

TRIBAL LENDING

Internet-based small dollar lenders operating from tribal lands have raised interesting questions of tribal sovereignty for federal and state policymakers and, in particular, for the Consumer Financial Protection Bureau (CFPB). In 2012, at least 10 Native American tribes had formed partnerships with technology companies that allowed them to make payday-type loans over the Internet – allowing tribes that are far from major population centers to offer financial services to non-Native American customers wherever they may be. This has mirrored a wider trend towards online payday lending which has created new challenges for regulators. In 2011, it was estimated that of the 300 businesses making payday loans online, 35 were owned by Native American tribes.

Proponents of tribal lending point to sovereign immunity which limits the reach of state consumer protection laws and can only be modified by Congress. Tribes must, however, comply with federal consumer protection laws, enforced by the CFPB and Federal Trade Commission (FTC), including ones against unfair, deceptive and abusive practices and the Truth in Lending Act, which governs the disclosure of borrowing costs.

State regulators, the FTC and the CFPB are all grappling with whether they have the standing or mechanisms to regulate tribal lenders. State lending and usury laws may not be enforceable, as state law only applies to tribal activities under certain limited circumstances and tribal sovereign immunity makes state court discovery rules inapplicable. Federal lending and usury laws are also difficult to enforce as existing case law provides little guidance on litigating lending enforcement actions when a tribal payday lender asserts sovereign immunity.

A number of states have taken enforcement actions against companies operating in tribal lands with mixed results. To sidestep the issue of sovereign immunity, state and federal regulators have begun to take new approaches targeting these companies. In 2014, Pennsylvania's attorney general filed a suit against a tribe's lending partner alleging their agreement with tribes was a conspiracy to evade state law, in violation of Pennsylvania's racketeering, consumer protection and lending laws. The Department of Justice filed a similar case alleging violations of the Racketeer Influenced and Corrupt Organizations Act.

It seems likely that federal and state governments, led by the CFPB, will continue to seek ways in which the activities of lenders based on tribal lands can be regulated in the same manner as their colleagues win the wider lending community.

AFSA'S POSITION

The American Financial Services Association supports competition among properly regulated lenders playing on a level playing field. The greatest concern to traditional installment lenders is that lenders operating from tribal lands will benefit from an unfair advantage, possibly claiming the right both to charge rates that generally exceed permissible charges in borrowers' states, and ignoring state law limitations on loan duration or rollovers, thus, negatively affecting lenders who are already complying with the law.