Advertising Dos and Don'ts for Mortgage Lenders and Brokers

December 6, 2012

# Upcoming Webinars

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*For information or to register, visit [www.ballardspahr.com](http://www.ballardspahr.com) or e-mail questions@ballardspahr.com.*
Moderator – Alan S. Kaplinsky

- Practice Leader of the Consumer Financial Services Group at Ballard Spahr
- Devotes his practice to counseling financial institutions with respect to bank regulatory and transactional matters and defending them in individual and class action lawsuits (including CFPB investigations and government enforcement matters)
- First President of the American College of Consumer Financial Services Lawyers
- Former Chair of the American Bar Association Committee on Consumer Financial Services of the Business Law Section
- Co-Chair of the Practising Law Institute’s Annual Consumer Financial Services Institute, now on its 18th year
- Has been named as a tier one banking and consumer financial services lawyer in the 2006 through 2012 editions of Chambers USA
- Has been named in *The Best Lawyers in America* under financial services regulation law and banking and finance litigation from 2007 to 2013
- Recently named the 2012 Philadelphia Lawyer of the Year for Litigation-Banking & Finance

*Ballard Spahr*
Panelist – Richard J. Andreano, Jr.

- Practice Leader of the Mortgage Banking Group and a member of the Consumer Financial Services and Privacy and Data Security Groups
- Has devoted more than 25 years of practice to financial services, mortgage banking, and consumer finance law
- Advises lenders, servicers, brokers, home builders, title companies, real estate professionals, and other settlement providers on regulatory compliance and related matters, including issues concerning Dodd-Frank, RESPA, TILA, ECOA, Fair Housing Act, FCRA, HMDA, and Gramm-Leach-Bliley Act
- Rich is Editor-in-Chief of *Mortgage Finance Regulation Answer Book 2011-2012*, published by the Practising Law Institute
Panelist – John D. Socknat

- Practice Leader of the Mortgage Banking Group and a member of the Consumer Financial Services and Privacy and Data Security Groups
- Uses his knowledge and breadth of the business issues affecting the residential and commercial mortgage banking industries and the legal landscape to advise clients on compliance and licensing matters under state and federal law
- John is an Editor of *Mortgage Finance Regulation Answer Book 2011-2012*, published by the Practising Law Institute
Panelist – Mercedes Kelley Tunstall

- Of Counsel in the Business and Finance Department at Ballard Spahr
- Practice Leader of the firm's Privacy and Data Security Group
- Also a member of the Consumer Financial Services Group, Bank Regulatory and Supervision Group, Mortgage Banking Group, software and business methods practice team in the Patents Group, and Trademark and Copyright Group
- Counsels clients on compliance with consumer financial services laws and the investigations and proceedings of the Consumer Financial Protection Bureau
- Practice focuses on emerging payments, including mobile wallets, digital marketing and social media, and privacy issues
What is considered an advertisement?: Regulation Z

• A commercial message in any medium that promotes, directly or indirectly, a credit transaction. Examples:
  - Messages in newspapers, magazines, leaflets, or promotional flyers
  - Radio or television announcements
  - Electronic advertisements, such as on the Internet
  - Direct mail literature
  - Printed material on any exterior or interior sign
  - Telephone solicitations

• Does not include direct personal contacts relating to the negotiation of a specific transaction, or informational material distributed to only business entities.

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What is considered an advertisement?: MAP Ad Rule

- Covers a “commercial communication,” which is “any written or oral statement, illustration, or depiction . . . that is designed to effect a sale or create interest in purchasing goods or services, whether it appears on or in [various media, including:]

- Newspapers, magazines, brochures, leaflets, or pamphlets
- Radio, television, or cable television
- Internet or cellular network
- Letter or insert
- Poster, billboard, or public transit card
- Audio program transmitted over a telephone system, telemarketing script, or on-hold script
What is considered an advertisement?: State Law

• State definitions of advertisement vary
  - Reg. Z definition
  - MAP Rule definition
  - SAFE Act

• Example – “material used or intended to be used to induce the public to apply for a mortgage loan and includes any printed or published materials, audio or visual material, website, or descriptive literature concerning a mortgage loan whether disseminated by direct mail, newspaper, magazine, radio or television broadcast, electronic, billboard or similar display.”

• What about promotional items?
Sources of mortgage loan advertisement requirements

- TILA Regulation Z (12 CFR Part 1026)
  - HELOC, 1024.16. General open-end plus specific HELOC requirements.
    - Trigger terms requiring additional disclosures
    - Variable rate disclosures
    - Initial discounted or premium rate disclosures
    - Detailed promotional rate and payment disclosures
    - Balloon payment disclosures
    - Tax implications disclosures
    - Prohibition on use of term “free money” or similar misleading terms
Sources of mortgage loan advertisement requirements

• TILA Regulation Z (12 CFR Part 1026)

  - Closed-end, 1024.24. General plus mortgage-specific requirements.
    • Trigger terms requiring additional disclosures
    • Variable rate disclosures
    • Detailed rate and payment disclosures
    • Balloon payment disclosures
    • Tax implications disclosures
    • Seven prohibited acts or practices
      - Misrepresentations of government endorsement
      - Misleading advertising of “fixed” rates and payments, rate or payment comparisons, use of current lender’s name, claims of debt elimination, use of term “counselor,” and use of foreign language
Sources of mortgage loan advertisement requirements

- Mortgage acts and practices advertising rule, Regulation N (12 CFR Part 1014)
  - Prohibition against material misrepresentations of any mortgage credit term, including:
    - The amount of interest a customer pays each month and whether unpaid interest is added to the amount due
    - APR, fees and costs, and prepayment penalties
    - The true costs of ancillary products such as credit insurance
    - The amount of insurance and taxes required for the loan
    - The variability of the interest and incorrectly using the term “fixed”
    - Comparisons between rates or payments and rates or payments only available for a portion of the term of the loan
Sources of mortgage loan advertisement requirements

- Mortgage acts and practices advertising rule, cont.
  - Prohibition against material misrepresentations of any mortgage credit term:
    - The amount of credit or cash available
    - The existence, number, amount, or timing of any minimum or required payments
    - The potential and circumstances for default
    - The effectiveness of the loan to consolidate or restructure debt
    - The association of the loan, program, or provider with governmental entities or programs
    - The source of the customer communication
    - The likelihood that the customer will obtain the loan, refinancing, or modification, including if the customer is preapproved
    - The availability of counseling
Sources of mortgage loan advertisement requirements

• Unfair, deceptive, or abusive act or practice laws
  - If one regulator or enforcement agency finds the practice unfair or deceptive, then it is likely others will also.
    • Use of calculators or graphs
    • Use of flags
    • Use of depictions of currency
    • Proper disclosure practices
    • Consumer testimonials
Sources of mortgage loan advertisement requirements

- State laws
  - Reg. Z “trigger terms”
  - Restrictions on use of another lender’s name
  - Disclaimer re: source of loan information
  - Disclosure of NMLS Unique ID
  - Loan comparisons
  - Licensing disclosures
  - Use of certain terms – preapproved, prequalified
  - Name(s) on license(s)
Hot-button advertisement issues for the CFPB and FTC

- CFPB’s Naughty List
  - Potential misrepresentations of government affiliation
  - Suggesting with a VA loan that the rate being offered was part of an “economic stimulus plan” that will expire shortly
  - Potential inaccurate information about interest rates, such as indicating a “fixed” rate for a variable rate loan
  - Potential misleading statements that consumers with reverse mortgages (1) would have “no payments” even though tax and insurance payments may still be required or (2) will have the opportunity to receive a discount on existing credit card debt
  - Potential misrepresentations that the consumer is pre-approved for or guaranteed specific rates or terms
Hot-button advertisement issues for the CFPB and FTC

- **FTC Naughty List**
  - Advertisements offering a very low “fixed” mortgage rate, without discussing significant loan terms
  - Advertisements containing statements, images, symbols, and abbreviations suggesting that an advertiser is affiliated with a government agency
  - Advertisements “guaranteeing” approval and offering very low monthly payments, without discussing significant conditions on these offers
“Mock Ad” examples provided by CFPB and FTC
“Mock Ad” examples provided by CFPB and FTC

PERSONAL & CONFIDENTIAL
Mr. John T. Walker
123 Park Ave
Anytown, VA 23456-7890

TIME SENSITIVE INFORMATION
IMMEDIATE ACTION REQUIRED!

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Loan Amount: $357,000.00
New Payment: $1,364.62

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Save money on your home mortgage with your new payment! Keep more of your hard-earned cash with an incredibly low fixed rate mortgage - even if you have less than perfect credit! These low rates won’t last - you must act now! Call us today at 1-877-555-1212 to take advantage of our Free Application Offer.

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“Mock Ad” examples provided by CFPB and FTC
The risks presented by loan officer websites/social media

- Status of websites and social media as advertisements
- Marshall McLuhan stated that “The medium is the message.”
- With advertising requirements, the focus is on the message and not the medium.
  - Regulation Z—An advertisement is a commercial message in any medium.
  - MAP Ad Rule—A commercial communication is a statement designed to effect a sale or create an interest in purchasing goods or services appearing in various formats, including the Internet or any other medium.
The risks presented by loan officer websites/social media

- Evaluate how social media is going to be used and apply traditional rules accordingly
- Take care about re-purposing comments received through social media for commercial communications.
- Protect against liability for content posted by third parties.
- Disclosure of “tag lines,” NMLS ID, trigger terms, etc.
  - Space limitations
- LO branding v. licensee branding
Potential consequences for violating advertisement requirements

- Regulation Z advertisement disclosure requirements, 1026.16 and 1026.24 (other than 1026.24(i))
- Regulation Z prohibited acts or practices with closed-end mortgage advertisements, 1026.24(i)
- MAP advertising rule, Regulation N, Part 1014
- Dodd-Frank UDAAP, state and federal UDAP
- State laws
The need for policies and procedures requiring the review of all consumer advertisements and marketing materials

- Companies must have policies and procedures requiring an appropriate and prior review of all consumer advertisements and marketing materials for legal compliance.

- Employee training must emphasize the need for the review of all advertisements and marketing materials.

- Techniques (“best practices”) to provide for appropriate review with limited compliance resources.
  - Manuals and guides
  - Examples of “good” and “bad” ads
  - Templates
Questions / Resources

If you have questions about anything we covered today, please contact:

Alan S. Kaplinsky, Practice Leader
Consumer Financial Services Group
215.864.8544
kaplinsky@ballardspahr.com

Richard J. Andreano, Jr., Practice Leader
Mortgage Banking Group
202.661.2271
andreanor@ballardspahr.com

John D. Socknat, Practice Leader
Mortgage Banking Group
202.661.2253
socknatj@ballardspahr.com

Mercedes Kelley Tunstall, Practice Leader
Privacy and Data Security Group
202.661.2221
tunstallm@ballardspahr.com

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