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FTC Issues Mortgage Acts and Practices - Advertising Final Rule

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On Tuesday, July 19, 2011, the Federal Trade Commission (“FTC”) issued the Mortgage Acts and Practices (“MAP”) – Advertising Final Rule (the “Final Rule”), which bans deceptive claims and practices that may occur with regard to mortgage advertising or other types of commercial communications.

The Final Rule will have important implications for all advertisers and marketers of mortgage credit products, including lead generators and advertising agencies. More specifically, the Final Rule (1) provides guidance and clarity as to what practices constitute deceptive mortgage advertising; (2) gives the FTC and state authorities power to seek civil penalties for deceptive mortgage advertising, which the Final Rule defines broadly; and (3) imposes record-keeping requirements on mortgage advertisers.

Without exception, all entities within the FTC’s jurisdiction that advertise mortgages, including mortgage lenders, brokers, and servicers; real estate agents and brokers; advertising agencies; home builders; lead generators; rate aggregators; and others fall under the auspices of the Final Rule. While the FTC and other state and federal agencies have promulgated separate rules that prohibit false or misleading advertising, none of the other statutes or regulations duplicates “the specificity and breadth of practices and diversity of entities covered in the Final Rule.”

Some illustrative examples of prohibited deceptive claims under the Final Rule include:

- Misrepresentations about the existence, nature, or amount of fees or costs to the consumer associated with the mortgage;
- Misrepresentations about the terms, amounts, payments, or other requirements relating to taxes or insurance associated with the mortgage;
- Misrepresentations about the variability of interest, payments, or other terms of the mortgage;
- Misrepresentations about the type of mortgage offered;
- Misrepresentations about the availability, nature, or substance of counseling services or any other expert advice offered to the consumer regarding any mortgage credit product or term;
- Misrepresentations about the source of an advertisement or other commercial communication; and
- Misrepresentations about the consumer’s ability or likelihood of obtaining a refinancing or modification of a mortgage or any of its terms.

Like Section 5 of the FTC Act the Final Rule will allow the FTC, the newly established Consumer Financial Protection Bureau (“CFPB”), and state agencies to seek appropriate relief (including civil penalties) against those who engage in deceptive mortgage advertising.

In addition, the Final Rule imposes record keeping requirements on those entities engaged in mortgage advertising. Generally speaking, covered entities are required to keep any commercial communication “regarding any term of any mortgage credit product,” and they must only keep those commercial communications they made or disseminated.

Importantly, however, with this Final Rule, the FTC chose not to adopt a number of disclosure and other requirements. For example, the Final Rule does not impose any affirmative advertising disclosure requirements. Yet it is important to note that the Final Rule broadly prohibits misrepresentations about any term of any mortgage credit product, such that an omission of qualifying information may cause a representation to be misleading and therefore violative of the rule.

In addition, and most significantly for lead generators and third-party marketers, the FTC did not include a substantial assistance provision in the Final Rule. The FTC stated that the record did not identify any classes of persons that may provide substantial assistance or support to mortgage advertisers that would not already be subject to the Final Rule. The FTC, however, also warned that to the extent that there are others who provide such assistance and support and are not covered by the

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rule, they may be liable under Section 5 of the FTC Act, or the CFPB could amend the MAP Final Rule to broaden its scope.

In a separate rulemaking, the Commission issued a final rule with respect to mortgage assistance relief services ("MARS"), which is more narrowly tailored than this Final Rule.

Because of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which President Obama signed on July 21, 2010, the FTC's rulemaking authority for the Final Rule and the MARS Final Rule will transfer to the CFPB on July 21, 2011, but the FTC will still maintain enforcement authority with regard to both rules.

The Final Rule will take effect on August 19, 2011 and is being published in the *Federal Register*. The Final Rule can be viewed now on the [FTC's website](#).

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Jonathan Pompan is Of Counsel at Venable LLP in the Washington, DC office. He represents nonprofit and for-profit companies in regulated industries, in a wide variety of areas such as advertising and marketing law, compliance with applicable federal and state regulations, and in connection with Federal Trade Commission and state investigations and law enforcement actions.

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