

LenderLive[®]

The Way to Greater Efficiency

Compliance Solutions Webinar August 8, 2018

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About Us

- **Who We Are**

- We are a team of regulatory experts who manage hundreds of compliance-ready documents for our auto and mortgage clients.
- We have a proven track record of helping auto and mortgage companies comply with federal and state regulations as well as investor requirements
- Our team is comprised of attorneys and consumer finance professionals, with decades of experience in providing insight regarding the best practices in the consumer finance industry.

- **Our Offerings Include**

- Template libraries for critical borrower communications
- Monitoring and reporting on legislative and regulatory changes impacting the vehicle and mortgage finance industries
- Client alerts that communicate judicial, legislative and regulatory changes at federal and state levels
- Legislative bulletins that deliver a summary report of key legislation
- Compliance webinars
- Custom consulting and research



Presenters



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Senior Regulatory Counsel



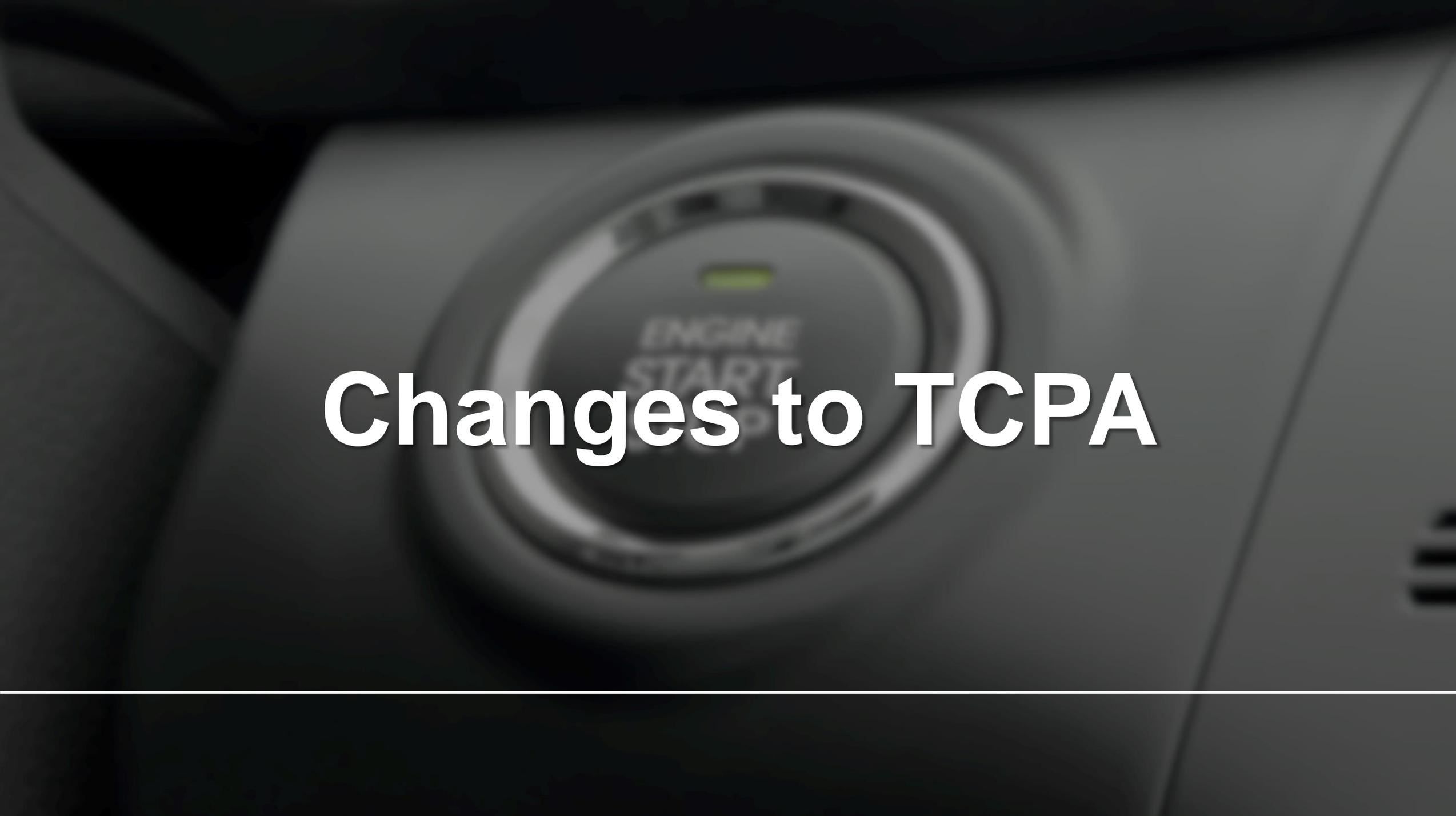
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Regulatory Counsel



Agenda

- Changes to TCPA
 - Background
 - Key Elements of *ACA Int'l* Opinion
 - *ACA Int'l* Opinion on Automatic Telephone Dialing Systems
 - What's Next?
- SCRA Compliance
 - DOJ Suit Against Auto Lender for Unlawful Repossession
 - DOJ Settlement with Lender over Upfront Leases
 - Best Practice Tips for SCRA Compliance
- Issues in Debt Collection
 - Law Firm defeats CFPB at Trial over FDCPA Violations
 - Recent Appellate Decisions
 - Georgia AG's \$8.5M Settlement with Debt Collector
 - Best Practice Tips for FDCPA Compliance
- Legislative Updates



Changes to TCPA



TCPA Background

- The TCPA regulates when and how auto dealers, lenders, and servicers can call, text, and fax customers and potential customers.
- Liability can be significant:
 - In 2016, a subprime lender was forced to create a **\$10 million** settlement fund in connection with a class action lawsuit over calls to confirm a loan applicant's references. In another settlement in 2015, a major auto loan servicer agreed to pay **\$14.8 million** to over 3.2 million potential class members.
- The TCPA prohibits anyone from making a call to a cell phone using an automatic telephone dialing system ("ATDS") unless the called party has given their prior express consent to be called.
- In 2015, the FCC handed down an Omnibus Ruling addressing several aspects of the TCPA, including use of ATDSs, consent/revocation rules, and calling reassigned numbers. ACA International challenged the rulemaking in an appeal to the D.C. Circuit court of appeals.



Key Elements of the ACA Int'l Opinion

- The D.C. Circuit issued its long-awaited opinion on March 16, 2018. *ACA Int'l v. FCC*, No. 15-1211, 2018 U.S. App. LEXIS 6535 at *9 (D.C. Cir. Mar. 16, 2018) (“*ACA Int'l*”).
- FCC’s ATDS Definition Set Aside
 - FCC’s interpretation of the “capacity” is overly broad.
 - FCC’s interpretation of the “functions” of an ATDS is internally inconsistent.
- Vacated Treatment of Reassigned (Wrong) Numbers
 - One-call safe-harbor “arbitrary” and “capricious”.
 - Reasonable reliance considerations?
- Revocation of Consent Approach Upheld
 - Upheld FCC’s ruling that a consumer may revoke consent.
 - Noted that nothing in the FCC’s order should be understood to speak to the parties’ ability to agree on revocation procedures.



Automatic Telephone Dialing Systems – Part One

- Three Fundamental Concepts: The **capacity**, **functionality**, and **use** of the equipment.
- **Statutory Definition:** An ATDS is “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S. C. § 227(a)(1).
- **Capacity:** The FCC’s 2015 Omnibus Ruling said that a device’s “capacity” included all “potential functionalities” including “features that can be added to the equipment’s overall functionality through software changes or updates.”
 - The D.C. Circuit held that this interpretation was much too broad, because it would make everyone who owns a smartphone a “TCPA violator-in-waiting.” Sent it back to the FCC for reconsideration.



Automatic Telephone Dialing Systems – Part Two

- **Functionality:** To be considered an ATDS, equipment must have the capacity to both “store and produce numbers using a random or sequential number generator” *and* dial them?
 - In the Omnibus Ruling, the FCC stated several times that to be an ATDS, the equipment must have the ability to do both.
 - However, the Omnibus Ruling also said that predictive dialers are ATDSs, even though many predictive dialers don’t have the capacity to “store and produce numbers using a random or sequential number generator.”
 - The Court overturned the FCC decision because of these two inconsistent positions.
- **Use:** The TCPA prohibits parties from making calls *using* an ATDS. If a call is made using a piece of equipment that has the capacity and functionality to act as an ATDS, but was not being used as an ATDS, is that call prohibited by the TCPA?
 - Not specifically addressed in either the Omnibus Ruling or the ACA Int’l Opinion. However, the Opinion strongly suggests it as a topic for the FCC to take into account as it reconsiders the definition of an ATDS.



What's Next?

- The FCC now must re-visit the definition of an ATDS.
- Since the 2015 Omnibus Ruling, the FCC's make-up has shifted, and it now has three Republican commissioners and two Democratic commissioners. The current Chairman, Ajit Pai, was the only commissioner to dissent in full from the 2015 Omnibus Ruling.
- Court decisions since ACA Int'l have addressed the uncertainty in various ways, primarily by focusing on the “functionality”, while either ignoring or specifically rejecting the “use” argument raised by the D.C. Circuit.
- Auto dealers, lenders, and servicers should make sure they receive express consent prior to contacting consumers by calling or texting, and that they have policies and procedures in place to ensure that clients who “opt-out” don't receive further calls or texts.

A close-up, slightly blurred photograph of a vehicle's engine start button. The button is circular and features a small green indicator light at the top. Below the light, the words "ENGINE START" are printed in a light color. The button is set into a dark, textured dashboard panel. The overall image has a dark, moody aesthetic with a white horizontal line at the bottom.

SCRA Compliance



Background

- SCRA is a federal law that provides certain protections in lending for servicemembers who are called to Active Duty.
- After a servicemember enters military service, a contract by [a] servicemember for ... the purchase personal property (including a motor vehicle)” and “for which a deposit or installment has been paid by the servicemember before the servicemember enters military service” “may not be rescinded or terminated for a breach of terms of the contract ... nor may the property be repossessed for such breach without a court order.
- Enforced primarily by the Department of Justice
 - Since 2011, the DOJ has recovered over \$467 million through its enforcement of the SCRA.
- Check with your internal legal and compliance partners before initiating repossession of a servicemembers’ vehicle, the penalties for non-compliance are severe!



DOJ Suit for Alleged Unlawful Repossession

- DOJ alleges that lender violated the SCRA by repossessing protected servicemembers' motor vehicles without obtaining the necessary court orders.
 - Lawsuit was based off of a single complaint.
- Alleged conduct
 - Lender knew customer was in the military at the time of repossession, but had practice of only granting SCRA rights only if the customer provided deployment orders.
 - Lender failed to check the Defense Manpower Data Center (DMDC) database to see if their customers are SCRA protected.
 - Defendant failed to have adequate policies and procedures in place to verify military status.



DOJ Settles Lawsuit Related to Upfront Leases

- The SCRA provides servicemembers with protections that permit them to terminate motor vehicle leases early without penalty, after entering military service or receiving qualifying military orders for a permanent change of station or to deploy. When servicemembers lawfully terminate motor vehicle leases, the SCRA requires that they be refunded all lease amounts paid in advance.
- DOJ alleged violations of the SCRA's requirements to rebate upfront expenses for servicemembers that terminate leases.
 - First case brought by the DOJ regarding auto leases.
 - Case initiated by just two complaints.
 - Financial Servicer failed to have policies and procedures in place for lease terminations in compliance with the SCRA.
 - Over \$2 million in damages.



Best Practice Tips for SCRA Compliance

- Identify accounts in which the borrower has changed his or her mailing address to an APO or FPO; consider calling the servicemember to confirm his or her active duty status.
- When a borrower is at risk of default, early and frequent customer contact may increase the likelihood of avoiding repossession.
- Prior to repossessing a vehicle, search the DMDC database for evidence of SCRA eligibility.
- Develop policies and procedures.
- Conduct annual SCRA training and compliance reviews.
 - Provide sufficient training to employees working with borrowers who are candidates for loan modifications to ensure communication with borrowers is accurate and consistent.

Questions?





Issues in Debt Collection



Law Firm Defeats the CFPB at Trial Over Alleged FDCPA Violations

- The CFPB claimed that the law firm sent demand letters that were deceptive and violated the FDCPA
- ***Consumer Financial Protection Bureau v. Weltman Weinberg & Reis Co. LPA*** (2018 U.S. Dist. LEXIS 60112)
 - The letters were deceptive according to the CFPB since they implied that an attorney was involved in the process when no attorney was involved at all.
 - Judge found that complaint lacked merit.
 - Judge found that the CFPB offered no evidence to show that any consumer was harmed.
- Trend of Adverse decisions for the CFPB
 - *Consumer Financial Protection Bureau v. RD Legal Funding, LLC*
 - *Consumer Financial Protection Bureau v. CashCall*



Recent Appellate FDCPA Decisions

- 8th Circuit - ***Hill v. Accounts Receivable Services, LLC (2018 U.S. App. LEXIS 9813)***
- Consumer alleging that he did not receive truthful information has met requirement of standing to proceed with lawsuit under the FDCPA.
 - 11th Circuit agrees.
- Lawsuit failed because there was no evidence that the consumer or court in the state court action was actually misled.
 - Consumer won debt collection lawsuit in state court.
 - The fact that a lawsuit turns out ultimately to be unsuccessful does not make the bringing of it an action that cannot legally be taken. A collection agency's inadequate documentation of the assignment does not constitute a materially false representation.



Recent Appellate FDCPA Decisions (Cont'd)

- 7th Circuit – Debt collector did not violate the FDCPA by only verifying the information in its records instead of contacting the creditor to verify the debt.
 - ***Walton v. EOS CCA***, No. 17-3040 (7th Cir. 2018)
 - The collection notice (description of the debt and the debtor) needs to convey the information received from the creditor accurately.
 - When the debtor disputes, debt collector is not required to take the extra step of verifying the debt with the creditor.
 - 4th and 9th Circuit agree.



Recent Appellate FDCPA Decisions (Cont'd)

- 3rd Circuit – The 1-year statute of limitations for FDCPA claims runs when the alleged violation occurs and not when it is discovered.
 - ***Rotkiske v. Klemm, 890 F.3d 422***
 - Court relied mainly on the text of the FDCPA, which provides that an action to enforce any liability created by the statute “within one year from the date on which the violation occurs”.
 - Two basic models to determine when the statute of limitations runs: the discovery rule and the occurrence rule. This court followed the occurrence rule for the FDCPA.
 - 4th and 9th Circuit disagree. This split will likely need to be settled by the U.S. Supreme Court.



Recent Appellate FDCPA Decisions (Cont'd)

- 2nd Circuit – Debt collector did not violate the FDCPA by failing to disclose information about interest or fees when the debt is actually not incurring interest or fees.

- ***Taylor v. Fin. Recovery Servs.*** (2018 U.S. App. LEXIS 7899)

- “A collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading”
- In the 2nd Circuit, if the debt is incurring interest and fees, then the notice must disclose it. If the notice contains no mention of interest or fees, and they are accruing, then the notice will run afoul of [the FDCPA].”



Georgia AG's \$8.5 Million Settlement with Debt Collector

- Debt collector forced to cease collections on nearly 12,000 accounts
- On April 4, 2018, Georgia Attorney General settled against a debt collector for \$8.5 million dollars.
 - Settlement requires debt forgiveness on nearly 12,000 accounts (company can't collect on accounts or sell those accounts for others to collect).
 - Civil penalty of \$20,000 that can rise to \$240,000 depending on future conduct.
 - 3-year monitoring period.
- Alleged Conduct
 - Represented that customers had committed crimes and were subject to arrest.
 - Falsely representing themselves as attorneys or government entities.
 - Divulging information about the account to third parties and failing to disclose that they were debt collectors.
 - Collecting on payday loans, which are illegal under state law.



Georgia AG's \$8.5 Million Settlement with Debt Collector (Cont'd)

- Good reminder that states will continue to enforce federal laws and regulations (when authorized by law) despite the CFPB's pullback in enforcement actions.
 - "Our office will hold debt collectors that try to coerce and intimidate consumers by employing abusive, deceptive and illegal tactics accountable," said Attorney General Chris Carr.
- Although most enforcement actions relating to collections tend to be taken by Democrats, the Georgia AG is Republican.
- The identity of the debt collector's compliance manager was included in the press release and national media around this case.



Best Practice Tips for FDCPA Compliance

- Clearly indicate to consumers the purpose of the call when collecting a debt.
- Do not disclose the existence of a consumer's debt to the public.
- Avoid repetitive telephone calls that annoy, abuse, or harass any person at the number called.
- Create detailed policies and monitor systems to prevent UDAAP & FDCPA violations.
- Effectively respond to all consumer calls.
- Apply collection policies and procedures uniformly.
- Maintain records of all customer contacts and communications.
- Review written debt collection and state required default/repossession notices.



Legislative Updates



Enacted Auto Legislation

California AB 2521 – *Enacted 7/9/18; effective 1/1/19*

Deletes the requirement in the California Military Families Financial Relief Act that the reservist provide a signed letter under penalty of perjury to be entitled to determent of financial obligations.

Hawaii HB 2442 – *Enacted 6/20/18; effective 6/20/18*

Requires counties to remove and dispose of abandoned vehicles on public roads within a specified number of business days of abandonment; addresses vehicles deemed derelict.

Idaho HB 497 – *Enacted 3/20/18; effective 7/1/18*

Amends existing law to provide that certain notice shall be mailed to a lienholder relating to the towing and storage of a motor vehicle within 72 hours.

Mississippi HB 1195 / SB 2929 – *Enacted 3/26/18; effective 7/1/18*

Creates a guaranteed asset protection (GAP) waiver framework, including requirements for offering the waiver, contractual liability, disclosures, and cancellation.

North Carolina SB 411– *Enacted 6/22/18; effective 1/1/19*

Expands the required use of the electronic lien system; revises the law governing transfer title to the motor vehicle; provides consumer remedies relating to certificates of title; provides for tax increases on motor vehicle sales.

West Virginia HB 4186 – *Enacted 3/28/18; effective 6/8/18*

Clarifies that GAP waivers are not insurance, specifies terms and conditions under which GAP waiver contracts may be sold in the state and provide an exception for commercial transactions.

Questions?





Questions? Please contact us at ComplianceSolutions@lenderlive.com.