

Deceptive Advertising Practices Remain Hot Target for CFPB

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I. Introduction

On February 12, 2015, the Bureau of Consumer Financial Protection (CFPB) announced enforcement actions against three mortgage companies for reverse mortgage loan advertisements that allegedly violated the Mortgage Acts and Practices Rule, also known as Regulation N (the MAPs Rule).¹ The three enforcement actions came in the form of two consent orders, as well as a complaint filed in the U.S. District Court for the District of Maryland.²

All three actions contained substantially similar factual allegations: the CFPB alleged that each company mailed advertisements improperly suggesting an affiliation with the United States government, or implying that the company's reverse mortgage loans were endorsed or sponsored by a government program. Regulation N has specific prohibitions on such representations, but the CFPB also contended that these practices violated the Dodd-Frank Act prohibition on "unfair, deceptive, or abusive acts or practices" (UDAAP).³

II. Background

The announcement of the three enforcement actions was not altogether surprising. In 2012, the CFPB and the Federal Trade Commission (FTC) sent warning letters to twelve mortgage companies, warning them to "clean up"

1. 12 CFR § 1014.

2. See: *In the Matter of Flagship Financial Group, LLC*, No. 2015-CFPB-0006 (Feb. 12, 2015); *In the Matter of Preferred Lending, Inc.*, No. 2015-CFPB-0005 (Feb. 12, 2015); *CFPB v. All Financial Services, LLC*, No. 1:15-cv-00420 (D. Md. Feb. 12, 2015).

3. 12 U.S.C. § 5531.

potentially misleading advertisements directed towards older Americans and veterans.⁴ The warning letters specifically advised that certain practices, among others, could be misleading, including:

- advertisements containing statements or abbreviations that imply an affiliation with the government;
- advertisements guaranteeing approval and offering low payments without discussing significant conditions on the offers;
- advertisements for reverse mortgage products that misrepresent that no payments are required when taxes and insurance may be required.

The warning letters were sent as a result of a joint “sweep” conducted by the CFPB and the FTC. Together, the two agencies coordinated efforts to review over 800 randomly-selected mortgage-related advertisements across the country, including advertisements for mortgage loans, refinancings, and reverse mortgage loans. The CFPB credits these coordinated efforts as directly leading to the February 2015 advertising enforcement actions brought under the MAPs and UDAAP Rules.⁵

The CFPB has not limited its advertising enforcement efforts to the issue of improperly implying association with the government. Indeed, the three aforementioned enforcement actions came fresh on

the heels of another advertising-related consent order, filed just two days before on February 10, 2015, alleging both UDAAP and Real Estate Settlement Procedures Act (RESPA) violations for a company’s representation of its relationship with a veterans’ organization.⁶

Aside from these four CFPB enforcement actions, the FTC also has recently shown a willingness to pursue alleged MAPs Rule violations for mortgage-related advertisements. And even the United States Supreme Court has thrown itself into the deceptive practices mix: In 2014 the Court found that compliance with one advertising regulation does not necessarily shield conduct that is subject to other federal statutes.⁷ Taken together, the actions by the CFPB, FTC, and the Supreme Court’s recent decision indicate that, now more than ever, mortgage-related advertising practices face an aggressive and complex regulatory regime.

III. The MAPs Rule and Regulation Z’s Prohibition on Misrepresentations of Government Endorsement

Although it was originally issued by the FTC in 2011,⁸ the authority to enforce the MAPs Rule was subsequently transferred to the CFPB by the Dodd Frank Act.⁹ The MAPs Rule prohibits the use of certain misleading statements in mortgage advertising, and defines mortgage advertising very broadly to include “any written or oral statement, illustration, or depiction, whether in English or any other language, that is designed to effect a sale or create interest in purchasing goods or services...”

Communications made in any advertising medium fall within this definition,

including social media channels. The MAPs Rule contains a long list of advertising prohibitions, including any misrepresentation that a mortgage provider is “affiliated with any governmental entity or other organization,” or that a mortgage product “relates to a government benefit, or is endorsed, sponsored by, or affiliated with any government or other program.”¹⁰

This provision explicitly bars the use of “formats, symbols, or logos” that resemble those of a government entity or program.¹¹ Aside from these specific prohibitions, which were the subject of the CFPB’s recent advertising enforcement actions, the MAPs Rule also prohibits misleading statements concerning:

- the existence and nature of interest charges, APR rates, fees, prepayment penalties and terms regarding insurance and tax payments;
- the pre-approval or guarantees of certain products, comparisons between temporary rates and hypothetical rates or payments, the type of amortization associated with the product, and the circumstances that would result in potential default under the product; and
- any association with any governmental entity or other organization, or the endorsement or sponsorship of any governmental entity, that would mislead the consumer as to the source of the advertisement.¹²

In addition to the prohibited representations, the MAPs Rule requires mortgage companies to maintain copies of all materially-different advertisements for a period of two years.

Moreover, mortgage advertising practices are not solely subject to the MAPs

4. See CFPB Press Release, Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False Mortgage Advertisements (Nov. 19, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-warns-companies-against-misleading-consumers-with-false-mortgage-advertisements/>; see also Federal Trade Commission, Press Release, FTC Warns Mortgage Advertisers that Their Ads May Violate Federal Law (Nov. 19, 2012), available at www.ftc.gov/opa/2012/11/mortgageadvertise.shtm.

5. CFPB Press Release, CFPB Takes Action Against Mortgage Companies For Misrepresenting U.S. Government Affiliation (Feb. 12, 2015), available at <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-mortgage-companies-for-misrepresenting-u-s-government-affiliation/>. See *supra* notes 1 and 3 for the MAPs and UDAAP rules.

6. *In the Matter of New Day Financial, LLC*, 2015-CFPB-0004, Consent Order (Feb. 10, 2015).

7. *Pom Wonderful, LLC v. Coca-Cola Co.*, 573 U.S. ___, No. 12-761, Slip Op. (June 12, 2014).

8. The FTC issued the MAPs Rule pursuant to an explicit congressional mandate. See 76 Fed Reg. 43826 (July 22, 2011) (implementing the final rule and discussing congressional authorization).

9. 12 U.S.C. § 5481.

10. 12 CFR § 1014.3(n)(1), (2).

11. *Id.*

12. *Id.*

Rule. The Truth in Lending Act's implementing regulation, Regulation Z, prohibits a number of practices similar to the prohibitions in the MAPs Rule, such as: misleading uses of the term "fixed" with respect to rates and payments; misleading comparisons; misrepresentations of a government endorsement; misleading use of the current lender's name; misleading claims of debt elimination; and misleading foreign-language advertisements.¹³

Although the three February 12, 2015 enforcement actions mostly focused on implied association with the government, businesses should be aware that both the MAPs Rule and Regulation Z offer many other instances of potential advertising practices violations. Indeed, as will be more fully explained below, in 2014 the FTC brought an enforcement action alleging both MAPs Rule and Regulation Z violations for the same underlying conduct.

IV. Recent CFPB Enforcement Actions

A. Introduction

As noted above at Parts I. and II, the "joint sweep" conducted by the CFPB and the FTC resulted in three separate enforcement actions being filed by the CFPB on February 12, 2015. With respect to the consent orders, both American Preferred Lending, Inc. (American Preferred) and Flagship Financial Group, LLC (Flagship) entered into stipulations neither admitting nor denying any of the CFPB's findings of facts or law. Both companies agreed to cease the alleged advertising misconduct, agreed to enter into a compliance plan to ensure their "mortgage credit product advertisements" complied with federal law, and further consented to civil fine payments of \$85,000 and \$225,000, respectively.

B. American Preferred Lending, LLC Consent Order

As to American Preferred Lending, the CFPB alleged that the company sent direct mail advertisements entitled "Payment Reduction Notice," that "evoked a government form" and "appeared as if they were United States government notices." To support this contention, the CFPB pointed to a number of features of the mailings, such as: Many of the advertisements contained the Federal Housing Administration (FHA) Approved Lending Institution Logo; the business name of the company was purposefully obscured to give the impression that the advertisements were endorsed by the government; the advertisements contained the web address www.FHAdept.us; and references were made to federal law, while the company's name appeared only in small-print disclosures.

C. Flagship Financial, LLC Consent Order

The CFPB focused on features similar to the American Preferred mailings in the Flagship consent order. In particular, the CFPB alleged that Flagship's FHA streamline refinance loan advertisements had a format and design that "looked like a government notice and implied that a government agency was the source of the advertisement." The FHA streamline advertisements allegedly contained the heading "PURSUANT TO THE FEDERAL HOUSING ADMINISTRATION (FHA)." Similar to the American Preferred consent order, the CFPB noted that Flagship's disclaimer of the company's non-affiliation with the government was on the back of the mailer.

The CFPB also singled out Flagship's Veterans Administration (VA) loan advertisements, which contained text such as "VETERAN BENEFITS IMPROVEMENT ACT." The CFPB took issue with an advertisement's alleged claims that the company "has been directed to" provide loans with certain features, because this implied an association with a government agency. Taken together,

these features and statements amounted to a MAPs Rule violation, and deceptive practices, according to the CFPB.

D. All Financial Services Complaint

The complaint filed against All Financial Services (All Financial) contained factual allegations similar to the two consent orders noted above, but also outlined particularized alleged violations of the MAPs Rule. The complaint contains a number of factual allegations of "deceptive misrepresentations regarding government affiliation" that pertain to either the mailing envelope itself, or statements or representations contained inside the mailer. As to the envelope, the CFPB argued that statements on the envelope "look like a government notice" because: they display an eagle image which closely resembles the Great Seal of the United States; each envelope contained the phrase "IMPORTANT DOCUMENT ENCLOSED," followed by a citation to the U.S. Code; and some mailers further contained the text "Home Saver – HECM Program Eligibility Notice" on the outside of the envelope.

The CFPB's complaint also focused on the actual contents of the advertisements contained therein. The CFPB alleged that headings such as "GOVERNMENT LENDING DIVISION," and statements such as "a HUD approved lender" further created a misleading impression that the advertisement was from a government agency or that the lender had a special relationship with the government.

Unlike the consent orders, however, the CFPB also focused on purported deceptive misrepresentations regarding whether payments are required. The CFPB took issue with All Financial's bolded statement that: "There is no monthly payment or repayment required whatsoever for as long as you or your spouse live in the home." According to the CFPB, this statement is a misrepresentation because borrowers are still required to pay hazard insurance and property taxes, and a spouse often cannot stay in a home if they are also not a borrower under the reverse mortgage.

13. 12 CFR § 1026.24(i).

Finally, the CFPB also alleged that All Financial violated the MAPs Rule by failing to maintain copies of all its advertisements for the prior two years.

E. Newday Financial, LLC Consent Order

The final action rounding out the CFPB's February 2015 enforcement sweep was a consent order entered into with Newday Financial, LLC (Newday), alleging RESPA and UDAAP violations. The CFPB alleged that Newday sent advertisements directly to consumers as if they were from a Veterans' organization. The advertisements recommended Newday as a lender, but allegedly failed to disclose the financial relationship between Newday and the veterans' organization.¹⁴

The violative representations included statements of endorsement such as "Newday USA is [the Veterans' organizations'] exclusive provider of home loan programs based on their high standards for service and excellent value of their programs." The CFPB found such statements to be deceptive, because the financial connection of the two Veterans' organizations would be material to consumers when determining the worth of such endorsements.

Further, the CFPB alleged that the payments made by Newday to the Veterans' organization were in violation of RESPA's prohibition on referrals and kickbacks.¹⁵ Specifically, it was the CFPB's position that 3,900 payments made in the form of "lead generation fees," which ultimately resulted in 400 closed mortgages, amounted to illegal referrals. For these alleged violations (which Newday neither admitted nor denied), Newday agreed to cease "assisting" any third parties from misrepresenting the relationship of the organizations, and further agreed to implement an ongoing compliance plan to be monitored

by the CFPB. Newday also agreed to pay a \$2,000,000 civil money penalty.

V. Recent FTC Activity

The FTC announced on June 10, 2014, that it had come to a settlement agreement with a homebuilder in Pennsylvania over deceptive mortgage advertising practices.¹⁶ The FTC and the homebuilder agreed on a \$650,000 civil penalty for alleged violations the MAPs Rule.¹⁷ The FTC alleged that the homebuilder advertised credit products that required no money down and had no closing costs, but in reality charged borrowers multiple fees including a good faith deposit, settlement fee, and annual fee.

The advertisements allegedly also advertised specific payment amounts without disclosing that payment could be achieved only through the USDA Rural Housing program, and without disclosing the annual percentage rate used for the specific payment amount. The FTC alleged that these actions violated the MAPs Rule and the Truth in Lending Act and its implementing regulation, Regulation Z (12 C.F.R. Part 1026).

The Consent Order enjoins the homebuilder from violating the MAPs Rule or Regulation Z generally, and also specifically prohibits the company from using or disseminating any piece of marketing or advertising that contains the statements specifically prohibited by the MAPs Rule and Regulation Z, including:

- misrepresenting material facts regarding the loan advertised;
- failing to disclose that qualifications exist for the loans being advertised;

- misrepresenting the existence and amount of fees required to be paid;
- failing to identify the annual percentage rate associated with a specific payment;
- advertising terms other than those that are actually offered; and
- advertising a payment amount without disclosing the terms utilized to obtain that payment amount.

VI. The Supreme Court on Deceptive Advertising: Compliance with One Regulation Does Not Shield Conduct Subject to Other Statutory Provisions

In addition to the FTC's and CFPB's consent orders, noted above, in 2014 the United States Supreme Court affirmed that advertising may be deceptive, independent of the advertisement's compliance with such regulations. In *Pom Wonderful, LLC v. Coca-Cola Co.*,¹⁸ the Supreme Court found that Coca Cola's display of one of its juice blends was subject to deceptive advertising laws, despite its compliance with FDA regulations. Coca-Cola's display prominently featured the words "Pomegranate Blueberry," but the product itself contained only 0.3 percent pomegranate juice, and only 0.2 percent blueberry juice.

Pom Wonderful sued Coca-Cola under the Lanham Act, a federal statute which "creates a cause of action for unfair competition through misleading advertising or labeling."¹⁹ Coca-Cola defended itself by asserting it was in compliance with FDA regulations regarding labeling for food products.²⁰

14. *In the Matter of New Day Financial, LLC*, 2015-CFPB-0004, Consent Order at 5 - 6 (Feb. 10, 2015).

15. *Id.* at 7 - 8; see 15 U.S.C. § 2607(a).

16. See FTC Press Release, *Pennsylvania Home Builder Settles FTC Charges of Deceptive Mortgage Advertising* (June 10, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/06/pennsylvania-home-builder-settles-ftc-charges-deceptive-mortgage>.

17. Payment of the penalty was suspended pursuant to the company's agreement to comply with the terms of the order. See *United States v. Heritage Homes Group, Inc.*, No. 14-CV-3173, Consent Order (Dkt. No. 3) (E.D. Pa. June 6, 2014). The consent order may be found at the FTC's website: <http://www.ftc.gov/system/files/documents/cases/140610heritagegroup.pdf>.

18. *Pom Wonderful, LLC v. Coca-Cola Co.*, 573 U.S. ___, No. 12-761, Slip Op. (June 12, 2014).

19. *Id.* at 3.

20. *Id.* at 4.

The Supreme Court rejected Coca-Cola's defense, finding that the FDA's regulations did not pre-empt the deceptive advertising provisions of the Lanham Act.²¹ Instead, the Supreme Court found that the regulation and law complement each other's respective purposes.

While the *Pom Wonderful* case did not involve mortgage-specific rules, it does highlight the fact that advertisements may be considered unfair or deceptive under

the MAPs Rule (or the CFPB's UDAAP authority) despite the fact that such an advertisement may comply with other laws regulatory provisions. Thus, just because one regulator may not have a concern with an advertisement with regard to regulations that the agency issues (*e.g.*, the U.S. Department of Veterans' Affairs or a state regulator may have no concerns with a particular advertisement under their own regulations), those ad-

vertisements are still also subject to scrutiny under the MAPs Rule, Regulation Z, and UDAAP standards. Reliance on compliance with one set of rules does not absolve responsibility for compliance with other sets of rules. *Pom Wonderful* underscores the importance of having a comprehensive marketing policy that addresses compliance with all laws and the regulations of all administrative regimes to which a company is subject.

21. *Id.* at 11.