

Internet Loans: Unique Legal Requirements

Nuts and Bolts of Internet Lending Panel

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Presented by

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Overview

- Select legal rules that apply to each step of an Internet payday loan transaction
 - Advertising and Marketing
 - Virtual Lobby
 - Electronic Documents
 - Electronic Disclosures
 - Special Operational Challenges
 - Wrap-up and Questions

Topics for another day...

- Disbursement, Repayment (ACH Rules)
- Uniform Electronic Transactions Act
- Information Security Requirements (GLBA)
- AML Compliance
- Others

Marketing and Advertising

- Traditional advertising –
 - Television, radio, billboards, window signs, fliers, mailings
- Internet advertising –
 - Posting rates, fees, and terms on website, email advertisements and communications
- Special rules apply

Marketing and Advertising (cont'd.)

- **TILA advertising rules**

- Only actually available terms may be advertised
- Be careful about “trigger terms”--
 - Number of payments
 - Period of repayment
 - Amount of any payment
 - Amount of any finance charge
- Must also state (as applicable)
 - Terms of repayment
 - APR
- “Clearly and conspicuously”

Marketing and Advertising (cont'd.)

- **“CAN SPAM Act”**
 - (Controlling the Assault of Non-Solicited Pornography and Marketing Act)
 - Applies to email advertisements about products or services, promoting a web site address

Marketing and Advertising (cont'd.)

- CAN SPAM Act (Cont'd.)
 - “From,” “to” and routing information (e.g., originating domain name, email address) must be accurate and identify the sender
 - Subject line can't be misleading
 - Must give an “opt-out” for future messages
 - Must disclose “advertisement” or “solicitation” and sender's postal address

Marketing and Advertising (cont'd.)

- CAN SPAM Act (cont'd.)
 - “Transactional or relationship” emails (agreed-upon transaction or existing business relationship) exempt.
 - BUT no false or misleading routing information
 - Big penalties for violations (\$11,000 per violation, imprisonment)

Marketing and Advertising (cont'd.)

- **State laws**
 - Misleading advertising/UDAP
 - Anti-spam

Virtual Lobby

- Postings
 - Fee schedule
 - License
 - “Rights” Disclosures
- Issues
 - Font, type-size
 - “Clear and conspicuous” standard

Electronic Documents

- Examples -
 - Application
 - Adverse action notice
 - Loan Agreement
 - TILA disclosures
 - Privacy disclosures
 - Military safe harbor

Electronic Documents (cont'd.)

- Paper loan requirements:
 - Payday loan contracts must be *in writing*, *signed* by the borrower and lender
 - TILA disclosures must be “*in writing*, in a form that the consumer *may keep*.”
 - State laws have similar requirements – writing, signed by customer, copy to customer
- How do you meet these requirements in the electronic world?

Electronic Documents (cont'd.)

- **“E-Sign”**
 - Electronic Signatures in Global and National E-Commerce Act of 2000
- Purpose: to permit and encourage the expansion of interstate commerce by electronic means

Electronic Documents (cont'd.)

- Anti-discrimination law --
 - Signature, contract, disclosure or other record cannot be denied legal effect solely because it is in electronic form
 - Contract cannot be denied legal effect solely because it is signed electronically

Electronic Documents (cont'd.)

- E-Sign does not...
 - Require anyone to use electronic documents
 - Affect the timing or content of any required disclosures – TILA, etc.
 - Affect any other rights, obligations or defenses

Electronic Documents (cont'd.)

- Who is subject to E-Sign?
 - Businesses and consumers
 - BUT - Special rules apply to consumer transactions

Electronic Documents (cont'd.)

- Consumer transactions:
 - Disclosures
 - Consumer consent
 - Consent not withdrawn
 - Notice of subsequent hardware/software changes

Electronic Documents (cont'd.)

- **Disclose** (pre-consent):
 - Any right or option to have paper documents
 - How to request a paper copy of an electronic disclosure (after consent) and whether any fee will be charged

Electronic Documents (cont'd.)

- **Disclose** (cont'd.):
 - Scope of the customer's consent
 - Particular document, disclosure or transaction? **OR**
 - Specific, identified categories of disclosures, documents and transactions
 - Right to withdraw consent
 - And any conditions, consequences or fees
 - Procedures to withdraw consent

Electronic Documents (cont'd.)

- **Disclose** (cont'd.):
 - Procedures consumer must use to update consumer's electronic contact information
 - Hardware and software requirements to access electronic documents

Electronic Documents (cont'd.)

- Consent to receive electronic documents.
- Consent must be obtained—
 - electronically, AND
 - in a manner that reasonably demonstrates that the customer can access the disclosures in the electronic form that will be used to provide the disclosures

Electronic Documents (cont'd.)

- Consumer **must not have withdrawn consent** to receive electronic documents.
- Withdrawal of consent is--
 - Effective a reasonable period of time after receipt
 - Does not affect any electronic disclosures made prior to withdrawal

Electronic Documents (cont'd.)

- Must give notice of changes in hardware or software requirements if there is a risk that the consumer will not be able to access or retain an electronic disclosure:
 - Revised requirements **AND**
 - Right to withdraw consent (again)
 - No conditions, consequences or fees unless previously disclosed
- Must obtain consent again
- Failure to give notice = withdrawal of consent (at customer's election)

Electronic Disclosures

- Fed rules for E-Sign compliance
 - Z, B, E, DD, M
 - Never mandatory, recently withdrawn
 - Filled some of the gaps in E-Sign
 - BUT – Excellent guidelines, “quasi” safe harbor

Special Operational Challenges

- Authentication
- Oral disclosures
- Rescission right
- Prepayment
- Payment plans
- APR calculations –
 - Funding date?
 - Contract date?



Wrap up and Questions



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