

# Notice and Understand: Disclosures in Mobile Lending

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## I. Introduction

The next revolution in consumer financial services has arrived -- the use of mobile devices to provide financial products and services. With smartphone

and tablet (collectively "mobile devices") ownership on the rise,<sup>1</sup> financial institutions are dedicating an increasing portion of their budgets to the development of mobile technology.<sup>2</sup> Regulators are also monitoring this development. Since 2011, the Federal Reserve Board has conducted an annual survey on mobile financial services.<sup>3</sup> In June 2014, the Bureau of Consumer Financial Protection (CFPB) published a request for information on mobile financial services, in an effort to gain an understanding of the opportunities and risks associated with offering financial services on mobile devices.<sup>4</sup> The CFPB's request for information outlined a number of advantages of mobile technology, including lower costs, increased convenience and broader access to financial services for underserved consumers.

Offering financial products and services on mobile devices raises a host of legal issues including security and privacy, unauthorized payments, vulnerable adult financial abuse and the Americans with Disabilities Act.<sup>5</sup> This

article focuses on another legal concern: providing proper disclosures on mobile devices, specifically in the context of mobile loan applications. A mobile device's features and the mobility of loan applicants create unique challenges for lenders. Improper loan disclosures could violate multiple statutes. To address these challenges, lenders should design mobile loan applications to encourage consumers to notice and understand disclosures.

## II. Loan Application Disclosures and Mobile Technology

### A. Disclosures in Loan Applications

Features of mobile devices and the mobility of loan applicants present unique challenges to lenders providing loan disclosures electronically. Both federal and state law require lenders to provide consumers with certain disclosures during the loan application process. Online loan applications usually involve three types of disclosures. First, lenders may provide so-called "precursor disclosures," such as disclosures required by the Electronic Signatures in Global and National Commerce Act (ESIGN Act),<sup>6</sup> to permit taking certain actions with respect to the loan application. Second, an applicant should receive the disclosures mandated by applicable lending or consumer protection laws, such as the

1. The Federal Reserve Board's 2013 mobile financial services survey found that 87% of U.S. adults have mobile phones and 61% of mobile phones are smartphones (Internet-enabled). See Bd. Of Governors of the Fed. Reserve Sys., Consumers and Mobile Fin. Services 2014 1 (2014), available at <http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201403.pdf>.

2. See, e.g., Penny Crosman, *Banks Open Their Wallets Wide for Mobile Banking: Survey*, Am. Banker (July 31, 2014, 3:23 PM), [http://www.americanbanker.com/issues/179\\_147/banks-open-their-wallets-wide-for-mobile-banking-survey-1069131-1.html](http://www.americanbanker.com/issues/179_147/banks-open-their-wallets-wide-for-mobile-banking-survey-1069131-1.html); see also Mary Wisniewski, *Credit Union's Mobile App Approves Loans with Six Taps*, Am. Banker (July 14, 2014, 4:03 PM), [http://www.americanbanker.com/issues/179\\_134/credit-unions-mobile-app-approves-loans-within-six-taps-1068649-1.html](http://www.americanbanker.com/issues/179_134/credit-unions-mobile-app-approves-loans-within-six-taps-1068649-1.html).

3. See *supra* note 1.

4. CFPB, Request for Info. Regarding the Use of Mobile Fin. Serv. by Consumers and Its Potential for Improving the Fin. Lives of Economically Vulnerable Consumers, 79 Fed. Reg. 33731 (June 12, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-06-12/pdf/2014-13552.pdf>.

5. See, e.g., Letter from P.J. Hoffman, National Assoc. of Fed. Credit Unions, Regulatory Affairs Counsel, to Monica Jackson, (Continued in next column)

5. (Continued from previous column)

Office of Exec. Sec'y, Consumer Fin. Prot. Bureau (Sept. 10, 2014). Similar issues arise when a bank integrates social media into its operations. See Benjamin C. Bowers, *Banking on Social Media: The Legal Issues Banks Face When Using Social Media*, 67 Consumer Fin. L.Q. Rep. 387 (2013).

6. 15 U.S.C. §§ 7001 *et seq.* (2000).

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Truth in Lending Act’s account-opening disclosures<sup>7</sup> or California’s married applicant notice.<sup>8</sup> Finally, lenders should allow a consumer to review any document containing the material terms of a loan prior to receiving the loan proceeds. Online loan applications may be subject to a multitude of disclosure and disclosure display requirements.

**B. Mobile Device Features**

Lenders continue to face difficulties translating disclosure display requirements written for paper applications to electronic applications. A mobile device’s size and features and the mobility of applicants can inhibit effective disclosure of loan information.<sup>9</sup> The variety of mobile devices and potential service plans and the complexity of some financial products can also pose challenges to effective disclosure design. Mobile devices contain features, including small monitors, touch screens and fast navigational capabilities, which can increase the pace of transactions and affect the readability of disclosures. For example, a loan applicant could scroll down a page in a second without reading a word on the page. A mobile device’s small monitor could cause an applicant to overlook information on the screen.

**C. Mobility of Applicants**

The mobility of applicants also creates challenges. Mobile devices allow applicants to obtain a loan at anytime from anywhere. An applicant’s surrounding environment may distract the applicant, lead the applicant to start and stop a loan application multiple times or cause the

applicant to speed through a loan application in order to move on to another activity. The mobile nature of applicants can discourage mobile applicants from reading and understanding loan disclosures.

Considering the unique challenges of mobile technology, the question is: How do lenders design a mobile loan application that satisfies loan disclosure display requirements?

**III. Disclosure Requirements and Potential Violations**

**A. Disclosure Display Requirements and Related Violations**

A lender should invest in the design of mobile loan applications because improper disclosures could violate multiple statutes, including: (1) the specific disclosure statutes; and (2) prohibitions on unfair and deceptive acts or practices. Disclosure statutes usually contain a font-size requirement, a location requirement or a “clear and conspicuous” requirement.<sup>10</sup> Online lenders encounter difficulties complying with font-size and location requirements because mobile devices: (1) have different display limitations that could make text appear to a consumer in a smaller size; and (2) often allow consumers to adjust display settings, such as brightness, color and contrast. The “clear and conspicuous” requirement also proves challenging because there is no set standard for evaluating whether information is “clearly” and “conspicuously” disclosed.<sup>11</sup> Generally, a “clear and conspicuous” requirement measures whether a reasonable consumer will notice and understand the disclosure within the context of the loan

application.<sup>12</sup> A “reasonable consumer” standard gives courts and regulators discretion to determine whether a disclosure meets the “clear and conspicuous” requirement. Non-compliance with disclosure statutes could result in statutory penalties, actual damages, punitive damages, reasonable attorneys’ fees, injunctive relief or licensing revocation.<sup>13</sup>

**B. Unfair and Deceptive and Abusive Acts and Practices and Related Violations**

In addition to violating a particular disclosure statute, an improper disclosure may constitute an unfair or deceptive act or practice (UDAP). Both federal and state laws prohibit UDAPs. At the federal level, financial regulators have established a reasonably uniform UDAP standard following the Federal Trade Commission’s interpretation of the meaning of “unfair” and “deceptive” under Section 5 of the Federal Trade Commission Act (FTC Act).<sup>14</sup> An “unfair” act or practice means: (1) an act or practice that causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or competition.<sup>15</sup> An unfair practice does not have to cause actual or monetary injury.<sup>16</sup>

A “deceptive” act or practice includes a representation or omission that is: (1) material; and (2) likely to mislead a consumer; and (3) the consumer’s interpretation of the representation

7. See 12 CFR § 1026.6 (2012).

8. Cal. Civ. Code § 1812.30 (1994).

9. See Fed. Trade Comm’n, Mobile Privacy Disclosure: Building Trust Through Transparency 10 (2013), available at <http://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf> (summarizing a discussion from industry, trade association, academia and consumer privacy group representatives participating in the Federal Trade Commission’s May 2012 workshop on mobile privacy, including how to improve privacy disclosures given space limitations on mobile devices and the limited attention span of consumers).

10. See, e.g., Wis. Stat. Ann. § 422.303(3) (1996) (requiring a notice to be clear and conspicuous, and located immediately above or adjacent to the place for the customer’s signature); N.H. Rev. Stat. Ann. § 399-A:11(XIV) (2009) (requiring a notice to be in a type size equal to at least 12-point type).

11. Fed. Trade Comm’n, Com Disclosures: How to Make Effective Disclosures in Digital Advertising 7 (2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

12. See *id.* at 6; see also Or. Rev. Stat. § 646.644(c) (2012).

13. See, e.g., Cal. Civ. Code § 1785.31 (2000); N.H. Rev. Stat. § 399-A:18(III) (2008).

14. 15 U.S.C. § 45(a)(4) (2006); Consumer Fin. Prot. Bureau, CFPB Bull. No. 2013-07, Prohibitions on Unfair, Deceptive or Abusive Acts or Practices in the Collection of Consumer Debts 1 n.1 (2013).

15. 12 U.S.C. § 5531(c)(1) (2010); Fed. Trade Comm’n, FTC Policy Statement on Unfairness (1980), available at <http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deceptionhttp://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

16. See CFPB Bull. No. 2013-07, *supra* note 14, at 2.

or omission is reasonable.<sup>17</sup> Material information includes information that is likely to affect a consumer's choice of or conduct regarding a product.<sup>18</sup> Courts consider the overall, common sense net impression of the whole representation or act to determine whether an act or practice is likely to mislead.<sup>19</sup> Courts may deem a technically accurate and complete disclosure misleading.<sup>20</sup>

The Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>21</sup> added a prohibition against "abusive" acts or practices, defined as an act or practice that materially interferes with a consumer's ability to understand a term or condition of a consumer financial product or service and takes unreasonable advantage of: (1) a consumer's lack of understanding of the material risks, costs or conditions of the product or service; (2) the consumer's inability to protect his or her interests in selecting or using a product or service; or (3) the consumer's reasonable reliance on a creditor to act in his or her interest.<sup>22</sup> The abusive acts or practices prohibition applies only to "covered persons" under the Dodd-Frank Act.<sup>23</sup>

Courts, the CFPB and other federal regulators continue their efforts to clarify the scope of the unfair, deceptive and abusive act or practice (UDAAP) doctrine. Currently, the doctrine of UDAAP is broad and vague, giving regulators a powerful enforcement tool. Thus, disclosure-related UDAAP violations could take many forms. For example, a lender could engage in an UDAAP by failing to disclose material information before a consumer consum-

mates a loan even if no statute mandates the disclosure. The circumstances that constitute a violation of a disclosure statute could also give rise to a separate UDAAP violation. Penalties for UDAAP violations vary by statute and regulator.<sup>24</sup>

The breadth and uncertainty of the "clear and conspicuous" requirement and prohibition on UDAAPs present significant compliance challenges in all loan applications, whether written or electronic. Nonetheless, the "clear and conspicuous" requirement and the prohibition on UDAAPs can be boiled down into the following inquiry: Does the lender display the disclosure in a manner that a consumer will notice and understand the disclosure at the proper time?<sup>25</sup> If the answer is no, the lender could be liable for multiple violations.

#### IV. *Federal Trade Commission v. AMG Services, Inc.*

A May 2014 decision involving the Federal Trade Commission (FTC) and online lenders demonstrates how improper disclosures can violate multiple statutes. In *Federal Trade Commission v. AMG Services, Inc.*,<sup>26</sup> the FTC filed an action against AMG Services and its lender-clients alleging that AMG Services' online loan application and the loan's repayment process violated the Truth in Lending Act (TILA) and Section 5 of the FTC Act. Lenders used similar websites provided by AMG Services to offer loans. Each website required a consumer to take the following steps to obtain loan proceeds: (1) select the desired loan amount from a dropdown box; (2) click four mandatory check boxes next to nine hyperlinks grouped in pairs of two or three per check box

that linked to disclosures and important loan documents; (3) type the consumer's name into an electronic signature box; and (4) click "I AGREE send me my Cash!"<sup>27</sup> The websites did not require an applicant to read any of the hyperlinks before receiving the loan proceeds.<sup>28</sup>

The website placed the hyperlink to the promissory note and TILA disclosure near the fourth check box and between two hyperlinks that were displayed in all capital letters. In the TILA disclosure, the TILA box showed a single payment obligation with one finance charge.<sup>29</sup> In a box directly below the TILA box, "fine" print described a renewal plan extending ten pay periods with multiple finance charges. Consumers were automatically enrolled in the renewal plan unless the consumer opted out. The district court observed a number of shortcomings with how the website displayed disclosures; however, the court based its holding primarily on the disclosure of information in the promissory note and TILA disclosure.

The district court granted the FTC's motion for summary judgment, finding that the disclosures in the promissory note and TILA disclosure were deceptive in violation of the FTC Act and ambiguous in violation of TILA.<sup>30</sup> In regard to the FTC Act claim, the court explained that the document's net impression was likely to mislead "because of the way the terms are presented to borrowers in the document."<sup>31</sup> The court noted that: (1) material terms about the automatic renewal plan were hidden in fine print; (2) the information in the fine print contradicted the prominently printed information in the TILA box; and (3) portions of the promissory note and TILA disclosure were vague and uncertain. The court characterized the promissory note and TILA disclosure hyperlink as the

17. Fed. Trade Comm'n, FTC Policy Statement on Deception (1983), available at <http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

18. *Id.*

19. See Fed. Trade Comm'n v. Cyberspace.Com, LLC, 453 F.3d 1196, 1200 (2006); see also Fed. Trade Comm'n v. AMG Services, Inc., No. 2:12-cv-00536-GMN-VCF, 2014 WL 2927148 at \*7 (D. Nev. May 28, 2014).

20. See *AMG Services*, 2014 WL 2927148 at \*7.

21. Pub. L. No. 111-203, 124 Stat. 1376 (2010) [Dodd Frank Act].

22. 12 U.S.C. § 5531(d) (2010).

23. *Id.* at § 5531(a).

24. Compare 15 U.S.C. § 57b (2006), with 12 U.S.C. § 5565 (2010).

25. See *supra* note 9, at 27 (discussing how to improve privacy disclosures for mobile customers).

26. 2014 WL 2927148 at \*4. The defendants settled these charges with the FTC on January 16, 2015 for \$21 million, the largest FTC recovery in a payday lending case. See Press Release, Online Payday Lending Companies to Pay \$21 Million to Settle Federal Trade Commission's Charges that They Deceived Consumers Nationwide (Jan. 16, 2015), <http://www.ftc.gov/news-events/press-releases/2015/01/online-payday-lending-companies-pay-21-million-settle-federal>.

27. Fed. Trade Comm'n v. AMG Services, Inc., No. 2:12-cv-00536-GMN-VCF, 2014 WL 584781, \*1 - 2 (D. Nev. Jan. 28, 2014) (magistrate's order).

28. *AMG Services*, 2014 WL 2927148 at \*1.

29. *Id.* at \*3.

30. *Id.* at \*10, 12.

31. *Id.* at \*9.

least conspicuous and the most important hyperlink of the nine hyperlinks.<sup>32</sup>

The AMG Services court also found that the defendants’ disclosures violated TILA’s requirement that creditors disclose “clearly and conspicuously” in writing terms mandated by TILA, including a loan’s annual percentage rate, finance charge, total of payments and payment schedule.<sup>33</sup> The court reasoned that because the promissory note and TILA disclosure were misleading as to the TILA-mandated terms, the disclosure of the TILA-mandated terms also must be ambiguous and, therefore, not clear and conspicuous.<sup>34</sup> This case demonstrates how a UDAP violation interplays with a violation of a disclosure statute.

**V. Addressing Disclosure Challenges on Mobile Devices**

Having explored the legal implications of improper loan disclosures, the question becomes: How can a lender design a mobile loan application that addresses the disclosure challenges with mobile devices? The ambiguous nature of the “clear and conspicuous” requirement and the broad doctrine of UDAAP force lenders to rely on “rules of thumb” when designing mobile loan applications. No comprehensive guidance exists on displaying loan disclosures on mobile devices. However, AMG Services and the FTC’s .Com Disclosure are instructive.

Based on AMG Services, lenders should design loan applications that encourage consumers to read disclosures. In AMG Services, the court concluded that the website’s format discouraged consumers from reading the required disclosures because of the large number of hyperlinks used to make the disclosures.<sup>35</sup> The website’s format likely factored into the court’s UDAP ruling. AMG Services indicates that courts will be sensitive to how consumers interact

with online or mobile loan applications. A lender should consider whether the placement of a disclosure discourages or, conversely, encourages consumers to read the disclosure. As noted above, features of mobile devices and the mobility of loan applicants are likely to discourage consumers from reading information on mobile devices. Therefore, lenders should intentionally incorporate elements into a mobile loan application to encourage consumers to notice and read disclosures.

In addition to considering a mobile applicant’s experience with the overall loan application, lenders should focus on satisfying individual disclosure requirements. In early 2013, the FTC published the .Com Disclosure guidance on how to make “clear and conspicuous” disclosures in online advertisements.<sup>36</sup> Disclosures in advertisements have different purposes than disclosures in loan applications. Nonetheless, the FTC’s guidance provides a number of considerations on how to display disclosures in mobile loan applications, such as:

- *Make certain disclosures unavoidable.*<sup>37</sup> Lenders should require applicants to view material disclosures prior to proceeding to the next step of an application. Given the speed of a mobile transaction, a mobile device’s small monitor, and the possible distractions in an applicant’s surrounding environment, applicants may be inclined to skip over optional disclosures. A lender can slow applicants down and signify the importance of information by making a disclosure unavoidable.
- *Do not bury material disclosures.*<sup>38</sup> Lenders should not bury material disclosures in text or in a “terms of use” or similarly-

ignored documents. The more an applicant must click or zoom to view disclosures, the less likely an applicant will read the disclosure and the less likely a court will find a disclosure to be “clear and conspicuous.”

- *Do not rely on a mobile device’s enhanced capabilities.*<sup>39</sup> Mobile lenders should not rely on a mobile device’s enhanced capabilities to make a disclosure “clear and conspicuous.” While some mobile devices have enhanced zooming, scrolling and other navigational abilities, not all devices may have such capabilities and not all applicants may be equally adept at using such features. Some applicants may even use these enhanced capabilities to avoid or ignore disclosures.

Ultimately, lenders must strike a balance between including features in a mobile loan application that help satisfy disclosure requirements and leveraging the advantages of mobile technology, such as speed and convenience.

**VI. Conclusion**

Mobile devices present unique disclosure challenges for lenders. It should be acknowledged that lenders cannot and should not be expected to control all aspects of an applicant’s experience with mobile technology. Consumers who opt to apply for a loan on a mobile device must navigate the challenges inherent in mobile technology. Until regulators or courts issue specific guidance, mobile lenders should carefully consider mobile devices’ features and the mobility of applicants to design applications that comply with loan disclosure requirements. Thoughtfully investing in a mobile loan application’s design could help lenders avoid disclosure and UDAAP violations.

32. *Id.* at \*1.

33. *Id.* at \*11 - 12.

34. *Id.*

35. *Id.* at \*1.

36. *See supra* note 11, at 1.

37. *Id.* at 7, 9.

38. *Id.* at 18.

39. *Id.* at 10.