

Client Alert

November 2012

The Consumer Financial Protection Bureau Provides Guidance for Mortgage Advertising

In a joint-agency media conference and press release with the Federal Trade Commission today, the Consumer Financial Protection Bureau used the “rulemaking-through-enforcement” method of regulation to create several de-facto guidelines for what is “unfair, deceptive, or abusive” in mortgage advertising. Bypassing the more arduous rulemaking process, the CFPB published “sample warning letters” that effectively made the following advertising practices illegal:

1. Falsely suggesting – through the incorporation of “Government Loan Department” in a company’s return address at the top of an advertisement, the use of a logo very similar to that of the United States Department of Housing and Urban Development, and the prominent display of a website address that includes the initials of the Federal Housing Administration – that a company is affiliated with a government agency or government-sponsored program (i.e., ads with misrepresentations about government affiliation);
2. Suggesting that consumers who enter into a reverse mortgage will have “no payments,” notwithstanding that such consumers may continue to be responsible for tax and insurance payments (i.e., ads with misleading statements about the costs of reverse mortgages);
3. Falsely indicating that a consumer is pre-approved for, or guaranteed, specific loan rates or terms (i.e., ads with misrepresentations about the amount of cash or credit available to a consumer);
4. Falsely indicating that a consumer entering into a reverse mortgage will have the opportunity to receive a discount on existing credit card debt in connection with the loan (i.e., ads with misleading statements about the benefits of reverse mortgages);
5. Falsely suggesting — through the use of a logo very similar to that of the United States Department of Veterans Affairs, the prominent display of a website address that includes the acronym “VA” and the use of language stating “the VA is offering you” the advertised product — that a company is affiliated with a government agency or government-sponsored program (i.e., ads with misrepresentations about government affiliation);
6. Indicating that a specific “fixed” rate is available for a “30-year” loan when, in fact, the stated rate is for an adjustable rate loan (i.e., ads with inaccurate information about interest rates); and
7. Suggesting that the rate being offered is part of an “economic stimulus plan” that will expire shortly, notwithstanding that the Department of Veterans Affairs’ loan guarantee programs do not have an expiration date (i.e., ads with misrepresentations about government programs).

The CFPB announced that, together with the FTC, it had conducted a joint “sweep” review of about 800 mortgage-related ads (ads for mortgage loans, refinancing, reverse mortgages, etc.) in newspapers, on the internet and from mail solicitations. The purpose of the sweep was to look for potential violations of the 2011 Mortgage Acts and Practices Advertising Rule, 12 C.F.R. Part 1014, which prohibits misleading

claims concerning government affiliation, interest rates, fees, costs, payments associated with a loan, and the amount of cash or credit available to the consumer.

The CFPB focused on mortgage advertisements that targeted older Americans or veterans, while the FTC focused on ads by home builders, realtors and lead generators. Of particular concern to the CFPB were advertisements related to reverse mortgages and mortgages that appear to take advantage of government programs.

Following the sweep, the CFPB issued warning letters to twelve companies and commenced formal investigations of six others. The FTC sent twenty letters and opened thirteen investigations. The determination of whether a letter or an investigation was more appropriate was made through a process the agencies described as “more an art than a science.” The agencies considered factors such as the number of objectionable statements, how clearly false the statements were and the potential harm to consumers.

The CFPB and FTC declined to provide comprehensive guidelines that would define “unfair, deceptive, or abusive” advertising practices. Instead, they gave themselves more leeway by saying that advertisers should follow the general standard of whether a reasonable consumer would perceive an ad to have a deceptive meaning. As an example, the agencies said that an advertisement with a prominent logo that gave the deceptive appearance of government sponsorship could not be fixed by a less visible footnote stating that the company offering the mortgage had no government affiliation.

Ronald Rubin, a partner at Hunton & Williams LLP, was one of the earliest employees at the Consumer Financial Protection Bureau, where he was an enforcement attorney in the Supervision, Fair Lending and Enforcement Division. He played an important role in building the new agency's enforcement capabilities, created the standard format for all of the Office of Enforcement's policies and procedures, and drafted many critical internal rules of operation such as the Enforcement Action Process and the NORA procedures. Ron has extensive knowledge of the Dodd-Frank Act and other consumer financial laws overseen by the CFPB.

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