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Mortgage Triggers Briefing Paper

Executive Summary

Mortgage triggers benefit consumers and lenders. Lenders benefit because where they received a lead based on this product, they are in a position to compete for a potential customer who is truly in the market and ready to seek a loan. Consumers clearly benefit from the nationwide competition which results from mortgage brokers and lenders which are using these products tens of thousands of times per month.

A few state legislatures have had an interest in how lenders use these mortgage triggers. Since 2007, four states have passed laws to address mortgage triggers. Three states, Connecticut, Kentucky, and Maine, passed laws regulating the practice such that if a lender or mortgage broker uses information from a mortgage trigger, that person must adhere to certain professional standards and ensure that the offers made are in compliance with state and federal lending statutes. Ensuring consumers are protected and that they can still receive competing offers which may well save them money is a rational and reasoned approach. Two states, Minnesota and New Jersey have enacted laws which attempt to ban the practice of making mortgage triggers available to lenders. Such efforts have failed because federal courts have stepped in in both cases to prevent the laws from taking effect on preemption grounds based on the operation of the federal Fair Credit Reporting Act. In private litigation unrelated to state legislation a third federal court in a third state likewise found that the federal FCRA preempted state laws.

This briefing paper is designed to help readers better understand the consumer and lender benefits of mortgage triggers and why the federal Fair Credit Reporting Act already provides consumers with the rights and protections they need. The Federal Trade Commission has carefully evaluated these products and issued the following notice:

> Clearly, some mortgage companies benefit from the practice. But the FTC says consumers can benefit, too: prescreened offers can highlight other available products and make it easier to compare costs while you carefully check out the terms and conditions of any offers you might consider.

Mortgage Triggers Q&A

What Are Mortgage Triggers?

Not all consumers shop around as much as they should, but every consumer wants to have the very best offer for which he/she can qualify. A mortgage loan is likely the single largest loan a consumer will ever undertake and encouraging consumers to consider lower-cost loans can put hundreds of dollars in discretionary spending back into their hands. Mortgage trigger help lenders to compete and to bring potentially better offers to the doorstep of the consumer. A mortgage trigger service is a prescreened offer of credit. It works like this: After a consumer has applied for a mortgage, if that consumer fits the criteria requested by someone who subscribes to a mortgage trigger service, a consumer reporting agency will notify subscribers of the service that the consumer has applied for a mortgage or refinance. The subscriber, which may be a credit union, mortgage broker, a bank, or other financial services company, will then extend to the consumer a firm loan offer. This offer may, in fact, be on better terms than the consumer had initially hoped to receive.

Are Mortgage Triggers Regulated by Federal Law?

Yes. A mortgage trigger service is regulated by the federal Fair Credit Reporting Act (FCRA). The Federal Trade Commission issued a notice to consumers that "federal law allows [the] practice [of mortgage trigger services] if the offer of credit meets certain legal requirements."[1]

Under the FCRA, a user of a mortgage trigger product (e.g., a credit union, community banker or other lender) must: (a) Certify to the consumer reporting agency that it has a permissible purpose to request a credit report; (b) actually make a "firm offer of credit" as defined under the FCRA; (c) actually have the means to honor the offer (i.e. mortgage brokers must have a contract that binds a lender to honor the offer); and (d) provide notice of the consumer's right to opt-out when making written solicitations to consumers.

[1] http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt171.shtm

The FCRA limits the amount of information a lender can receive from a consumer reporting agency. Neither the consumer reporting agency issuing the trigger or the lender making the offer will have access to the consumer's original loan application. The lender will receive contact information such as the consumer's name and address. Telephone numbers can be provided but all lenders are required to comply with state and federal do-not-call lists. Some lenders do some additional research in court house public records to learn about the consumer's current mortgage loan (such as the original purchase price or the current value of the home based on tax assessments).

When making a loan offer to a consumer based on a mortgage trigger, a credit union or other type of lender is required to adhere to the FCRA, as well as other federal laws (such as the Equal Credit Opportunity Act, Fair Housing Act, Truth in Lending Act, Real Estate Settlement Procedures Act and Home Mortgage Disclosure Act) and federal and state unfair and deceptive and trade practices laws.

Are Consumers Protected by Federal Law?

Yes. Consumers have an absolute say in whether or not they will receive offers from other lenders to which they have not made an application for a loan. For example, consumers who wish to prevent lenders from calling them with loan offers can can simply sign up for the Federal Trade Commission's do-not-call list. In this case the consumer will still receive an offer in the mail and may welcome these, since they may be for better rates and thus consumers save money. Some consumers may not want to hear from any lender other than the one to which they have made application. In this case the consumer can opt out of all such offers by calling 1-888-5-OPT-OUT or by logging on to www.optoutprescreen.com.

Consumers also have a right to see their consumer credit report disclosure whenever they wish, and can do so annually for free (www.annualcreditreport.com). When consumers look over their free disclosure, they can see which credit unions, community banks or other lenders have had access to their information.[2]

[2] When a consumer requests a copy of his or her credit report, the consumer reporting agency must disclose to the consumer, among other things, all persons that requested the consumer's credit report in the preceding year (15 U.S.C. § 1681g(a)(3)). Consumer reporting agencies are under a federal obligation to maintain reasonable procedures to ensure maximum possible accuracy. Id., § 1681e(b). Non-consumer initiated inquiries, including mortgage trigger services cannot, by law, impact a consumer's credit score.

Do Mortgage Trigger Offers Help Consumers?

Yes. Simply put, mortgage trigger services offer consumers the opportunity to save substantial sums of money. Take a hypothetical consumer who puts 10% down on a $204,000 home. The difference between a 6.25% mortgage and a 6% mortgage is $30 per month or $11,000 over the life of the 30 year mortgage. The FTC noted that

> Clearly, some mortgage companies benefit from the practice….[C]onsumers can benefit, too: prescreened offers can highlight other available products and make it easier to compare costs while you carefully check out the terms and conditions of any offers you might consider.[3]

A 2005 Federal Reserve report on lending showed that 35% of all "high-cost" mortgage refinances were taken out by African-Americans and 19% by Latinos. Mortgage or refinance offers from a community bank, broker or credit union due to a mortgage trigger service could very well reduce the percentage of "high-cost" loans paid by any consumer, and particularly minority populations. An October 8, 2006 article from the Washington Post entitled "The Fleecing of Black Borrowers" noted that "[y]ears of denials [of credit against minority consumers] may lead minorities to look for 'guaranteed approvals' instead of the lowest price" and that these borrowers, especially African-Americans frequently underestimate their creditworthiness. In fact, it was noted by a spokesperson for the American Bankers Association that "[p]eople shop more for a loaf of bread than they do for a mortgage." Just a point on a mortgage can mean a savings of tens of thousands of dollars on the life of a 30-year mortgage. Offers provided to minority borrowers from mortgage trigger services have the potential to reverse the unfortunate reality of minority home lending.

Mortgage trigger services are uniquely positioned to assist consumers when shopping for a mortgage because the offers from such services arrive on the consumer's doorstep just when they need the information the most.

A 2018 story in the Wall Street Journal said that "[b]orrowers who finance the purchase of cars or homes without soliticing quotes from multiple lenders often pay more

[3] <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt171.shtm> (viewed Oct. 1, 2007).

than their financial peers."[4] The article adds that "in the absence of that competitive pressure, lenders have no incentive to offer similar borrowers comparable rates." According to research by the CFPB, in a 2017 paper, "[t]he average spread on home mortgages among all borrowers is a half percentage point. Paying 4% interest on a $400,000 mortgage instead of 3.5% amounts to an extra $114 in monthly payments."[5] By contrast, "[t]he average difference in car loans is 1.3 percentage points," as studied by researchers at MIT and Brigham Young University. For the typical car loan, the difference would be like paying $1,300 more on the purchase price."[6]

Can a State Ban on Mortgage Triggers?

No. Mortgage trigger services, which are made available by consumer reporting agencies cannot be banned in the states. The federal Fair Credit Reporting Act (FCRA) regulates consumer reporting agencies and this law prohibits any state from imposing any requirement or prohibition with respect to any subject matter regulated under 15 U.S.C. § 1681b(c). This was the conclusion reached by the Connecticut Office of Legislative Research and by the Maine Office of Consumer Credit Regulation and by a number of court decisions discussed below.[7]

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[4] Jo Craven, McGinty, *The Costs of Getting Just One Rate Quote: Studies show financial peers can pay widely different amounts on home and car loans*, Wall Street Journal, March 30, 2018, https://www.wsj.com/articles/the-costs-of-getting-just-one-rate-quote-1522414800.

[5] Alexandrov, Alexei and Koulayev, Sergei, No Shopping in the U.S. Mortgage Market: Direct and Strategic Effects of Providing Information (March 14, 2017). Consumer Financial Protection Bureau Office of Research Working Paper No. 2017-01. Available at SSRN: https://ssrn.com/abstract=2948491 or http://dx.doi.org/10.2139/ssrn.2948491.

[6] Argyle, Bronson and Nadauld, Taylor and Palmer, Christopher, Real Effects of Search Frictions in Consumer Credit Markets (October 18, 2017). MIT Sloan Research Paper No. 5242-17. Available at SSRN: https://ssrn.com/abstract=3044889 or http://dx.doi.org/10.2139/ssrn.3044889.

[7] Connecticut. "Connecticut is most likely preempted from passing any sweeping legislation affecting mortgage lead triggers." Connecticut General Assembly, Office of Legislative Research, Report No. 2007-R-0072, "Mortgage Trigger Leads," January 24, 2007, <http://www.cga.ct.gov/2007/rpt/2007-R-0072.htm> (viewed July 27, 2007).

Maine. "While the federal preemptive language…prevents a state from prohibiting or severely restricting legitimate use of such trigger leads…it is within a state's prerogative to require that such information be utilized in a way that conforms with federal law and that is not misleading to consumers." State of Maine, Office of Consumer Credit Regulation, "Legislative Proposals to Address Predatory Lending Practices in Maine," December 8, 2006, pp. 2-4, 23, <http://www.maine.gov/tools/whatsnew/attach.php?id=26818&an=1 > (viewed July 26, 2007).

The most comprehensive judicial review of mortgage triggers was made by the U.S. District Court in Minnesota in 2007 when CDIA successfully challenged that state's ban on mortgage triggers. This decision was followed by federal courts in New York and in New Jersey which also sided with CDIA and its members.

In 2007, a federal court struck down the first state law that banned mortgage triggers – Minnesota – because that law was preempted by the FCRA. The court, in looking specifically at the subject matter preemption of 15 U.S.C. § 1681t(b)(1)(A), found that "the preemptive reach of FCRA is both broad and explicit" and held that the "'subject matter' of mortgage-trigger lists is unquestionably regulated by [the FCRA]". Thus, "neither Minnesota nor any other state may prohibit or regulate their sale." *Consumer Data Indus. Ass'n. v. Swanson*, No. 07-CV-3376 (PJS/JJG), 2007 WL 2219389 (D. Minn., July 30, 2007), at 7-8. The state did not appeal this ruling and on Aug. 21, 2007, a final order was entered "find[ing] and declare[ing] that [the Minnesota ban on mortgage triggers] is preempted in its entirety by 15 U.S.C. § 1681t(b) of the FCRA and is not enforceable, directly or indirectly, by [the state]." *Consumer Data Indus. Ass'n. v. Swanson*, No. 07-CV-3376 (PJS/JJG), (D. Minn., Aug. 21, 2007), amended consent order, at 2.

The U.S. District Court for the Western District of New York followed the holding of the federal court in Minnesota and found that the FCRA "pre-empts both statutory and common law prohibitions or restrictions on the practice of prescreening..." *Premium Mortgage Corp. v. Equifax,* U.S.D.C. (W.D.N.Y. No. 6:07-cv-06349-MAT) (Sept. 30, 2008).

The most recent court to find in favor of preemption and against state regulation of mortgage triggers was the U.S. District Court for New Jersey. New Jersey became the second state to pass a ban on mortgage triggers when it did so in January 2009. Shortly thereafter, the court issued a preliminary injunction which was followed quickly by the legislature's repeal of the law. *CDIA v. Milgram*, No. 09-CV-01270 (MLC).

Summary and Conclusion

Mortgage trigger services offered by consumer reporting agencies are commonly used, offer consumers the possibility of substantial financial savings, and allow for consumer protection. Mortgage trigger services are uniquely positioned to assist

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New Jersey. "[T]he regulation of [mortgage triggers] by credit agencies is governed through, and state regulation preempted by, federal law." New Jersey Office of Legislative Services statement accompanying A. 3821/S. 2720 (213th Legislature, 2009).

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Background on the Consumer Data Industry Association

CDIA was founded in 1906 and is the international trade association that represents more than 100 consumer data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, te