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MORTGAGE TRIGGER LEADS

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You asked for information about "mortgage trigger leads" and the laws that might be implicated by their use.

SUMMARY

Trigger leads are leads generated by consumer reporting agencies (generally for credit providers) based on some recent activity by a consumer who meets certain pre set criteria. In the context of mortgages, reporting agencies create lists of consumers who have recently had their credit pulled for the purpose of obtaining a mortgage, fall within a certain credit score range, and meet any other criteria set by the business purchasing the service. The Fair Credit Reporting Act governs the furnishing of consumer reports (or information contained therein) in connection with a credit or insurance transaction that the consumer did not initiate. It sets out the situations under which consumer reporting agencies may provide this information and how consumers can prevent them from doing so. There is controversy over whether these lists violate the Act but at least one state regulator and a major industry trade organization agree that the practice raises some consumer protection concerns. While the state is probably preempted from making any major changes to the law in this area, it is permissible to require that such information be utilized in a way that conforms with federal law and that is not misleading to consumers.

"MORTGAGE TRIGGER LEADS" DEFINED

It is common practice for credit card companies to solicit new accounts using prescreening to identify potential customers for their products. Generally, a creditor or insurer will (1) ask a consumer reporting company (typically Equifax, TransUnion, or Experian) for a list of people in the company's database who meet established criteria or (2) provide a list of potential customers to a consumer reporting company and ask that it identify people on the list who meet certain criteria. This process is permissible under the Fair Credit Reporting Act if the client agrees in advance that each consumer on the list will receive an offer of credit (CCH Consumer Credit

Guide, ¶ 25,050). Congress has determined that the benefits of the “firm offer” outweigh any privacy concerns arising from the compilation and use of credit information to formulate the “pre-screened” list (S. Rep. No. 103-209, 13-14 (1993)).

According to a 2005 *Mortgage Banking* magazine article written by Chet Wiermanski, TransUnion's vice president of Analytics, home-equity and other secured real estate lenders have used the prescreened lists from credit bureaus for years to acquire qualified loans. However, in an effort to address the “static” nature of the lists, credit bureaus have begun, within the last five years, to offer lenders lists generated by “credit events” or “triggers” that indicated a consumer is beginning the process of obtaining a new line of credit.

These so-called “leads” include the consumers' names, addresses, and contact information and, apparently, detailed financial information such as FICO scores and credit balances (although the web sites relating to the products offered by the three major credit reporting agencies do not specifically state what is included). The leads are based on consumers' recent behavior, sometimes providing information on consumers who have had their credit pulled to obtain a mortgage within the preceding 24 hours.

LAWS IMPLICATED

Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies (15 U.S.C.A. § 1681 et seq.). It became law in 1970 and is administered by the Federal Trade Commission (FTC). In 1996 Congress made substantial consumer protection related changes in the law that took effect in September 1997. Currently, FCRA allows consumer reporting agencies to issue “consumer reports” in a number of circumstances, but contains special provisions for situations where the transaction is not initiated by the consumer (i.e., for unsolicited pre-screened offers). Specifically, the law prohibits an agency from furnishing a consumer report in connection with any credit or insurance transaction that is not initiated by the consumer unless:

1. the consumer gives his authorization or

2. the transaction consists of a “firm offer” of credit or insurance, the consumer reporting agency gives consumers an opportunity to be excluded from such pre-screened lists that the agency provides without the consumer's consent, and the consumer has not exercised his right to be excluded.

Consumer reporting agencies that subscribe to this practice must maintain a system to notify consumers that they may be included on these lists and give them the opportunity to “opt out”. Consumers can opt out for five years or permanently by contacting the agencies, calling 1-888-5-OPTOUT (1-888-567-8688), or visiting www.optoutprescreen.com. The telephone number and website are operated by the major reporting agencies. In accordance with the law, consumers' opt out preferences must become effective beginning five business days after submission.

The FCRA prohibits any person from obtaining a consumer report from a reporting agency unless the person has certified to the agency the permissible purpose for which the report is being obtained and certifies that the report will not be used for any other purpose (15 U.S.C.A. § 1681b(f)). The requestor of the consumer report can receive the consumer's name and address, an identifier not unique to the consumer that is used only to verify his identity, and other information that does not identify the consumer's relationship or experience with a *particular* creditor or other entity. The law also prohibits the agency from furnishing anyone, except the consumer, with a record of inquiries related to transactions not initiated by the consumer (15 U.S.C.A. § 1681b(c)).

The law also places disclosure duties on users of these reports in connection with their solicitations of consumers. They must accompany each *written* solicitation with a clear and conspicuous statement that:

1. information in the consumer's credit report was used;

2. the consumer received the offer of credit or insurance because he satisfied the criteria for credit worthiness or insurability under which he was selected;

3. if applicable, the credit or insurance offer may be denied if, after the consumer responds, he does not meet the selection criteria or any applicable criteria or does not furnish any required collateral; and

4. the consumer has a right to prohibit information in his file at the agency from being used in connection with a transaction not initiated by him and can exercise this right by writing to a specific address or toll-free number (15 U.S.C.A. § 1681m(d)).

The law does not address how the disclosures should be made for telephone solicitations.

Connecticut Consumer Credit Report Law

Connecticut's consumer credit report law covers "credit rating agencies," meaning anyone whose business is assembling and evaluating information about the credit standing and credit worthiness of a consumer for the purpose of furnishing credit reports to third parties for fees and dues (CGS § 36a-695). Until 1995, Connecticut's law on credit rating agencies was fairly limited. It concentrated on guaranteeing consumers the right to receive notification if they were denied credit based on an adverse credit report, to see their own credit files, and to correct erroneous information in them. It also gave the state banking commissioner certain regulatory and enforcement authority and established penalties for violations of the law. PA 95-104 considerably expanded consumers' rights in this area and placed stricter obligations and limits on the credit rating agencies. Many of its provisions anticipated and are the same as or similar to what Congress passed the following year.

Like the FCRA, Connecticut law prohibits an agency from providing a credit report for use in a credit transaction that is not initiated by the consumer, if the consumer notifies the agency in writing that he does not consent. It requires each agency to publish annually, in a publication of general circulation in the state, a notice that information in its files may be used in connection with such a credit transaction not initiated by the consumer. It also allows the consumer to notify the agency that he chooses to be excluded from these credit transactions by writing to the address the agency provides in the notice. For this purpose, a credit transaction not initiated by the consumer does not include (1) a request for a consumer report by an entity with which the consumer has an account for purposes of reviewing the account or collecting on it or (2) an employer's legal request for a consumer report (CGS § 36a-699d).

ISSUES RAISED REGARDING TRIGGER LEADS

The National Association of Mortgage Brokers (NAMB) has been very critical of the use of mortgage trigger leads and raises a number of concerns with the practice. First, NAMB opposes the use of the prescreened lists by lenders because they believe that most mortgage lenders are unable to make a true “firm offer” of credit based on the information contained in the report alone. They differentiate between a firm offer for a credit card or insurance and a firm offer for a mortgage loan.

Next, the organization asserts that the lists are being sold to third party “lead generators.” In NAMB's view, this increases the potential for identity theft and violates FCRA since these lead generators are not lenders and therefore are in no position to make a firm offer of credit. It should be noted that the FCRA does contemplate the resale of consumer reports. It states that a person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the reporting agency (1) the identity of the end-user of the report (or information) and (2) each permissible purpose for which the report is furnished to the end-user of the report (or information). However, there appears to be no exception to the “firm offer of credit” rule for this situation.

NAMB also points out that opt-out provisions are really ineffective in this instance, since FCRA gives the reporting agencies up to five days to remove a consumer's name from a list but trigger leads can be generated within 24 hours of a consumer's “triggering event.” Finally, from a consumer protection standpoint, NAMB points out that mortgage terms are not as easily comparable as credit cards terms, and consumers are susceptible to “bait and switch” schemes whereby they are lured away from the original lender with terms that are “too good to be true.” Other individuals and organizations raise similar points, as well as the possibility that smaller lenders who cannot afford to purchase the service are unable to compete and creditors may be calling consumers who may be on the national “Do Not Call” list.

For their part, the credit reporting agencies indicate that they comply with all applicable state and federal laws. Proponents of the mortgage trigger leads argue that it is not a novel practice, but merely a refined one, offering lenders the chance to offer their product at the time of sale and creating options for the consumer.

POSSIBLE LEGISLATIVE RESPONSES

Connecticut is most likely preempted from passing any sweeping legislation affecting mortgage lead triggers. First, the state generally has considerable authority to pass legislation affecting its own state-chartered banks, but it generally cannot regulate national banks or out-of-state banks except in limited areas permitted by federal laws. Also, the FCRA generally only supersedes inconsistent state law, and even then, only to the extent of the inconsistency. However, the law goes on to preempt state regulation in several areas. Among other things, it specifically preempts any state requirement or prohibition relating to the prescreening of consumer reports or the disclosure provisions that must accompany an unsolicited written offer (15 U. S. C. § 1681t).

Initially, the law banned new state legislation in these areas until January 1, 2004. After that point, states could enact provisions on these subjects as long as the new law explicitly stated that it was intended to supplement the federal law and it gave greater protection to consumers than is provided by the FCRA. However, the 2003 Fair and Accurate Credit Transactions Act amended the FCRA to extend the preemption provisions indefinitely (and add other areas where states are preempted that are not relevant here). Even Connecticut's existing statute on credit transactions that are not consumer initiated is probably technically preempted (although there is no real effect since it tracks the federal law).

Maine's efforts to legislate this area may offer some insight. Many of the articles on the subject of mortgage trigger leads quote William Lund, director of the Maine Office of Consumer Credit Regulation (OCCR), who aired the concerns of state regulators when he spoke at the New England Mortgage Bankers Conference in 2006. On December 8, 2006, OCCR published a report containing a number of legislative proposals to address predatory lending practices in the state, including one on the subject of trigger leads. In developing the proposal OCCR evaluated the following concerns raised about trigger leads:

1. too much personal financial information about consumers was being given to subscribers of mortgage trigger lead services;

2. telemarketers were not complying with the federal laws' requirements to provide the consumer with a “firm offer of credit”;

3. the law requiring that consumers be told of their opt-out rights to avoid prescreened solicitations did not contemplate telephone solicitations, only written ones;

4. callers were misleading consumers, by omission or commission, with respect to the callers' identity, or about how the information concerning the consumers' recent application was obtained; and

5. callers were enticing consumers to drop “their” lenders with promises of lower rates and fees, only to subsequently raise those rates and fees (i.e., they were employing “bait and switch” tactics).

OCCR highlighted a few key points that impacted the proposed legislation. First, publicity about trigger leads has most likely caused credit reporting agencies to become more conscientious since OCCR's initial August 2006 Request for Comments. Additionally, OCCR acknowledged possible limitations created by the FCRA. Credit reporting agencies could argue that the FCRA could be read to permit the sale of the most detailed financial information, as long as the names of the creditors to which the debts are owed are not revealed.

Also, FCRA's preemption language could prevent states from prohibiting or severely restricting legitimate use of trigger leads. In OCCR's opinion, “a state law must be general in scope rather than specific to prescreened procedures, and should likely be based on that state's unfair trade practices laws” in order to survive a challenge based on preemption. However, the office found that the law did not prevent a state from requiring that such information be utilized in a way that conforms with federal law and that is not misleading to consumers. To those ends, OCCR proposed the following legislation:

§ 1327-A. Solicitation using prescreened trigger lead information from consumer report

No lender or loan broker shall utilize unfair or deceptive practices when using prescreened trigger lead information derived from a consumer report to solicit a consumer who has applied for a loan with another lender or loan broker. Without limitation, it shall be unfair or deceptive to:

A. fail to state in the initial phase of the solicitation that the solicitor is not affiliated with the lender or broker with which the consumer initially applied;

B. fail in the initial solicitation to conform to state and federal law relating to prescreening solicitations using consumer reports, including the requirement to make a firm offer of credit to the consumer;

C. knowingly or negligently utilize information regarding consumers who have opted out of prescreened offers of credit or who have placed their contact information on the federal “do not call” list; or

D. solicit consumers with offers of certain rates, terms, and costs, with intent to subsequently raise the rates or change the terms to the consumers' detriment.

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