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FTC Publishes Final Rule on Mortgage Advertising: Prohibited Representations under Mortgage Acts & Practices

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On July 22, 2011 the Federal Trade Commission (FTC) published the Mortgage Acts and Practices - Advertising Final Rule "relating to unfair or deceptive acts and practices that may occur with regard to mortgage advertising". 76 FR 43826.

The Mortgage Acts and Practices- Advertising Rule (MAP Rule) amends Title 16, Code of Regulations by the addition of Part 321. The MAP Rule applies to mortgage lenders, brokers, servicers and others who engage in mortgage advertising such as real estate agents or advertising agencies. The Rule does not apply to banks, savings and loan institutions, federal credit unions and other entities that are excluded from the FTC's jurisdiction. Previously, mortgage lenders have been subject to advertising regulation through other regulations including the Truth in Lending Act (TILA), the Home Ownership and Equity Protection Act (HOEPA) and state specific requirements.

The MAP Rule "prohibits any material misrepresentation, whether made expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product." 76 FR 43833. The Rule adopts the FTC's standing definition of a deceptive act as occurring "if there is a material representation, omission or practice that is likely to mislead consumers acting reasonably under the circumstances, where the information is material if it is likely to affect a consumer's choice of, or conduct regarding a product." 76 FR 43826.

Section 321.3 of the MAP Rule outlines a list of 19 areas in which mortgage advertising misrepresentations have been prevalent and in which false or deceptive claims would result in Rule violation. This listing is not meant to be all encompassing but meant to instead "provide clarity and guidance" in determining a deceptive misrepresentation under the Rule. 76 FR 43833. The list includes misrepresentations regarding loan terms, fees and costs, the consumer's potential for savings or approval and additional services or affiliated providers.

MAP Rule examples arising under the Loan Terms category include misrepresentations regarding:

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The interest charged for a mortgage credit product

This section explains that interest misrepresentations include the total amount owed each month, be it included in the payments, loan amount or total amount due, well as the interest owed each month that is not included in the payments, but instead is added to the total amount due. (321.3(a))

The APR, simple annual rate, period rate or any other rate, including payment rate
In the Discussion of the Final Rule, the FTC indicated that there has been an increase in deceptive rate claims and included an example of claims which had arisen where originators understated the true rate by more than 100 percent. (321.3(b))

Any pre-payment penalty

This section includes misrepresentations concerning not only the existence of a pre-payment penalty but also the nature, amount or terms. (321.3(f))

The variability of interest, payments or other terms

Under this section use of word "fixed" will not be allowed when the interest, payments or other terms are actually variable or will only stay unchanged for a limited amount of time. (321.3(g))

The type of mortgage credit product offered

This section gives the example of a misleading claim that the product offered is fully amortizing when it is not. (321.3(i))

The potential for default

Consumers must be made aware that the potential for default includes not only mortgage nonpayment default, but also potential default for nonpayment of taxes or insurance, failure to maintain the property or default as a result of not meeting other required obligations. (321.3(l))

The right to reside in the subject dwelling

The right to reside in the home arises as an issue when the product is a reverse mortgage and there are misrepresentations as to how long and under what conditions a consumer will be able to live in the home. (321.3(p))

Examples of deceptive claims relating to Fees and Costs under the MAP Rule include misrepresentations about:

The existence, nature or amount of fees or costs associated with any mortgage credit product
A statement cannot be made that there will be no fees charged, when in fact the fees and costs will be incorporated in the loan amount or total amount due from the consumer. The fees charged include any fees collected over the life of the loan, not just at origination. (321.3(c))

The taxes or insurance associated with a mortgage credit product

The terms, amounts and payments of taxes or insurance requirements may not be misrepresented. Specifically, the requirements for tax and insurance payments to be included consumer's monthly mortgage payments and the extent to which the tax and insurance payment will be included in the loan amount or total amount due from the consumer. (321.3(e))

The consumer's ability to obtain any mortgage product or term

Misrepresentations under this section include claims that the consumer has been pre-approved or guaranteed for any product or term. (321.3(q))

The consumer's ability to refinance or

modification of any mortgage product or term
Misrepresentations under this section include claims that the consumer has been pre-approved or guaranteed for any refinancing or modification. (321.3(r))

Deceptive claims as to Payments and Consumer Savings under the MAP Rule include misrepresentations regarding:

Comparison between rates or payments

This section includes false and misleading comparisons using a rate or payment that will not be available for the full term of the loan and also any deceptive claims that consumers will save money by accepting a credit offer. (321.3(h))

The amount of the obligation or existence, nature, or amount of cash or credit the consumer would receive from the loan

The examples provided for this section include false claims that the consumer will receive an amount of cash by obtaining HELOC or receive a credit through a purchase money loan. (321.3(j))

The existence, number, amount of timing of any minimum or required payments

In the case of reverse mortgage where there is no monthly mortgage payment but there are taxes and insurance payments required, it may not be advertised as having no payments without clear clarification. (321.3(k))

The effectiveness of product in helping consumers resolves problems paying debts

This section includes false or misleading claims that a product can reduce, eliminate or restructure a debt or any other obligation. (321.3(m))

Misrepresentations regarding Additional Products or Services offered and Affiliated Services, optional or otherwise, include:

The terms associated with additional products or features sold along with the mortgage credit product

This section includes false claims regarding credit insurance, credit disability insurance, car loans, or other additional optional features. (321.3(d))

The association between the mortgage credit product or provider and any other person or program

Misrepresentations under this section include false claims that the provider is or is affiliated with any organizational or government program, benefit or entity. Also included are misrepresentations by using logos, forms or symbols that resemble those used by other entities, organizations or programs which the product is not or for which the provider is not affiliated. The Final Rule Discussion clarifies that government logos may be used as required or allowed, including advertising FHA programs if they are offered. (321.3(n))

The source of commercial communications

This section includes false claims that the communication with the consumer is made by or on behalf of the consumer's current mortgage lender or servicer. (321.3(o))

The availability, nature, or substance of counseling services or any other expert advice offered to the consumer

A deceptive claim regarding the qualifications of those providing services under this section is not allowed. However, this section does not prohibit truthful, non-deceptive references to valid professional designations. (321.3(s))

The prohibited acts and practices as described above, arise from numerous FTC enforcement actions and trends that have emerged in advertising practices found to be misleading to consumers.

In ensuring MAP Rule compliance, it should be noted that only false or misleading advertising under the 19 above examples are prohibited. The rule does not prohibit advertising using these 19 items in advertising as long they are not used deceptively or falsely. For example, if a mortgage lender offers a certain desirable loan program, they may advertise as such. If a mortgage lender chooses to use a disclaimer to clarify an advertisement claim, it must show as clearly and conspicuously as the claim itself.

The FTC's Final MAP Rule may be viewed at:

<http://ftc.gov/os/fedreg/2011/07/110719mortgagead-finalrule.pdf>

The MAP Rule will be effective as of August 19, 2011.