enforcement actions involving the lead generation industry show that advertisers should consider similar standards when the raw materials they buy are consumer leads.



Andrew Smith

The Federal Trade Commission's settlement with Career Education Corporation[1] is the latest in a series of cases that pull back the curtain on the arcane world of lead generation. The complaint alleges that CEC marketed its post-secondary schools through leads obtained from companies like Sun Key Publishing LLC[2] and Expand Inc.[3]

Vendor Management Contract Checklist

- Scope: license, ownership, data fields, etc.
- Cost and compensation
- Right to audit
- Monitoring and performance standards
- Confidentiality and security of information, including GLBA Privacy and Safeguards Rules
- Representations and Warranties
- Indemnification
- Default and termination
- Dispute resolution
- Limits on liability
- Insurance
- Customer complaints
- Recordkeeping
- Business resumption and contingency plan of service provider
- Foreign based service providers and legal and regulatory considerations
- Subcontracting
- Other topics: AML/BSA, Credit Reporting, telemarketing, internal audit, risk management (e.g., models, interest rate calculations, etc.)

Consumer Behavior: A Quality Check

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- Why does consumer behavior explain marketing behavior?
- How to take consumer responses , and determine how each partner is advertising
- What data is noise? And what data should you really dive into?
- How do we take these responses, and adjust consumer contact to better improve conversions?
- How to take charge of your conversion metrics

How to Better use Data to Optimize

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- What data sets are most important to explore when optimizing a campaign?
- How can you ensure you are improving the spend with the right source?
- How do you eliminate noise in subids?
- “Master subids” vs “Campaign specific” subids
- Best practices for addressing performance when data doesn’t allow for optimization (i.e. the infinite subid problem)
- RegTech solutions can help enhance compliance

Real Life Legal Challenges and How to Better Address Them

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- What's on the horizon – Election 2020
 - Outcome of *Seila Law v. CFPB*
- Preparing for a Regulatory Audit / Investigation
 - Not the same as vendor diligence
- Updating Compliance Management System
- Prioritized Transaction Testing



Questions/Discussion

If you would like to ask a question, you can ASK or type your question into the CHAT feature NOW.

Wrapping up: Thank you for your time Today !



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