



**OLA**  
Online Lenders Alliance

## Strategies for Addressing Emerging Risk

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## Learning to Identify Risk

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## Learning to Identify Risk

### General

- **Risk in Many Forms Across the Enterprise – Identification Structures**
  - ✓ Regulatory Legal (Interpretations, Regulatory Applicability)
  - ✓ Compliance (Implementation, Controls, CMP, Policies, Procedures, Training, Vendor Management, Change Management, Audit/Testing)
  - ✓ Enterprise Risk Management—Risk Owners: Strategy, Operations, Markets, Security (InfoSec, Physical), Environment, Personnel, General Legal, Etc.
  - ✓ Lines of Defense/Independence
- **Company Activities & Footprint**
  - ✓ Licenses? Charter?
  - ✓ Applicable Laws & Regulations
  - ✓ Change Management & Monitoring – Business/Regulatory Change

### Federal Supervisory Structures & State Licensing Regimes

- **Depositories**
  - ✓ OCC (National Banks/Thrifts), Fed, FDIC, NCUA, State Banking/Credit Union Charters
- **Non-depositories**
  - ✓ State Licenses (Lender, Broker, Money Transmitter, Auctioneer, Servicer, Debt Collection, Escrow)
- **All Covered Entities**
  - ✓ CFPB, FTC, Federal (DOJ)/State AGs

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## Learning to Identify Risk – Cont'd

### CFPB Examination Manual

- **Compliance Management System/Compliance Management Program**
  - ✓ Board/Senior Management Oversight/Reporting
  - ✓ CCO/Independence/Resources
  - ✓ Policies and Procedures
  - ✓ Risk Assessment/Applicable Laws/Emerging Risks
  - ✓ Monitoring/Testing
  - ✓ Audit
  - ✓ Training
  - ✓ Consumer Complaint Response
  - ✓ Vendor Management/Service Provider Oversight
  - ✓ Regulatory Change Management

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## Learning to Identify Risk – Cont'd

### Bank Partner Regulatory Oversight

- Bank Supervisory Requirements Expanded to Vendors Providing Certain Outsourced Services

### DOJ Sentencing Guidelines

- There's almost always a bad apple...
  - ✓ Guidelines provide considerations that could reduce criminal sentences
  - ✓ Better yet, note circumstances separating the bad actor and the company
  - ✓ If a CFPB style CMS and CMP is followed and properly executed, the mitigating factors and separation typically would be achieved
  - ✓ Fraud Happens
  - ✗ See FTX and Sam Bankman-Fried - Bahamas HQ as a risk mitigation strategy...?
  - ? SVB.... CRO vacancy/reporting discrepancies? Under investigation.

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## Understanding Your Risk

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## Understanding Your Risk

### Underlying Product/Services/Activities?

- What are your products/services?
  - ✓ Lead Generation
  - ✓ Loan Broker
  - ✓ Lender
  - ✓ Proprietary Tech: AI/ML Underwriting; Data Intermediary
  - ✓ Data Collection/Aggregation/Sales
  - ✓ Advertising/Marketing
  - ✓ Loan Servicing/Debt Collection
  - ✓ Credit Reporting Agency
  - ✓ Credit Repair
  - ✓ Financial Advisory
- How offered? B2B? B2C? Direct? Indirect? Private Label? Secondary Market/Investor?
- Entity and Individual License?
  - ✓ Web site/App Operators
  - ✓ Blockchain/Smart Contracts/DeFi/Loan in US\$ or Crypto?

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## Understanding Your Risk

### Applicable Law?

- **Geographic Footprint**
- **State License Type**
  - ✓ Can determine many practice restrictions and prohibitions
- **Federal and State Disclosure Laws**
  - ✓ TILA, TRID, GFE, State Equivalents
- **State Usury and Points & Fees Limitations**
- **UDAAP/UDAP**
- **Fair Lending**

### Data Privacy

- **Federal and State Privacy and Data Security Laws**
  - ✓ Subject to GLBA? Authorized by the consumer or as part of GLBA financial transaction?
  - ✓ GLBA and State Privacy Laws (Entity and Transactional GLBA Exemptions)
  - ✓ EUGDPR
  - ✓ FTC and Banking Agency Data Safeguards Laws
  - ✓ Consumer Authorized Data Collection for a Future Possible Financial Transactions/Other Use?
    - FCRA, UDAP/UDAAP

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## Understanding Your Risk

### Compliance System and Resources

- **Size, Maturity and Product Type/Business Model**
- **Dictates Resources – Personnel, Monitoring/Testing/Audit, Independence, Sophistication**
  - ✓ Riskier Products with Heightened Risk for Consumer Harm
  - ✓ Outdated Technology/Various Stages of Legacy Tech
  - ✓ Inhouse vs. Outsourced
- **Gap Analysis**

### Business Model and Structure

- **CFPB Supervised vs. State Supervised**
  - Mortgage Lender, Payday Lender, Private Student Lenders
- **Lender vs. Broker vs. Lead Generator, Etc.**
  - ✓ Risk Spectrum for Business Activities
  - ✓ Sales Staff vs. Internet/Pos Sales
  - ✓ Incentive Structures/Sales Targets
- **Gross Revenues/Pro Forma**
- **Markets**
- **Publicly Traded (SOX/Derivate Lawsuits) vs. Private Equity**
- **Board vs. LLC structure with Senior Management**
- **Complex Organizations – Larger Size, Large Holding Company/Subsidiaries Structure, Multiple Business Lines**

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## Harnessing Emerging Risk

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## Federal Trade Commission

- Congress has authorized the Federal Trade Commission (FTC)'s to protect consumers from "unfair and deceptive practices." 15 U.S.C. § 45(a)
  - In a recent policy statement, the Commission promulgated an expansive definition of "unfair" business practices.
  - This broad, self-given mandate equates to "I know it when I see it."

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## Consumer Financial Protection Bureau

- Established to regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.
- Broad enforcement authority over a wide range of financial products and services.

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## Regulatory Enforcement Authority

- The FTC and CFPB have been tasked by Congress with enforcing a number of statutes related to online lending, including:
  - Electronic Fund Transfer Act
  - Gramm-Leach-Bliley Act
  - Truth in Lending Act
  - Military Lending Act

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## Electronic Fund Transfer Act (EFTA)

- Prohibits online lenders from conditioning the extension of credit to a consumer on repayment through preauthorized electronic fund transfers

15 U.S.C. § 1693k; 12 C.F.R. § 205.10

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## Gramm-Leach-Bliley Act (GLB)

- Requires companies that offer consumers financial products or services like loans, financial or investment advice, or insurance to explain their information-sharing practices to their customers and to safeguard sensitive data

15 U.S.C. § 6822

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## Truth in Lending Act (TILA)

- Applies to most types of consumer credit, including closed-end credit, such as car loans and home mortgages, and open-end credit, such as a credit card or home equity line of credit
- Example regulations:
  - 3 day right of rescission of the loan at no cost to the consumer
  - Consumers must be provided a TILA Agreement outlining the terms and conditions of the credit, the annual percentage rate (APR), and financing details

15 U.S.C. §§ 1601-1667f

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## Military Lending Act (MLA)

- Applies to active duty servicemembers—including those on active Guard or active Reserve duty—spouses, and certain dependents
  - Limits interest rates charged on many types of consumer loans to **36%**
  - Covered servicemembers cannot be submitted to mandatory arbitration or give up certain rights
  - Prohibits pre-payment penalties

10 U.S.C. § 987

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## Credit Practices Rule (CPR)

Three primary prohibitions:

1. “Unfair” contractual provisions, such as confessions of judgment, waivers of exemption, wage assignments, and security interests in household goods
2. “Misrepresentations” regarding the nature or extent of cosigner liability
3. “Pyramiding” Late Charges

15 U.S.C. § 57a; 16 CFR Part 444

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## FTC Enforcement

- *FTC v. Avant, LLC*, No. 19-cv-02517 (N.D. Ill. 2022)
  - Defendant alleged to have violated EFTA by “deceiv[ing] consumers about the amount needed to pay off their loans, and has collected or attempted to collect additional payments from consumers who have already paid the quoted payoff amount”
  - Complaint resulted in nearly \$4 million settlement

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## FTC Enforcement

- *FTC v. PayDay Fin. LLC*, 989 F. Supp. 2d 799 (D.S.D. 2013)
  - Defendant alleged to have violated EFTA by including language in agreements authorizing defendant to effect both debit and credit entries into consumers bank accounts to to fulfill loan obligations.
  - Complaint resulted in approximately \$1 million settlement

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## FTC Enforcement

- *FTC v. LendingClub Corp.* No. 18-cv-02454 (N.D. Cal. 2021)
  - Defendant alleged to have violated GLB by promising loans with “no hidden fees” while allegedly charging consumers hundreds or even thousands of dollars in hidden up-front fees from the loans
  - Complaint resulted in approximately \$18 million settlement

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## FTC Enforcement

- *FTC v. RCG Advances* No. 20-cv-04432 (S.D.N.Y. 2022)
  - Defendant alleged to have violated GLB by misrepresenting the terms of merchant cash advances, and then using unfair collection practices, including threatening physical violence
  - Complaint resulted in approximately \$3 million settlement

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## FTC and State AG Enforcement

- *FTC et al v. Harris Originals of NY, Inc., et al.*, No. 22-cv-04260 (E.D.N.Y. 2022)
  - First enforcement action brought by FTC under the MLA. Brought together with 18 State Attorneys General.
  - Alleged defendant cheated military families with illegal financing and sales practices in violation of the MLA.
  - Complaint resulted in \$1 million settlement

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## State AG Enforcement

- New York: Partnered with the CFPB to sue subprime auto lender for “obscure[ing] the true cost of its loans to car buyers, leading to severe financial distress for borrowers and subjecting them to aggressive debt collection tactics on loans its own systems predicted that borrowers can’t afford to repay. Filed January 2023.
- Colorado: Banned lender from the state after it partnered with an out-of-state bank in an attempt to circumvent Colorado’s interest rate limits

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## State AG Enforcement

- Arizona: Entered into consent judgment for nearly \$5 million in restitution, the ceasing of all collection efforts, and forgiveness of all loans for operating alleged scheme using tribal land to exceed interest rates allowed in Arizona
- New Jersey: Consent order reached with Yellowstone Capital LLC involving forgiveness of more than \$20 million in merchant cash advances and restitution and penalties exceeding \$5 million for, among other things, obligating consumers to pay a fixed amount subject to interest, over a defined period, untethered from the consumers' receivables and without the legal protections (such as interest rate caps) afforded to loan borrowers

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## MLA Class Action

*Wood v. Omni Fin. of Nevada, Inc.*, 2023 WL 3766524 (E.D. Va. May 31, 2023)

- Denying Motion to Dismiss MLA Class Action Complaint where Plaintiffs argued Omni was making loan payments that should never have been owed and due because the loans involved unlawful refinancing, impermissible conditioning of the loans on repayment by allotment, and a mandatory security interest in their bank accounts
  - Currently on Appeal

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## Class Actions

- *Cox v. Community Loans of America, Inc.*
  - Certifying class under the MLA brought against company issuing vehicle title loans to military members who signed contracts with defendant that “imposed an annual percentage rate of greater than 36 percent and required the title of a vehicle as security for the obligation for a term of 181 days or less.”
- *Kemp v. Low Cost Interlock, Inc.*
  - Pre-discovery settlement of TILA claims on class basis for \$130,000 and \$50,000 in plaintiff’s attorney’s fees
- *Klopfenstein v. Fifth Third Bank*
  - Class certified in TILA action where defendant operated a program where “as both lender and bank, had direct access to borrowers’ checking accounts. It deposited Early Access loans straight into borrowers’ accounts and then paid itself back automatically—plus a 10% ‘transaction fee’—after a direct deposit posted or thirty-five days elapsed, whichever came first. The contract governing the program disclosed the annual percentage rate (‘APR’) as 120% in all cases.”
- *Herrera v. Wells Fargo Bank*
  - Court approved class action settlement alleging multiple claims, including violations of TILA, which required Wells Fargo to establish a settlement fund of \$45 million and pay attorneys fees in the amount of \$23.1 million