



LEAD GENERATORS' DUE DILIGENCE – UP ONE STREAM AND DOWN THE OTHER

July 18, 2023

Scott M. Pearson
Manatt, Phelps & Phillips LLP

Jonathan L. Pompan
Venable LLP

COMPLIANCE UNIVERSITY

Legal Disclaimer

Any content included in this presentation or discussed during this session (“Content”) is presented for educational and general reference purposes only. Content is provided as a courtesy to be used for informational purposes only. The Content is not intended to serve as legal or other advice. The presenters and their law firms do not represent or warrant that the Content is accurate, complete or current for any specific or particular purpose or application. This information is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel. The views and opinions of the speakers expressed herein are solely those of the presenters and not their law firms or respective clients. ATTORNEY ADVERTISING.

Today's Session

- I. Introduction
- II. Why Due Diligence is Important for Lead Generators and Purchasers
- III. Applicable Laws and Regulations
- IV. Regulatory Guidance
- V. Recent Regulatory Enforcement and Litigation
- VI. What's on the horizon?
- VII. Due Diligence Best Practices

Why Due Diligence is Important for Lead Generators and Purchasers

COMPLIANCE UNIVERSITY



Laws and Regulations

Laws and Regulations

Lead generators can be subject to many federal and state laws and regulations, including:

- Federal and state prohibitions on unfair, deceptive, and abusive acts and practices (UDAP/UDAAP), and federal and state advertising laws.
- Restrictions on the use of unsolicited commercial email, such as the CAN-SPAM Act and state email marketing laws.
- Restrictions on the use of marketing activities conducted by telephone, including the Telemarketing Sales Rule (TSR) and the Telephone Consumer Protection Act (TCPA).

May also be subject to federal and state laws and regulations regarding unsolicited commercial email, telemarketing, user privacy, search engines, Internet tracking technologies, direct marketing, data security, data privacy, pricing, sweepstakes, promotions, intellectual property ownership and infringement, trade secrets, export of encryption technology, acceptable content and quality of goods, and taxation, among others.

When promoting loans, websites and marketing services are subject to various federal, state and local laws, including state licensing laws, credit reporting, loan disclosures and other substantive rules specific to the type of loan.

Lenders are subject to similar requirements, and may also be subject to federal and state supervision and examination, that can also cover third party lead generators.

The costs of compliance with these regulations and new laws may increase in the future and any failure to comply with such laws may subject the lead generator and lender to significant liabilities.

Regulatory Guidance

CFPB Interpretive Rule on Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception to Digital Marketers

August 10, 2022 – CFPB issued an interpretive rule laying out when digital marketing providers for financial firms must comply with federal consumer financial protection law.

- Digital marketers that are involved in the identification or selection of prospective customers or the selection or placement of content to affect consumer behavior are typically service providers for purposes of the law.
- Digital marketers acting as service providers can be held liable by the CFPB or other law enforcers for committing unfair, deceptive, or abusive acts or practices as well as other consumer financial protection violations.

BILLING CODE: 4810-AM-P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception with Respect to Digital Marketing Providers

AGENCY: Consumer Financial Protection Bureau.

ACTION: Interpretive rule.

SUMMARY: Section 1002 of the Consumer Financial Protection Act of 2010 (CFPA) defines the term "service provider" and sets forth two exceptions to that definition. Under one of those exceptions, a person is not a service provider solely by virtue of such person offering or providing to a covered person time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media. The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing this interpretive rule to address digital marketing providers that commingle the targeting and delivery of advertisements to consumers, such as by using algorithmic models or other analytics, with the provision of advertising "time or space." Digital marketing providers that are materially involved in the development of content strategy would not fall within the "time or space" exception as interpreted by the Bureau. Accordingly, digital marketing providers that are involved in the identification or selection of prospective customers or the selection or placement of content to affect consumer engagement, including purchase or adoption behavior, are typically service providers under the CFPA.

DATES: This interpretive rule is applicable on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*.]

FOR FURTHER INFORMATION CONTACT: Christopher Davis, Attorney-Advisor;

CFPB Issues Guidance to Protect Mortgage Borrowers from Pay-to-Play Digital Comparison-Shopping Platforms (and how its relevant to personal loans)

February 7, 2023 – CFPB issued an advisory opinion to “protect Americans from double dealing on digital mortgage comparison-shopping platforms.”

- Companies operating these digital platforms appear to shoppers as if they provide objective lender comparisons, but may illegally refer people to only those lenders paying referral fees.
- When shoppers use a lender that is not the best option for their needs, they may end up with a lower quality lender or paying thousands more in closing costs or interest.
- The advisory opinion outlines how companies violate the Real Estate Settlement Procedures Act (RESPA) when they steer shoppers to lenders by using pay-to-play tactics rather than providing shoppers with comprehensive and objective information.

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1024

Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this Advisory Opinion to address the applicability of the Real Estate Settlement Procedures Act (RESPA) section 8 to operators of certain digital technology platforms that enable consumers to comparison shop for mortgages and other real estate settlement services, including platforms that generate potential leads for the platform participants through consumers' interaction with the platform (Digital Mortgage Comparison-Shopping Platforms). Generally, this Advisory Opinion describes how an operator of a Digital Mortgage Comparison-Shopping Platform violates RESPA section 8 if the platform provides enhanced placement or otherwise steers consumers to platform participants based on compensation the platform operator receives from those participants rather than based on neutral criteria. More specifically, this Advisory Opinion states that an operator of a Digital Mortgage Comparison-Shopping Platform receives a prohibited referral fee in violation of RESPA section 8 when: (1) the Digital Mortgage Comparison-Shopping Platform non-neutrally uses or presents information about one or more settlement service providers participating on the platform; (2) that non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, those settlement service providers, thus constituting referral activity; and (3) the

2015 FTC Workshop “Follow the Lead”

- Online lead generation is a complex and often opaque industry.
- Lead generators collect consumer information from a variety of sources, including online forms, search engine results pages, and social media.
- Lead generators sell this information to businesses that are seeking to market their products or services to consumers.
- Lead generation can be beneficial for both businesses and consumers, but there are also potential risks associated with it.
- The FTC has brought enforcement actions against unscrupulous lead generators, and it continues to monitor the industry.

“Follow the Lead” Workshop

STAFF PERSPECTIVE | SEPTEMBER 2016

Introduction

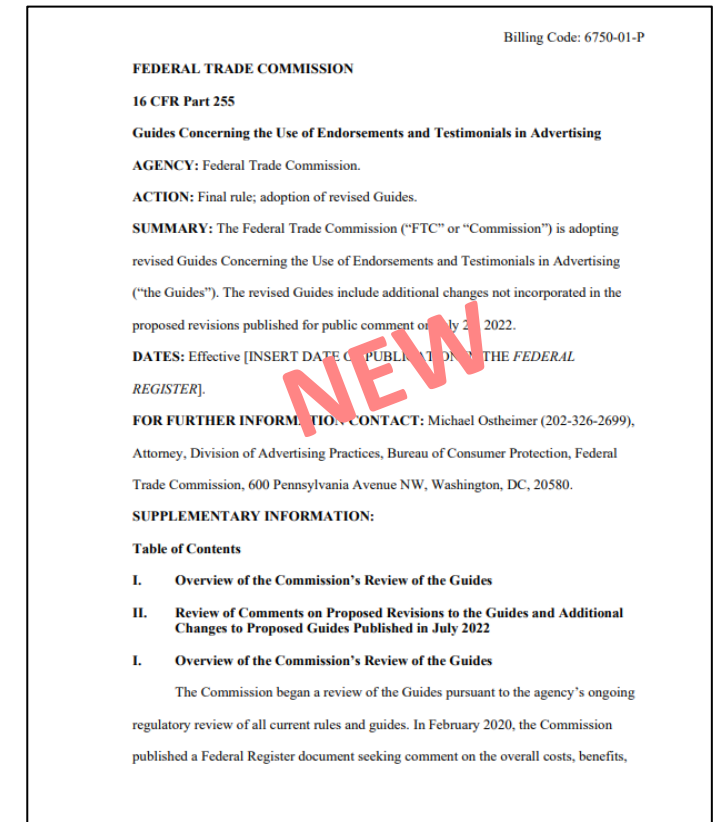
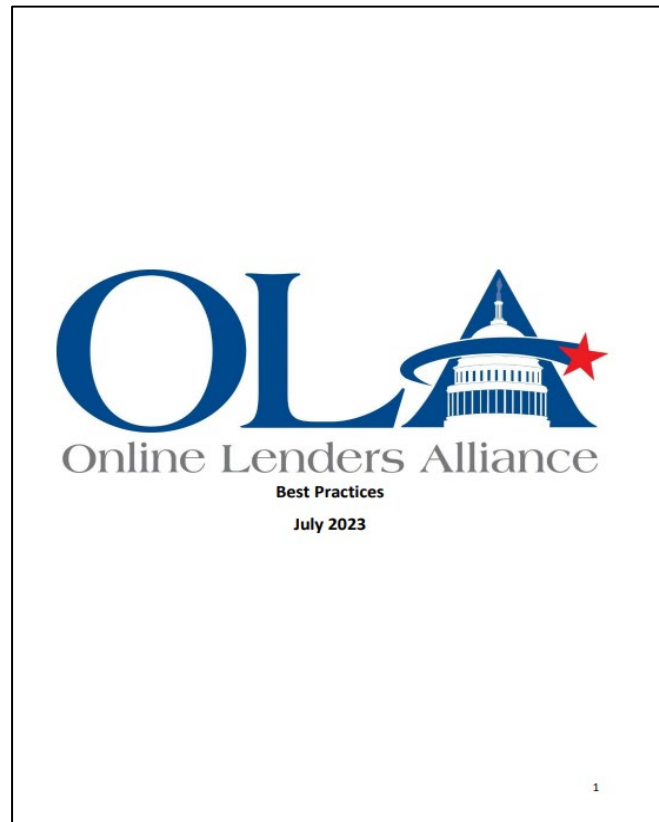
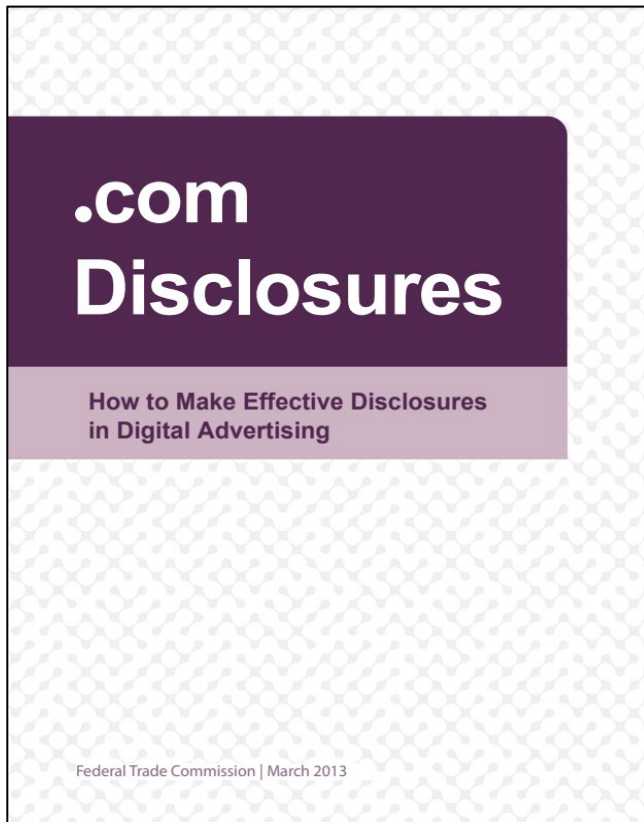
Online lead generation is nearly ubiquitous in the modern marketplace, connecting consumers who are interested in goods or services with the merchants or providers who can offer them. But because lead generators often operate behind the scenes in complex ways, consumers and many businesses may know little about what they do and how they do it.

As the nation’s consumer protection agency, the Federal Trade Commission (“FTC”) has broad jurisdiction over lead generators, whether they are generating leads for a lender, an educational institution, or a company offering another good or service. Using this authority, the agency has brought law enforcement actions against unscrupulous actors in the lead generation industry. For example, the FTC has sued lead generators that lured consumers with promises of extremely low fixed rate mortgages or free refinancing, but then sold consumers’ information to entities that did not actually offer these deals.¹ The FTC also has sued payday loan lead generators that sold consumers’ sensitive bank account information to non-lenders who simply debited charges directly from consumers’ accounts without authorization.²

Given the complexity of the industry, on October 30, 2015, the FTC hosted a public workshop, entitled “Follow the Lead” (“Workshop”), at which a variety of experts and stakeholders discussed online lead generation practices and key consumer protection issues raised by those practices.³ This Staff Perspective summarizes and reflects upon that discussion, the associated public comments, and other information gathered through law enforcement and experts. In particular, we detail the mechanics of online lead generation and potential benefits and concerns associated with lead generation for both businesses and consumers.


Follow the Lead
An FTC Workshop on Lead Generation

Additional Related Guidance



Recent Regulatory Enforcement and Litigation

Rate Cap Enforcement

- 36% rate caps have been adopted in more than 20 states, and enforcement is a priority in many of them
- Rate cap enforcement is challenging for products such as bank and tribal loans, so some regulators are pursuing service providers including lead generators in attempts to curtail high-interest lending
- Active states include Illinois, Pennsylvania, and Connecticut
- Key issues include licensing and UDAAP

Other Issues

- PA AG/Fluent (May 2023): Inadequate consent (fine print and dark patterns); robocalls
- CT Banking Comm'r/SoLo Funds (May 2023): Licensing; tips issues
- FTC/IT Media (Jan. 2022): Lead sales to non-lenders such as debt settlement companies; sales to bad actors; FCRA credit score reselling claims
- IL AG/Money Mutual (Nov. 2021): Licensing and sale of leads to unlicensed lenders (rate caps)
- FTC/Career Education Corp. (Aug. 2019): Liability for lead gen conduct such as deceptive websites
- Wisconsin Litigations (2023): Multiple individual cases allege failure to obtain credit service organization licenses, privacy, FCRA and ECOA violations

What's on the Horizon?

Evolving Legal and Regulatory Landscape

- FCC Proposal to ban the practice of obtaining a single consumer consent as grounds for delivering calls and text messages from multiple marketers on subjects beyond the scope of the original consent (April 2023, ongoing).
 - The FCC sought comment on amending the TCPA consent requirements to require that such consent be considered granted only to callers logically and topically associated with the website that solicits consent and whose names are clearly disclosed on the same web page.
 - The FCC also sought comment on whether prior express consent to receive calls or texts must be made directly to one entity at a time.
 - More broadly, the FCC sought comment on the extent of the problem, the proposed rule, and whether the proposed rule will clarify consent and help to eliminate illegal text messages and calls.
- Enforceability of Online Consent and Disclosures - E.g., *Berman v. Freedom Financial Network LLC*
- State Lending and Broker Law Developments
- New Safeguards Rule Compliance – Will the FTC come knocking?
- Fair Lending / AI and More
- CFPB Registry of *Supervised* Nonbanks (CFPB Final Rules Stage)
- FCRA Rulemaking (CFPB Prerule Stage)

Key Due Diligence Issues

Consent

- Can you **prove** the consumer consented?
 - Do you have the consent language and how it was presented to the consumer?
 - Can you authenticate the consumer's consent?
 - Traditional contract principles determine whether the consent is adequate
 - Was the consent language presented in a clear and conspicuous manner?
 - Are there issues with "digital dark patterns," tiny print, or otherwise?
- What did the consumer consent to?
 - Is the consent broad enough to encompass the use of the information the consumer provided?
 - Regulators are focused on the scope of consent
 - Was the lead used consistent with what the consumer authorized?
 - "Zombie leads" issue – is the consent language subject to equitable or other limitations?

Deception/UDAAP

- What representations are made?
 - False claims concerning how the information will be used?
 - Leads sold to non-lenders
 - Leads sold for purposes other than providing the advertised service
 - Deceptive promises concerning results?
 - Education example (e.g., job placement)
 - Lending promises (e.g., “best rates”)
- Disclosures re ping tree order

Other Issues

- Is the lead buyer using the information to offer unlawful products?
 - Focus on rate caps
- Is the lead buyer a bad actor?
 - E.g., collections practices
- Are licenses required?

Due Diligence Best Practices

For Aggregators

- Pre-Onboarding of Publishers/Affiliates
 - Review of Publisher/Affiliate websites, telemarketing, etc.
 - Background checks (litigation and regulatory enforcement history, criminal)
 - Licensing
 - General Compliance
- Onboarding
 - Contractual commitments
- Ongoing Monitoring
 - Ongoing website reviews
 - Compliance audits

For Buyers

- Assume you will be secondarily liable for lead gen behavior
- Diligence should largely mirror what aggregators should do
 - Pre-Onboarding Reviews
 - Contractual commitments
 - Ongoing Monitoring

Questions?

Scott M. Pearson
Manatt, Phelps & Phillips, LLP
(310) 312-4283
spearson@manatt.com

Jonathan L. Pompan
Venable LLP
(202) 344-4383
jlpompan@venable.com