FinTech Tools for a New World

Lessons Learned (So Far) in a Challenging Environment

BY CATHERINE M. BRENNAN

If the current pandemic has taught us anything, it is that we depend on each other for in-person contact more than we thought. This is especially true for unbanked and underbanked consumers seeking financial services. Customers obtain credit through store branches, and many of the customer service representatives in the stores have worked with these consumers for years, accepting their payments in person. For consumers seeking a title loan, allowing a look at the car has required an in-person visit to the branch. All of this became upended as state after state issued "stay at home" orders requiring nonessential businesses to close. How do financial services businesses under orders to keep employees home, especially when those employees are key to accept, process or collect payments on consumer loans at a branch, adjust? Just as consumers have scrambled to address their credit needs, money services businesses, payday lenders, installment lenders and title lenders have worked hard to adjust their operations to meet the current challenge.

Financial technology, or FinTech, is the application of an electronic process to a financial service. FinTech is used pre-origination through collections and given the physical distance under which we all currently struggle, attention to areas where fintech can help lessen the gap between you and your customer is warranted.

Marketing: The current environment might cause you to reconsider the claims you make in your advertising. Claiming "easy access to credit" during a lockdown when you have no online loan application might lead to a UDAP claim in some states. Now more than ever, we recommend that you carefully review your marketing material to ensure that they comply with consumer credit advertising requirements, do not make any claims that are unfair or deceptive, clearly and conspicuously display all disclosures necessary to qualify any claims, adequately substantiate objective claims prior to their publication or dissemination, and do not materially interfere with the ability of consumers to understand the terms of the offer or otherwise take unreasonable advantage of consumers. If you are making a claim in your advertising that you are "here for consumers" during this time of great need, you must be able to back this claim up.

Online Originations: If you have not thought about taking applications online, now is as good a time as any to consider adopting an online portal to accept loan applications. The Electronic Signatures in Global and National Commerce Act (ESIGN) is a twenty-year old federal law that facilitates the use of electronic records and electronic signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. ESIGN allows you to electronically deliver to consumers any document or disclosure that is supposed to be given in writing, one you get the customer's consent and give them disclosures they will need to be able to access the electronic disclosures, among other things. You will need to ensure that your online application process, including taking the loan application and esigning the loan agreements, comply with ESIGN. It's not enough to just throw your paper application on your website. Additionally, for applicants who are denied a loan, you need to build out your adverse action notification procedure for the online world.

Collateral Appraisal: For title loans, examining the motor vehicle secured by the title is key to the transaction. FinTech could be used to maintain physical distance in the process, as this technology is already in use in the sale of motor vehicles.

Mobile Delivery: As noted above, ESIGN allows you to deliver documents electronically, so long as you obtain consent from and provide specific disclosures to the consumer. The method of delivery – through a website, a mobile app, email, or text – requires some thought. Who are your customers? Are they more likely to have a desktop computer or a smart phone? It is important to think through the technology on which documents and disclosures are provided, because they may look different depending on how the consumer receives them. The same holds true for federal and state laws that require disclosures to appear in certain formats. For example, the federal Truth in Lending Act requires certain disclosures to appear "clearly and conspicuously." In September 2018, the Federal Trade Commission (FTC) settled a lawsuit with Sunkey Publishing, a lead generator. A key theme in the settlement was what "clear and conspicuous" disclosure means. The FTC ordered Sunkey to cease use of "army.com" and to make disclosures in a certain font size. Additionally, the FTC imposed requirements about an overlay – content box visible in its entirety without scrolling plus an affirmative disclosure that the consumer has to check off before she can enter her personal information. This FTC enforcement action and others also highlight the need to test these disclosures on a variety of devices – laptops, smart phones, tablets – and operating systems such as Apple or Android to ensure that the displays are clear and conspicuous.

Working Remotely and Customer Service: All of the industries under the FiSCA umbrella are heavily regulated at the state level. In the current pandemic, numerous states have adopted "work from home" orders that require certain professionals to work remotely. If your industry was not deemed an "essential business" and allowed to operate out of your offices, you need to consider how (or if) you will allow certain employees to work from home. If your employees are permitted to work from home, how are you monitoring your employees to ensure that they provide customer service that both comports with law and with the "best practices" adopted by your company? Do you have procedures and technology in place to monitor calls? The learning you have gained from the COVID-19 pandemic should be used to develop contingencies in the event other circumstances occur that require prolonged absence from the workplace.

Collections: Numerous states have imposed limitations on debt collection by third-party debt collectors. Although these restrictions do not apply to a creditor collecting its own debts, no company wants to be the bad actor that did not work with consumers in this time of economic uncertainty. Additionally, at least two state attorneys general – Arizona and Colorado – have made public statements that they expect the financial services industry to treat customers fairly during this time frame. If your customers are signed up for preauthorized electronic funds transfers to pay their debts to you, are you seeing previously good paying consumers go bad when the ACH hits their accounts with insufficient funds? Consider whether you will impose bad check fees or late fees in this instance. Similarly, are you allowing for payment flexibility, either through deferrals, modifications or forbearance? Each of these accommodations also may have state or federal law implications, so make sure you are working with counsel to ensure you do not run afoul of the law.

Cybersecurity: It is a fact of life now that we are working from home to help flatten the curve. As we are all trying to learn how to use mobile technology, some of us for the first time, remember that bad actors will seek to prey on the vulnerabilities of these systems to find information to exploit your company. Even without such bad actors, an unwitting employee could cause a data breach inadvertently by sharing sensitive data over unencrypted networks. Your cybersecurity policy has been put to the test by these conditions. Now is the time to make sure you have covered the elements of cybersecurity to protect both customer data and your company's reputation. Failure to have adequate cybersecurity policies can lead to trouble with the FTC if breaches occur.

Catherine M. Brennan is a partner in the Maryland office of Hudson Cook, LLP. She assists national and state banks, investment banks, consumer and commercial finance companies, mortgage bankers, installment lenders and other licensed lenders in the development and maintenance of nationwide consumer and commercial lending programs. Brennan engages in credit due diligence on behalf of investors in FinTech firms, bank partnership platforms, small business lenders, merchant cash advance companies, consumer finance companies, title loan companies and payday lenders. She is the Editor in Chief of Installment Law, a product of CounselorLibrary.com, LLC., an entity affiliated with Hudson Cook, LLP. She was recently ranked in the 2020 Chambers "FinTech USA Guide for Corporate, Securities & Financing." Brennan may be contacted at cbrennan@hudco.com.