Lead Generators

RegList Workshop
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What is a lead generator and why care?

- Many lenders are buying leads
  - Many lead generators target individual originators not companies
- RESPA prohibits compensation for referrals & splitting fees
- TILA restricts compensation to loan originators
- States license mortgage brokers – but what about lead generators
- State and Federal laws govern advertisements
- Creditors have vendor management obligations
- TCPA creates more obstacles
Leads vs prohibited referrals

- Referral is defined by Reg. X as “any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service... when such person will pay for such settlement service... or pay a charge attributable in whole or in part to such settlement service...” 12 CFR 1024.14(f)(1).

- The PHH en banc decision vindicated our understanding that Section 8(c)(2) permits payments for goods or facilities actually furnished or for services actually performed. 12 U.S.C. 2607(c)(2).
  - Payments must bear reasonable relationship to value of services. 12 CFR 1024.14(g)(2).
  - Charges where no or nominal services are performed are violations. 12 CFR 1024.14(g)(2).

- HUD statements of policy 1999-1, 2000-1
  - “HUD [did] not view the name of the payment as the appropriate issue under RESPA.” 64 Fed. Reg. 10080, 10084 (March 1, 1999).
  - HUD emphasized value of disclosure and reliance on the specific factual circumstances applicable to each transaction. 66 Fed. Reg. 53052, 53054 (October 18, 2001).
• Reg Z defines loan originator as “a person who... performs any of the following activities: takes an application, offers, arranges, assists a consumer in obtaining or applying to obtain, negotiates, or otherwise obtains or makes an extension of consumer credit for another person; or through advertising or other means of communication represents to the public that such person can or will perform any of these activities.” 12 C.F.R. § 1026.36(a)(1)(i).

• “The scope of activities covered by the term loan originator includes:
  - 1. Referring a consumer to any person who participates in the origination process as a loan originator...
  - 3. Assisting a consumer in obtaining or applying for consumer credit by advising on particular credit terms that are or may be available to that consumer based on the consumer's financial characteristics... or collecting application and supporting information on behalf of the consumer to submit to a loan originator or creditor...
  - 5. Advertising or communicating to the public that one can or will perform any loan origination services...” 12 C.F.R. Part 1026, Supp. I, cmt 36(a)-1.i.

• Third party vs employee
  - “a mortgage broker with respect to a particular transaction is any loan originator that is not an employee of the creditor.” 12 C.F.R. § 1026.36(a)(2).
  - Loan originator compensation cannot vary based on terms of transaction. 12 C.F.R. § 1026.36(d)(1).
  - Anti-steering disclosures are required of lowest rate, lowest rate without special features, and lowest total origination fees. 12 C.F.R. § 1026.36(e)(3).
MSA’s vs lead generators

- Bureau states MSAs are not exclusive to settlement service providers
  - MSA’s may “involve third parties who are not settlement services providers, such as membership organizations. MSAs are usually framed as payments for advertising or promotional services, but in some cases the payments are actually disguised compensation for referrals.” CFPB Bulletin 2015-05.
  - Arguably lead generator relationships that are not loan originators are MSAs
- Bureau states fact specific nature requires transaction level analysis
  - “The outcome of one matter is not necessarily dispositive to the outcome of another.” CFPB Bulletin 2015-05.
- Senior Bureau attorney unofficially stated at conferences that it could not say MSAs were per se violations but that it had never seen an MSA that was not a violation.
- Mulvaney Bureau walked back aggressive tactic, but State regulators are taking up the mantle.
Lead generator advertising

- Marketing vs endorsements
  - Endorsements generally have the effect of **affirmatively influencing a consumer’s selection**.
  - “an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser... The Commission... treat[s] endorsements and testimonials identically” 16 C.F.R. § 255.0(b), (c).

- Reg N mortgage advertisements
  - “Commercial Statement means any written or oral statement, illustration, or depiction... designed to effect a sale or create interest in purchasing goods or services... Promotional materials and items and web pages are included.” 12 C.F.R. § 1014.2.
  - “**Term** means any of the fees, costs, obligations, or characteristics of or associated with the product. It also includes any of the conditions on or related to the availability of the product.” 12 C.F.R. § 1014.2.
  - 24 month recordkeeping requirement. 12 C.F.R. § 1014.5.
Lead generator advertising (cont.)

• Reg Z
  • “‘Advertisement’ means a commercial message in any medium that promotes, directly or indirectly, a credit transaction.” 12 C.F.R. § 1026.2(a)(2).
  • “applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit... loan..., other than an open end credit plan...to the extent that the Bureau may by regulation require.” 15 U.S.C. § 1664(a)-(b).

• Unfair, Deceptive, and Abusive Acts and Practices (UDAAP)
  • Ties in to the clear and conspicuous standard for advertising
  • TILA and Federal Trade Commission Act
State Licensing
State licensing requirements

- Activity and/or data may trigger licensing
  - Few states have specific lead generator language in licensing
  - Most license lead generators as mortgage brokers when required

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<th>Entity Licensing</th>
<th>Originator Licensing</th>
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<td><strong>Most Frequent</strong></td>
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<td>Solicit</td>
<td>29</td>
<td>Offer</td>
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<td>Place</td>
<td>19</td>
<td>All</td>
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<td>Assist</td>
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<td>All</td>
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<td><strong>More Terms</strong></td>
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<td>Find, Negotiate, Serve as agent, Offer, Help to Obtain, Aid, Procure, Provide, Advertise, Recommend, Refer, Steer</td>
<td>Place, Arrange, Find, Explain, Recommend, Discuss, Advertise</td>
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Connecticut – Doubles Down

- Specific lead generator license
  - “‘Lead generator’ means a person who, for or with the expectation of compensation or gain: (A) Sells, assigns or otherwise transfers one or more leads for a residential mortgage loan; (B) generates or augments one or more leads for another person; or (C) directs a consumer to another person for a residential mortgage loan by performing marketing services, including, but not limited to, online marketing, direct response advertising or telemarketing. Conn. Gen. Stat. § 36a-485(14).
Virginia – Exempts with specificity

- Statutory definition of Mortgage Broker
  - “Mortgage broker” means any person who directly or indirectly negotiates, places or finds mortgage loans for others, or offers to negotiate, place or find mortgage loans for others. Va. Code § 6.2-1600.

- Clarify definition by Rule
  - “For purposes of [the statute and the regulation governing mortgage lenders and mortgage brokers], the term ‘mortgage broker’ does not include... a lead generator.” 10 Va. Admin. Code 5-160-10.
  - “‘Lead generator’ means a person who engages in a form of marketing activity in which the person collects and transmits a prospective borrower's contact information and minimal information pertaining to potential mortgage loans. A person shall not be considered a lead generator if the person collects a prospective borrower's social security number or sufficient personal information to enable a mortgage lender or mortgage broker to evaluate, in whole or in part, the prospective borrower’s creditworthiness.” 10 Va. Admin. Code 5-160-10.
• No clear definition of mortgage broker
• No definition of lead generator
  • Pilot program for “finders” of small dollar loans (not mortgages)
• Aggressive enforcement against lead generators attempting to license
  • Watch list that flags lead generator when applying for license
  • No explanation of internal definitions or policy
• Pending internal request from enforcement for clarification from Office of Law and Policy
• Still no opinions provided from Public Records Act request and we have been informed internal enforcement opinion will not be public.
Vendor Management
Entity Information

- Organizational chart for entity and affiliates, including
  - State of organization
  - States where entity is licensed, and how
  - Trade names/DBA registrations
    - Make sure you’re contracting with the right entity name
    - Any state that requires licensure for lead generators may also require a DBA to be properly registered to the entity
License Information

• Verify all mortgage-related licenses held by entity or affiliates, including
  • Name of license holder
  • Issuing state or local agency
  • License number

• Knowing affiliates and understanding licensing strategy matters!
  • Some organizations may be broadly licensed, but across multiple subsidiary companies. If you’re buying leads that need to be sold from a licensed lead generator, then they need to be routed via the specific company that’s licensed in that lead’s state.
License Information (cont.)

• Verify licensure on nmlsconsumeraccess.org
  • Lead generators aren’t required to be licensed in lots of states....YET!
  • The expectation is that licensure of lead generators will be required more broadly soon.
  • Best Practice: buy from a licensed entity, or at least have a plan in place to require licensure by a date that fits in with your company’s risk appetite

• Make your own determination on whether licensing is required, and line that up with your company’s risk tolerance.
  • In other words, don’t just rely on the lead generator to say their licensure is adequate!
Compliance

• Copies of correspondence or other documentation for entity or affiliates relating to or alleging non-compliance with any licensing requirements
• Consent orders or settlement agreements relating to compliance issues
Litigation & Insurance

• Information about any material litigation filed against entity in past 3 years
  • Define materiality depending on risk tolerance

• Certificate evidencing insurance
  • Errors and Omissions (E&O)
  • Cyber coverage

• TCPA insurance coverage is available, but could have costly premiums, little coverage, and caps on defense costs – so many lead generators (or lenders) may not have it.
  • So, getting TCPA right from the outset is important. More on that later....
• Information Security Issues
  • Data Protection / Information Security Policy
  • Password requirements
  • Employees have access to sensitive or personal information on a need-to-know basis
  • Physical security on buildings with servers
  • Servers with lead information partitioned off from other servers (is data isolated and not co-mingled?)

• Incident Response Plans
  • Confirm regularity of penetration testing
  • Confirm existence of Business Continuity Plan and Disaster Recovery Program, particularly if this will be a large provider of your leads. (The bigger the relationship, the more effect there will be on your organization if the lead generator goes down.)
    • Find out about testing BCP. At least annually is best.
Advertising

- Compliance program
  - UDAAP
    - What is the process for ensuring compliance? What triggers legal review, and how frequently does it occur?
    - Do you have liability for UDAAP issues by a lead generator? Maybe not...but the lead quality could tank if consumers are confused or feel tricked.
  - Social Media
    - Are disclosures present? When should they be there and where do they live?
    - Space may be limited in posts. Understand lead generator’s approach.

- Traffic driving
  - Misleading content – ex., “Click here to find out more about your VA benefits”
  - Offensive content

- Approach this from both sides – look at advertising before entering the relationship, but also watch lead quality closely during the relationship.
  - Consumers who are frequently confused about why you’re calling them and have a mistaken idea about what you do might indicate an advertising problem.
Customer Relations

• How does the lead generator handle and escalate complaints?
  • This may matter more depending on the types of leads sold and
    the contacts the lead generator may have with your borrower
    before he/she reaches you. More on that soon....

• Consumer Privacy – data sharing and permission
  • The TCPA consent language on the lead form should also give the
    lead generator permission to share the lead information with
    lenders.
  • Who owns the lead data – you or the lead generator?
    • Are there contractual limitations on how that data can be used by either
      of you?
    • Can you re-sell the lead?
    • Can the lead generator re-target the lead within X days after selling you
      the lead?
Telephone Consumer Protection Act (TCPA)
General Requirements

• Prior written consent for auto-dialed marketing calls or texts
  • FCC says auto-dialer = *potential future capacity* to store and dial random or sequential numbers. Broad definition.
  • Under review by DC Circuit Court of Appeals

• State-specific requirements exist, but generally meeting federal requirements works
Pre-Relationship

• Review site for existing language and determine if appropriate
  • Lead generators should be getting consent for YOU, not just them
    • By name is best, but not always possible
    • Linking to a list of possible lenders who may contact is another approach
    • General statement about being contacted by lenders is less desirable and potentially not compliant
  
• Contract for appropriate TCPA consent whether or not currently present
  • Negotiate for indemnification if possible
  • Reserve right to approve language
  • Contractually restrict changes to language without prior approval (but this might be tough to get)
After Relationship Begins

- Regularly review all forms where you receive leads....but sometimes this may be impractical.
  - Lead generators may revise TCPA consent language without us knowing due to requests by new lead buyers.
  - Favorable language in the contract helps, but it’s not a substitute for diligent monitoring of forms.
- Consider a vendor in this space that captures lead form consent language for each lead submitted, and notifies you of changes.
Follow Up

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Workshop Scenarios
Scenario 1 discussion questions

1. Do you have any concerns about pricing?
   • How will you decide the fair market value of a lead?

2. What additional vendor management risk is there in working with a lead aggregator/network?
   • Do you need to know your source’s sources?

3. What do you anticipate the Consumer’s perception will be of the role of Leads Abound?

4. What other concerns have you identified?
1. With expert script writers and guaranteed performance, management wants to know why they should tinker with the language and lose the guarantee?

2. Is there any reason not to include inbound services for all of the company’s advertising?
   - With 24/7 coverage and all the data they could collect loan officers would save a lot of time.

3. Based on the attached sample script, what is the Consumer’s perception on the call?

4. What other concerns have you identified?
1. In either aspect of its program, is Leads Abound selling leads, or prohibited referrals?
   • What changes in the available program options might mitigate the risk?

2. Is Leads Abound’s representative acting as a loan originator in the live transfer option above?
   • Does use of the IVR change your answer as it would pertain to Leads Abound performing origination activity as an entity?

3. Leads Abound may be getting adequate TCPA consent for itself, but let’s assume it isn’t getting adequate TCPA consent for you.
   • Is that risk greater in one type of lead offered in this program over the other?

4. What if Leads Abound adds a third option to this program, in which it verifies some of the information provided by the consumer before transferring the lead (such as a soft credit pull)?
   • Does this change your analysis of questions 1 and 2 above?
Follow Up

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